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

**Seventh Session  
Geneva, November 1 to 5, 2004**

REPORT

*Adopted by the Committee*

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## INTRODUCTION

1. Convened by the Director General of WIPO in accordance with the decision of the WIPO General Assembly at its thirtieth session (WO/GA/30/8, paragraphs 94 and 95) to extend a revised mandate, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) held its seventh session in Geneva, from November 1 to 5, 2004.
2. The following States were represented: Albania, Algeria, Argentina, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Bolivia, Botswana, Brazil, Bulgaria, Cameroon, Canada, Chad, China, Colombia, Comoros, Congo, Costa Rica, Côte d’Ivoire, Croatia, Czech Republic, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, Ethiopia, Fiji, Finland, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea-Bissau, Holy See, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Latvia, Lesotho, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malaysia, Malta, Mexico, Morocco, Mozambique, Myanmar, Nepal, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Senegal, Serbia and Montenegro, Singapore, South Africa, Spain, Sri Lanka, Sweden, Syrian Arab Republic, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Turkey, United Arab Emirates, United Kingdom, United States of America, Uruguay, Venezuela, Viet Nam, and Zambia (103). The European Commission was also represented as a member of the Committee.
3. The following intergovernmental organizations (IGOs) took part as observers: United Nations (UN), African Regional Industrial Property Organization (ARIPO), African Intellectual Property Organization (OAPI), Benelux Designs Office (BBDM), European Patent Organization (EPO), Food and Agriculture Organization of the United Nations (FAO), International Labour Office (ILO), International Union for the Protection of New Varieties of Plants (UPOV), International Vine and Wine Office (IWO), League of Arab States (LAS), Office of the United Nations High Commissioner for Human Rights (OHCHR), Organization of the Islamic Conference (OIC), Secretariat of the Convention on Biological Diversity (SCBD), South Centre, United Nations Conference on Trade and Development (UNCTAD), United Nations Environment Programme (UNEP), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Environment Programme (UNEP), United Nations Permanent Forum on Indigenous Issues, United Nations University Institute of Advanced Studies (UNU-IAS), the World Bank and the World Trade Organization (WTO) (24).
4. Representatives of the following non-governmental organizations (NGOs) took part as observers: American Folklore Society (AFS); Assembly of First Nations; Berne Declaration; Biotechnology Industry Organization (BIO); Brazilian Association of Intellectual Property (ABPI); Call of the Earth (COE); Canadian Indigenous Biodiversity Network (CIBN); Caribbean Antilles Indigenous Peoples Caucus & the Diaspora (CAIPCD); Center for International Environmental Law (CIEL); *Centre de documentation, de recherche et d’information des peuples autochtones (DoCIP)*; Centre for International Industrial Property Studies (CEIPI); *Consejo Indio de Sud América (CISA)*; Consumer Project on Technology (CPTech); *Coordinadora de las Organizaciones indígenas de la Cuenca Amazónica (COICA)*; Creators’ Rights Alliance (CRA); Foundation for Aboriginal and

Islander Research Action (FAIRA); *Federación Folklórica Departamental de La Paz*; Franciscans International; Friends World Committee for Consultation (FWCC); *Fundación Nuestro Ambiente (FuNA)*; Genetic Resources Action International (GRAIN); Ibero-Latin-American Federation of Performers (FILAIE); Indian Council of South America (CISA); Indian Movement *Tupaj Amaru*; Indigenous Peoples (Bethechilokono) of Saint Lucia Governing Council (BCG); Innu Council of Nitassinan; International Association for the Protection of Industrial Property (AIPPI); International Centre for Trade and Sustainable Development (ICTSD); International Confederation of Music Publishers (ICMP); International Environmental Law Research Centre (IELRC); International Federation of Industrial Property Attorneys (FICPI); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Federation of Reproduction Rights Organizations (IFRRO); International League of Competition Law (ILCL); International Literary and Artistic Association (ALAI); International Society for Ethnology and Folklore Studies (SIEF); International Publishers Association (IPA); International Seed Federation (ISF); Inuit Circumpolar Conference (ICC); Kaska Dena Council (KDC); Max-Planck-Institute for Intellectual Property, Competition and Tax Law; Métis National Council (MNC); SAAMI Council; Third World Network (TWN); Tulalip Tribes; World Conservation Union (IUCN); World Self Medication Industry (WSMI); and the World Trade Institute (50).

5. A list of participants was circulated as WIPO/GRTKF/IC/7/INF/1, and is annexed to this report.
6. Discussions were based on the following documents and information papers:
  - “Draft Agenda for the seventh session” (WIPO/GRTKF/IC/7/1 Prov. 2); .
  - “Accreditation of certain Non-Governmental Organizations” (WIPO/GRTKF/IC/7/2 and WIPO/GRTKF/IC/7/2 Add.);
  - “Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Principles” (WIPO/GRTKF/IC/7/3);
  - “Protection of Traditional Cultural Expressions/Expressions of Folklore: Outline and Analysis of Policy Options and Legal Mechanisms” (WIPO/GRTKF/IC/7/4);
  - “Protection of Traditional Knowledge: Overview of Policy Objectives and Principles” (WIPO/GRTKF/IC/7/5);
  - “Protection of Traditional Knowledge: Outline and Analysis of Policy Options and Legal Mechanisms” (WIPO/GRTKF/IC/7/6);
  - “Update on Technical Standards and Issues Concerning Recorded or Registered Traditional Knowledge” (WIPO/GRTKF/IC/7/7);
  - “Recognition of Traditional Knowledge in the Examination of Patent Applications” (WIPO/GRTKF/IC/7/8);
  - “Genetic Resources: Draft Intellectual Property Guidelines for Access and Equitable Benefit-Sharing” (WIPO/GRTKF/IC/7/9);
  - “Genetic Resources and Patent Disclosure Requirements: Options on the National and International Dimension” (WIPO/GRTKF/IC/7/10);
  - “Update on Legal-Technical Assistance and Capacity Building Activities” (WIPO/GRTKF/IC/7/11);
  - “Participation of Indigenous and Local Communities” (WIPO/GRTKF/IC/7/12);
  - “Decisions and Recommendations of the Third Session of the United Nations Permanent Forum on Indigenous Issues Relevant to WIPO” (WIPO/GRTKF/IC/7/13);

- “New Zealand proposal - practical participation of indigenous and local communities” (WIPO/GRTKF/IC/7/14);
- “List of Documents Posted on Accredited Observers Web Page” (WIPO/GRTKF/IC/7/INF/2);
- “Brief Summary of working documents” (WIPO/GRTKF/IC/7/INF/3);
- “Establishing effective systems for the protection of traditional cultural expressions/expressions of folklore” (WIPO/GRTKF/IC/7/INF/4);
- “Further observations by Switzerland on its proposals regarding the declaration of the source of genetic resources and traditional knowledge in patent applications” (WIPO/GRTKF/IC/7/INF/5);
- “Questionnaire on recognition of traditional knowledge and genetic resources in the patent system” (WIPO/GRTKF/IC/Q.5).

7. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions and provides the essence of interventions, without reflecting all the observations made in detail nor necessarily following the chronological order of interventions.

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

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

9. At its sixth session, held from March 15 to 19, 2004, the Committee had re-elected Mr. Henry Olsson (Sweden) as Chair, re-elected Mr. Ahmed Aly Morsi (Egypt) as Vice-Chair and elected Mr. Tian Lipu as its Vice-Chair, each for one year, and in each case by acclamation. They accordingly continued in that capacity. Mr. Antony Taubman (WIPO) acted as Secretary to the seventh session of the Committee.

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

10. A revised draft agenda (WIPO/GRTKF/IC/7/1 Prov. 2) was submitted for consideration by the Chair, and adopted by the Committee.

#### *General Statements*

11. The Delegation of Egypt, on behalf of the African Group, expressed appreciation to the International Bureau for the excellent preparations for the meeting and the quality of the documents, and made a general statement on the Committee's deliberations and meeting documents. At the Committee's last session, the African Group had emphasized the need for the Committee to fulfil its new mandate, in particular the need to accelerate its work, to focus on the international dimension, without excluding any outcome, including the possible development of an international instrument or instruments. To contribute to this process, the African Group had submitted a document at the sixth session (WIPO/GRTKF/IC/6/12) on objectives, principles and elements of an instrument or instruments. The Secretariat had been requested to prepare drafts of core principles and policy objectives for protection of traditional knowledge (TK) and expressions of folklore/traditional cultural expressions (EoF/TCEs). The African Group therefore particularly welcomed WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5, which contained overviews of the core principles and policy

objectives in relation to protection of TCEs and TK. These two well structured documents were particularly valuable for stimulating the Committee's discussions on issues of fundamental importance which lie at the heart of the endeavors to protect folklore and TK. The Group fully agreed with the assertion in the two documents that the elaboration of policy objectives and core principles was a key step in establishing a firm foundation for consensus on the more detailed aspects of protection, including the development of legally binding international instruments in these fields. It was on this premise that the African Group had made its own submission and it was satisfied to see that its submission had contributed to structure the discussions in the Committee on the matters under examination. Annex I of both documents appeared to encapsulate the essence of the objective and core principles suggested. These two Annexes would serve as a useful basis for future work, as suggested in paragraph 32 of WIPO/GRTKF/IC/7/3, and paragraph 44 of WIPO/GRTKF/IC/7/5. The Group emphasized the need for as wide participation as possible regarding any process of consultation on these documents in the future, thus ensuring its open-endedness and representative nature. The Group also considered it appropriate for the Secretariat to make available a compilation of comments or changes suggested by stakeholders, and in particular Member States, to the wording and concrete drafting of the Annexes in both documents. The core principles and policy objectives in the two documents were very complementary to one another. The African Group welcomed the general emphasis on the prevention and suppression of misappropriation as the central tenet of any protection regime for TK and expressions of folklore. While this emphasis is particularly well developed in WIPO/GRTKF/IC/7/5, it could have been highlighted further in WIPO/GRTKF/IC/7/3 as preventing illicit exploitation has also been a salient preoccupation in relation to EoF/TCEs. While the principles of equitable benefit-sharing and prior informed consent were adequately mentioned especially in WIPO/GRTKF/IC/7/5, the role of the patent system in ensuring compliance and the implementation of these principles was not fully addressed, despite the fact that many countries, including the African Group in its own submission, had underlined the centrality of measures within the patent system such as disclosure of origin relating to TK and genetic resources (GR). The African Group noted that on several occasions in both documents, it is underlined that protection of TK should be consistent with and supportive of the existing IP system, and had difficulties in going along fully with this assertion as it appears to subordinate TK protection to the operation of the existing IP system, while for the Group, on the contrary, a focus on misappropriation suggested a need to make the existing IP system supportive of the protection of TK and not to run contrary to its objectives and principles. The most fundamental concern in this regard while devising a suitable regime should be the expectations of TK holders, and the need to address the protection of TK and folklore from the development dimension. The Group hoped that further progress would be achieved in the Committee's deliberations and work would be accelerated on the core principles and objectives proposed to the Committee. The Delegation reaffirmed that discussing the draft policy objectives and core principles was not an end in itself, but should be the basis for further discussions on the legal status of protection and in particular for the development of an international legally-binding instruments on IP in relation to GR and the protection of TK and folklore.

12. The Delegation of Italy, on behalf of Group B, expressed appreciation for the intensive work of the Secretariat in the past months to respond to the request made at the Committee's last session to prepare material and suggestions for the Committee's consideration. There was high quality material under all agenda items, which would help foster debate and to move these issues forward. The Group appreciated the key role WIPO had in this area, and recognized its expertise to review fully the complex issues which were being addressed in the Committee. The questions to be discussed were not easy to resolve as all knew: differences

and nuances existed on several issues, and deserved a thorough analysis and discussion. The Delegation pledged the Group's constructive engagement on these issues.

13. The Delegation of Peru on behalf of the Member States of the Andean Community expressed appreciation for the efforts of the Secretariat relating to the voluminous and substantive documentation for the Committee. The Andean Community had always had a leadership role in relation to IP, in view of different community legal instruments which, with national legislation, were one of the most important reference points for the Committee's work. All Andean Community countries had an invaluable genetic and cultural heritage which they wished to protect. They shared one of the most important mountain regions of the world, the Andes, and the basin of its longest river, the Amazon. In these territories, the TK of indigenous communities is a source of richness unequalled throughout the world. Therefore the Andean Community assigned particular importance to the Committee's work. Apart from the pride that this heritage gave it, for many years they had been doing everything possible to preserve all this knowledge and GR. There was a tremendous amount of concern that biopiracy would prevent these countries from taking advantage in a just manner from this genetic wealth. This is also linked to protection of TK in these communities as well as GR. Decision 486, the most important Andean Community standard regarding IP, included in its Article 3 a principle which guides the whole legislation, and illustrated the importance given to this topic: this required Member Countries to "ensure that the protection granted to intellectual property elements shall be accorded while safeguarding and respecting their biological and genetic heritage, together with the TK of their indigenous, African American, or local communities. As a result, the granting of patents on inventions that have been developed on the basis of material obtained from that heritage or that knowledge shall be subordinated to the acquisition of that material in accordance with international, Andean Community, and national law." Andean Community decision 391 concerned a system of access to GR, and decision 345 related to protection of plant breeders. The Andean Community had concluded a Memorandum of Understanding with the Amazonian Cooperation Treaty Organization so as to establish close cooperation regarding biodiversity, GR and TK related to biodiversity so that they could jointly fight against biopiracy. These norms and efforts at the level of the Andean Community are insufficient, with the emergence of new cases of biopiracy outside the region in developed countries which are not covered by protection mechanisms such as the Andean Community's. This posed a real threat for the whole international community and it was necessary to find effective means to face up to this properly. The Committee was one of the diverse fora in which these issues were being discussed and analyzed, along with others within WIPO and other important fora such as the WTO and the CBD. It was important to examine the mandate which the General Assembly had given the Committee, which underscored that work should be without prejudice to the work of other fora, and that its results should not exclude the conclusion of an international instrument or instruments. Special importance was assigned to the need to include a disclosure of source mechanism in patent applications to enable the protection of TK and to ensure the equitable sharing of benefits. The time was right for the Committee to become a real tool so that developing countries which are the ones mainly suffering from the problems outlined would find specific solutions to their problems. It was not just a matter of sharing national experiences or analyzing cases; this can help the debate and development of theory, but it does not enable to do something about the fundamental problem: how can these countries truly face up to the problem of biopiracy and protect their communities' GR, TK and folklore. The task is not simple, but the countries were ready to work on this problem. The WIPO General Assembly had recently taken important decisions to discuss a request from the CBD. In its work, the Delegation committed itself to work arduously to find a final answer to all the concerns which had been raised. The General Assembly had also recently

decided, in a decision which would give a new direction to WIPO's work, to take action to become a driving force to introduce the development dimension within the organization. WIPO was given a highly important opportunity to give a more worthy, humane context to the work undertaken within the scope of intellectual property. Among Committee participants were Indigenous brothers coming from different parts of the planet, who were daily confronted with the various problems that had been pointed out. They were the voice and face which reflected their concerns and hopes. Their participation was important, and appropriate and sustainable mechanisms were required to ensure their active participation in the Committee. The Delegation hoped that the Committee would focus on the concerns pointed out, which particularly affect developing countries. Andean Community delegations would cooperate in the best manner possible to find specific solutions to the problems that best their countries.

14. The Delegation of China expressed appreciation for the Secretariat's informative preparations, particularly WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5, welcoming the fact that these documents were written on the basis of the extensive discussions within the Committee on existing legal mechanisms and experience gained in practice with protection of TK and folklore, absorbing existing legal mechanisms and practices and then using the relevant theories and policy achievements of international outcomes. These two documents for the first time put forward the policy objectives, guiding principles and specific substantive principles on TK and TCEs protection, laying a foundation to develop TK and TCE protection. Through these two documents, the work of the Committee had gone from general discussions into concrete actions and there had been updated from discussions of principles to discussions of practices and operations. For this, the Delegation was encouraged, but was aware that while the Committee had made initial achievements, to reach an international consensus on matters such as content and form of genetic resource, TK and folklore protection still required time and mutual efforts. The Delegation, together with all other members, would contribute its experiences and understanding during the Committee's session in support of the establishment of an effective mechanism to protect GR, TK and TCEs. This protection was conducive to the preservation of biological and cultural diversity, as well as sustainable human development. The Government of China scrupulously abided by the principle of respecting and protecting GR, TK and TCEs, and assiduously promoted the formation of a regime properly to protect this material. This would certainly benefit the mutual prosperity of humankind.

15. The Delegation of the Philippines commended the International Bureau for assisting delegations in preparing for the meeting, noting that the highly informative briefing sessions conducted before the meeting had helped Member States gain a better understanding of the complex matter to be considered. The distribution of documents had room for improvement, but the documents were of excellent quality. The Delegation highlighted the ongoing regional capacity building efforts undertaken by WIPO to increase awareness, and thanked WIPO and the Government of the Republic of Korea for the WIPO Asia-Pacific Regional Seminar on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, held in Daeduk, Republic of Korea from October 11 to 13. The seminar's technical comments on policy objectives and core principles and important conclusions made by fifteen Asian countries, including the Philippines, would serve as interesting food for thought for the Committee. The Delegation cited recommendations that "further work on the protection of TK and TCEs should be based on the framework of objectives, principles and elements of an international instrument or instruments, which are set out in the submission of the African Group (WIPO/GRTKF/IC/6/12), as well as submissions from the Asian Group (WIPO/GRTKF/IC/4/14) and other submissions," and that "objectives and principles which



might form the subject of an international instrument or instruments should allow maximum flexibility for the selection, development and implementation of appropriate policy options and legal mechanisms at the community, national and regional levels.” On the participation of indigenous peoples and local communities, the Philippines supported the Committee’s decision to establish a support mechanism for enhanced participation. It was not enough that indigenous peoples and local communities had access to the meetings of the Committee, but more importantly that had to be provided with the means to come and participate effectively in the Committee’s debates. The alarming level of biopiracy and misappropriation of TK and TCEs required the Committee to undertake immediate steps to address this international problem. Over the years, the Committee had strengthened understanding of the legal and practical aspects of addressing concerns about inadequate protection and recognition of TK and TCEs. Much remained to be done to safeguard the interest of communities who had developed and preserved and are the rightful holders of these valuable pieces of cultural heritage. The Delegation therefore welcomed the development of policy objectives and core principles for the protection of TK and TCEs (WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5). The outline of policy options and legal elements for protection (WIPO/GRTKF/IC/7/4 and WIPO/GRTKF/IC/7/6) served as a helpful basis for discussions in the light of the Committee’s new mandate to accelerate its work on the protection and recognition of TK and TCEs. The Delegation also saw the need to hasten the development of guidelines and recommendations concerning the interaction between access to GR and patent disclosure, and urged Member States to intensify and accelerate exchanges of national experience and case studies in this regard. The draft intellectual property guidelines for access and equitable benefit sharing (WIPO/GRTKF/IC/7/8) was a good starting point for these discussions. The Delegation noted that the Committee had been criticized, albeit unfairly, for its snail-like pace in coming up with measures which countries could use to protect effectively GR, TK and folklore. The Committee’s new mandate gave hope that Member States would agree on measures to preserve and protect this subject matter, and for that reason the Philippines fully supported the Committee’s work.

16. The Delegation of Zambia recorded thanks for the Secretariat for providing valuable and important documents, particularly Annexes 1 of WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5. The Delegation supported the statement made by Egypt on behalf of the African Group which sets the principal view of the Group, and contributed further points on moving the Committee process positively forward. The Delegation doubted whether many delegates would be ready to express substantive views on the content of the Annexes, although there may be several comments on the provisions themselves. Concerning the decision paragraphs, the Delegation welcomed these Annexes as the appropriate basis for future work, without necessarily agreeing with the contents as such, as the technical and substantive details would be dealt with in the future. The Delegation noted the Secretariat’s reference in these two documents to the African Group paper WIPO/GRTKF/IC/6/12 and indicated that this document should be made available as a working document of the current session. The Delegation expressed its intention to submit written comments by the proposed date, including specific textual amendments and encouraged other participants to do the same. The Delegation stressed the need for Member States to have ownership of the process, which should be Member-driven because of its importance. The Secretariat was requested to make all comments received available on a website and to make paper copies available for the Committee’s next session. The Delegation supported intersessional working groups on the two issues, distinctly, to allow the provisions to be commented on by specialist on the two issues. Experts could be selected by regional groups, three per region, with expertise on the full range of issues. They would review the annexes and ensure that comments received had been properly inserted. Member States could be encouraged to host such working groups.

The revised documents should be as short and focussed as possible, and should be published also in Arabic, Chinese and Russian. The Committee at its next session should refer the Annexes as amended to the WIPO General Assembly.

17. The Delegation of Indonesia highly appreciated the Secretariat's excellent documentation for the meeting. The Delegation noted that, like other development countries whose local and indigenous communities were rich in cultural diversity, it placed great value on the Committee's work and considered the information provided by WIPO Member States to be very useful and valuable in dealing with these issues. The Delegation expressed great interest in the progress made by the Committee and stressed the need for concrete results, in particular a legally binding instrument to protect TK, GR and folklore. WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5 provided helpful background information for further discussion at the national, regional and international levels, and represented important and appropriate steps in the work of the Committee. To enhance the ability of developing countries to develop appropriate national policies and measures relating to IP and GR, TK and folklore, WIPO should continue to offer increased capacity building in the form of legal advice and information, expert missions, education, awareness raising and training. Given the importance of protection of this subject matter, Indonesia was drafting a regulation on the use of GR, which dealt with equitable benefit sharing, sustainable conservation and prior informed consent. At a later stage, the Delegation considered that important documents should be submitted with patent applications concerning the disclosure of source and country of origin of biological resources and TK, and evidence of prior informed consent and benefit sharing under the relevant national regimes. This is necessary to avoid misappropriation and misuse of GR, TK and folklore, and as an acknowledgement of the moral right of the concerned States, and to ensure equitable benefit sharing. As a member which abided by agreements signed by other IGOs dealing with issues related to the rights of local and indigenous communities such as CBD, FAO and UNESCO, Indonesia looked forward to continuing effective consultation and collaboration between WIPO and those organizations. The Delegation supported any reasonable initiatives to facilitate the consideration of relevant issues within subsidiary bodies.

18. The Delegation of Colombia supported the statement of the Delegation of Peru on behalf of the Andean Community and acknowledged the important work being done within the Committee on GR, TK and folklore. Much had been done to develop new viewpoints. The documentation was of high quality, especially for the current session. The Delegation was aware of the major headway that had already been made. It was fundamental that States should have an effective model of protection for further guidance of discussions. This could then form the basis for further work and discussions within the Committee. The draft policy objectives and core principles for TK and TCEs were excellent documents which drew together the perspectives of many countries and regions, and would help move forward more quickly on these issues, and would certainly be a useful contribution to future discussions. The Delegation supported the renewal of the Committee's mandate and hoped that in the near future it would be possible to achieve tangible results in respect of protection of these matters and to raise awareness about them. Colombia had significant cultural diversity, including around 86 different ethnic groups with 74 different languages, making up 2% of the total population, as well as a major community of African origin, as well as great cultural diversity throughout the country and vast natural resources and considerable biodiversity which formed part of its existing and future potential. There were many parties involved with issues of protection. For Colombia, it was vitally important – indeed a *sine qua non* – to have WIPO's support in these matters, since this would facilitate a constructive debate and fruitful consultations at the national level. The elements involved were diverse, so it would be better

in the short term at least for the Committee's work to proceed flexibly, enabling adjustments to be made as necessary. The Delegation reiterated its interest in developing an international system for protection GR, TK and folklore, based on a WIPO international instrument. The Delegation believed that this would be the fruit of an integrated process accepted worldwide by all WIPO Member States. Colombia was already making major efforts to make headway in that direction, having set up a national inter-institutional working group which was discussing all the aspects of the issues. This process had indicated the need for international efforts if there was to be a clear reference framework which would help focus on the main points for examination and discussion. In this respect, the Committee provided an excellent opportunity for further progress. On participation of indigenous and local communities, it was necessary to establish a sustainable financial mechanism which was sufficient to meet the needs for participation. Broader participation than the present level would be helpful to all participants.

19. Delegation of Ecuador expressed gratitude for the work undertaken by the Secretariat and for the quality of the documents provided for the session, especially in the Spanish language. The Delegation fully endorsed all the points made by the Delegation of Peru on behalf of the Andean Community and reiterated Ecuador's interest in having as soon as possible a binding international instrument to provide effective protection for TK, GR and folklore. It acknowledged that the presentation made by the documents for the Committee represented an important step forward, and particularly WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5 would be very useful as the basis for future deliberations. As a great step forward, it was necessary to build upon them, through further discussion, so that the Committee's work would conclude with appropriate international instruments. These two documents included some principles to which the Delegation attached great importance because they expressed national sovereignty over GR. This was not a recent issue, even though some of the documents suggested this had arisen only recently. Many countries, including Ecuador, had been stressing this principle for a considerable amount of time. Concerning TK, the Delegation emphasized that the documents (especially WIPO/GRTKF/IC/7/5) seemed to consider that those using TK outside its original context should do everything possible to identify the source and origin of the knowledge. The Delegation emphasized that they should not only do everything possible, but should be obliged to identify the source and origin of TK. The issue of prior informed consent should also be borne in mind with respect to the use of TK. It was important to maintain absolute clarity about the relationship between TK and GR, and to recognize the need for special treatment for GR as such, given the close link between GR and patents. Genetic resources cannot only be dealt with on a contractual basis.

20. The Delegation of Bolivia commented that cases of biopiracy and misappropriation of TK and TCEs, which represented age old culture of indigenous peoples, were occurring and reoccurring without any national legislation to provide an adequate solution to these complex problem. This represents a shared responsibility. Accordingly, the Delegation welcomed the new mandate of the Committee which privileged the international aspects of the problem as well as the desired result of an international legally binding instrument to be achieved as soon as possible, so as to meet the needs and requests of the developing countries as well as those of the indigenous peoples who are the owners of TK, GR and folklore. The Delegation considered that any future instrument must incorporate a requirement of the disclosure of source and country of origin, and evidence of prior informed consent and equitable benefit sharing. The Delegation supported mechanisms to ensure the fully fledged and constant participation of local and indigenous communities, which did not depend only on a voluntary structure, which would be random and would not ensure a permanent, sure and sustainable

result. The Delegation had followed with interest the interventions of the Delegation of New Zealand and indigenous representatives, and looked forward to positive results from informal consultations.

21. The Delegation of Morocco, in supporting the statement made on behalf of the African Group, expressed its sincere gratitude to the Secretariat for the efforts made to ensure a successful meeting, in particular by preparing substantial documents which would without doubt facilitate the Committee's discussions and structure its future work. The Delegation remarked that the work of the Committee had evolved in a very positive way since its mandate had been renewed by the General Assembly in 2003. The current results had been achieved thanks to the spirit of compromise which had characterized the participation of various delegations. The Delegation appealed for this spirit to continue to guide future work on these issues which affected the interests and development objectives of the respective countries. In this regard, effective protection of EoF, TK and GR had been the leitmotiv of the vast majority of Member States in the last six sessions of the Committee. However, the search for the appropriate means to provide this protection had not been easy. Concerning WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5, the Delegation welcomed these documents and their Annexes, and considered that they were an essential basis for the Committee's present discussions and a good road map for its future work. Morocco would make further comments subsequently. The Delegation was in favour of the proposal of the Secretariat in paragraphs 32 and 44 of the respective documents, knowing that this would make it possible to accelerate work in accordance with the Committee's mandate. After February 25, 2005, the Secretariat would need to elaborate news drafts of objectives and principles on the basis of the contributions by participants. The process undertaken by the Committee should now pass from political debate to a technical and legal framework which would necessitate consultations and expert meetings to advance this process on the basis of balanced and equitable participation that is transparent to all. The Delegation expressed its preparedness to take part in any meeting which the Secretariat judged useful to accelerate the work. As the Delegation had stressed at the sixth session, the proposal to establish a voluntary fund to finance the participation of indigenous and local communities is a praiseworthy initiative which would strengthen the Committee's work. The Delegation was convinced of the need to protect biological and cultural diversity, but was prepared to examine other proposals in line with the principles accepted by the WIPO Member States at the Committee's fourth session.

22. The representative of the United Nations Environment Program (UNEP) welcomed the establishment of the Committee and WIPO's invitation for UNEP to participate in the current session. UNEP commenced collaboration with WIPO in 1998 after the establishment of the Global Intellectual Property Issues Division of WIPO. The work of that Division was complementary to various aspects of UNEP's work, given its global focus on biodiversity, biotechnology and IP. That Division's work also supported implementation of the provisions of the CBD, which was one of UNEP's objectives. An area of interest to both organizations was that of access and benefit sharing of GR. Countries around the world had made efforts to draft policies to regulate access to biological diversity and find ways of sharing benefits from using GR. The tenth anniversary of the establishment of the CBD had provided a good opportunity to identify areas of progress and obstacles in meeting the objectives of that Convention. UNEP through funding from the Government of Ireland was currently undertaking a study on the status of access, benefit sharing and IP policies among African countries. A workshop in 2005 would review that study, draw lessons from it, and design strategies to implement further the objectives of the CBD. The representative reported that UNEP and WIPO had jointly published a study, which had been circulated to the Committee, which identified and explored the role of IP in the sharing of benefits arising from the use of

biological resources and associated TK. This publication illustrated the lessons from the use of existing IP regimes with respect to benefit sharing. It focussed on aspects of IP and current benefit-sharing experiences in respect of biological resources and associated TK. The representative noted that the publication had provided lessons regarding the role of IP in the implementation of Article 15 as well as Articles 8, 10 and 16 of the CBD. A UNEP initiative of access and benefit sharing, including an action plan for capacity building, was in operation, and was recognized by the CBD COP. Various initiatives including the decisions of the seventh COP had called upon UNEP and WIPO, among others, to cooperate with the *Ad Hoc* Open-Ended Working Group on ABS in elaborating the proposed international regime. Outcomes of the Committee's sixth session, in particular the draft guide on IP aspects for agreements on ABS relating to GR (WIPO/GRTKF/IC/6/5 and WIPO/GRTKF/IC/7/9), together with outcomes of the UNEP-UNU workshop on ABS held in Palau, the UNEP informal advisory group of experts on ABS held in Naroibi, all aimed to strengthen the capacity of developing countries to enable them to obtain an equitable share of benefits arising from the use of their GR and TK. This required building capacity for negotiating contracts on GR and benefit sharing, improving the negotiators' capability in international fora, developing case studies that build on technical information related to the enforcement and compliance of national, subregional and regional biodiversity laws and regulations, and development and application of *sui generis* systems relevant to ABS, as well as promoting the understanding and application of the IP regimes related to ABS. This could only be achieved by strong collaboration between UNEP and other players in the field, notably WIPO, FAO and WTO. Such collaboration was consistent with the goals of UNEP's current program of work, and UNEP was exploring the possibility of another memorandum of understanding with WIPO for continued partnership.

23. The representative of the United Nations University Institute of Advanced Study congratulated the Secretariat for the comprehensive and thought-provoking nature of the documents prepared for the meeting. The representative noted the significant advance that the preparation of these documents signified for the progressive development of mechanisms to effectively recognize, respect and protect the rights of indigenous peoples and local communities over their TK and folklore. The UNU-IAS was working to build greater links between the academic community and the United Nations system, and to facilitate international negotiation processes through the provision of sound objective policy research, organization of round tables and workshops, and capacity building. The biodiplomacy program had developed activities relating to access to GR and benefit sharing, and protection of TK, with a view to promoting research into key areas of debate, including access and benefit sharing, user measures, and TK related issues. One key area of research concerned disclosure of origin and the role of certificates of origin for tracing genetic resource flows and the use of TK. UNU-IAS has fed information into the Committee process directly with the dissemination of a draft and final report on TK registers and databases. This research was continuing with particular attention to the impact on TK of publicly held databases, relating to broader research regarding access to information, IP rights and the public domain. In an active program of capacity building, recent work has including a program with the countries of Micronesia on the role of customary law on the protection of TK. A regional Pacific-wide workshop was planned for early 2005 with the South Pacific Environmental Program.

24. The representative of the Call of the Earth expressed gratitude to the Secretariat for providing excellent documents which were of great help in entering into the debate. The documents on TK and access to GR and benefit sharing were of importance to the indigenous peoples of the world. TK cannot be dealt with in isolation from GR and EoF/TCEs, and an holistic approach had to be adopted, since indigenous peoples were recognized under

international law and TK was linked to that status and to their cultural identity, indigenous spirituality and lands and territories. TK was part of indigenous peoples' vision of the cosmos. To find one single model for the protection of TK was pointless. The documents that had been developed in WIPO had concluded that it was better to adopt a flexible and holistic approach, which the representative supported in view of the features of TK that had been mentioned: the intergenerational nature of TK, collective ownership, continuing innovation, and the inherent value that it has for indigenous peoples. On policy options and legal mechanisms, the representative said that Indigenous peoples had reservations about directing the discussion towards protection of TK through current IP rights, especially the patent system, since they were incompatible with the characteristics of TK. IP rights favored private property and commercial exploitation within a given timeframe; this limits collective ownership, the intergenerational nature, and the development and free circulation of knowledge within the culture of indigenous peoples. The representative urged the Committee to find complementary approaches, such as a *sui generis* regime which would include rules based on traditional laws and cultural practices pertaining to indigenous peoples. TK cannot be limited to one single area of protection because it is inalienable and not limited by time. From this perspective, the basic objectives of TK protection should be the respect, encouragement and preservation of TK, custodianship and the ownership in the hands of indigenous peoples themselves, the promotion of permanent innovation and sustainable development as a contribution to the development of humanity. When drafting policy options and ways of protecting TK, the principle of prior informed consent should be borne in mind as a basic principle. This principle was a basic human right, going hand in hand with the recognition of indigenous peoples. Progress had been made in important forums, particularly the CBD, which continued to work towards an harmonious relationship between TK and scientific knowledge. The representative stressed the importance of cooperation between WIPO and the CBD for a future *sui generis* regime for protecting TK. Participation in equitable benefit sharing should also be borne in mind; indigenous peoples themselves should determine whether benefits should be monetary or non-monetary. This was aimed at consolidating the status of indigenous peoples, their organizational structures, and the legal security of their lands and territories. A guiding principle in the draft guidelines concerning IP aspects of access to GR should be the participation of indigenous peoples as holders of the associated TK, as well as the equitable sharing of benefits, including benefits from derivatives of TK.

### AGENDA ITEM 3: ACCREDITATION OF CERTAIN ORGANIZATIONS

25. At the invitation of the Chair, the Secretariat introduced WIPO/GRTKF/IC/7/2 and WIPO/GRTKF/IC/7/2 Add, which gave details of fourteen additional non-governmental organizations (NGOs) that had requested *ad hoc* observer status for the sessions of the Committee since its sixth session. The Committee unanimously approved accreditation of all the following organizations as *ad hoc* observers: Congolese Association of Young Chefs and Gastrotechnie Consultancy International, Centre for Folklore/Indigenous Studies, *Groupe des jeunes agronomes actifs pour le développement intégré au Cameroun (JAADIC)*, Hawaii Institute for Human Rights (HIHR), Human BioEthics Treaty Organization (HBTO), Indonesian Traditional Wisdom Network (ITWN), *Institut du développement durable et des relations internationales (IDDRI)*, International Commission for the Rights of Aboriginal People (ICRA), Jigyansu Tribal Research Centre (JTRC), Mbororo Social Cultural Development Association (MBOSCUDA), *Programme d'intégration et de développement du peuple Pygmée au Kivu (PIDP - KIVU)*, Sámikopijja - The Saami Reproduction Rights

Organization, South Pacific Regional Environment Programme (SPREP), and the West Africa Coalition for Indigenous Peoples' Rights (WACIPR).

#### AGENDA ITEM 4: PARTICIPATION OF LOCAL AND INDIGENOUS COMMUNITIES

26. The Secretariat introduced WIPO/GRTKF/IC/7/12, drawing attention to various proposals for enhancing the participation of local and indigenous communities in the work of the Committee that had been initiated, the proposal for enhanced voluntary funding of representatives of such communities, and the immediate need for a more formal Voluntary Fund to support such participation.

27. The Delegation of the Islamic Republic of Iran stated that the participation of indigenous peoples as a means of enriching discussions in the Committee had been discussed previously and as indicated in the document, a concern of the Committee was the method of financing their participation, including the establishment of an informal consultative forum. The Delegation added that, as indicated in the document, the Secretariat had carried out its work based on the views of countries with its existing capabilities. Indigenous peoples and local communities could coordinate with their national authority on the ways of participating. Such coordination would mean that those eligible to receive financial assistance would be properly recognized. The Delegation added that WIPO should continue the current trend and should explore the eligibility of possible participants with the cooperation of States. Regarding practical steps, WIPO had properly financed the participation of the members of local communities from different resources and WIPO had consulted with local communities to enrich the discussion in the Committee. It underlined the fact that it was necessary to utilize the experience of high-ranking experts in related government bodies in this regard. On options for the establishment of a voluntary fund to support the participation of indigenous people, any long-term measures should be compatible with the trend of the work of the Committee. The Delegation believed that the creation of a structural body to finance the participation of indigenous people alongside the continued work of the Committee made sense, the Committee being the right place to decide on shaping any structural framework or any activities of such communities. The Delegation did not believe that paragraph 10 of document WIPO/GRTKF/IC/7/12 would entail a positive result. Although diverse alternatives were suggested in paragraph 11 for the shaping of an agreed framework for a voluntary fund, it believed there were other alternatives to take into consideration. The Delegation noted that regarding the proposal of paragraph 11(iii), given the budgetary constraints it was necessary to decrease dependency on the WIPO budget, which meant enriching other resources and incorporating them in national delegations. The Delegation believed that the existing voluntary assistance should be continued until the 41st session of the General Assembly in 2005 and that further discussion on the establishment of any formal structural voluntary fund should be subject to the decision of the General Assembly in 2005 on the continuation of the work of the Committee so that the organized presence of indigenous people and local communities would be guaranteed. The Delegation reserved its procedural and substantial right to comment later on the development of a voluntary fund.

28. The representative of the Kaska Dena Council delivered a consensus statement developed by the Indigenous Peoples' organizations that had attended the informal consultative forum that proceeded the Committee. The representative stated that they took an atypical position and opposed the adoption of the decision paragraph 25 of WIPO/GRTKF/IC/7/12, as currently drafted, and proposed additional text for the Committee to consider. The efforts of the Committee to enhance Indigenous Peoples' participation and

involvement had not sufficiently progressed, and its form and procedure did not reflect the integral role that Indigenous Peoples must play in discussions that spoke to the protection of their knowledge. Since the fifth session, an enhanced role for participation of indigenous peoples had been unanimously supported. Yet they had not received tangible and concrete support. Although 80% of TK is Indigenous and their knowledge was the subject matter of much of the Committee's discussions, indigenous peoples remained disempowered and a minority. The representative believed this was most clearly indicated in their representation at the Committee. Among the 120 Member States, they were less than 5% of the participants. In this light they proposed for the immediate establishment of a voluntary fund, the selection criteria of which should be led by Indigenous Peoples representatives. The criteria should be impartial and transparent, not subject to the discretion of contributing parties. They submitted that appropriate criteria included: regional representation (three representatives from the seven indigenous regions was a minimal standard); proportional representation placing particular emphasis on gender equality, Elders and Indigenous youth; and financial need. They submitted that these criteria and funding should apply to all Committee-related meetings, including informal consultative meetings with the Secretariat. The representative noted that WIPO/GRTKF/IC/7/12 highlighted the recent decision of the Convention on Biological Diversity (CBD) Conference of the Parties to establish an Indigenous participant voluntary fund and that the criteria were to be developed in close consultation with Indigenous Peoples' organizations. The criteria for any WIPO voluntary fund should be similarly developed as this was fundamental to its credibility. The representative requested an immediate review of the procedural equality of the Committee, proposing modifications to its form and procedure that better reflected their integral role in these discussions. The CBD's *Ad Hoc* Intersessional Open-Ended Working Group on Article 8(j) and Related Provisions, the UN Draft Declaration on the Rights of Indigenous Peoples and the Permanent Forum on Indigenous Issues were instructive models, for such progressive modifications as: an Indigenous Peoples member of the Secretariat; Indigenous Co-chairs – nominated by Indigenous Peoples' caucus; Indigenous Peoples representatives informally invited to participate in the Bureau; amendment to the procedure related speaking order – as opposed to the current practice of Indigenous Peoples' being relegated to make their submissions following Member States – which often leaves them with less than 10 minutes of floor time each day; designated seating for Indigenous Peoples' organizations; and separate accreditation for Indigenous Peoples' organizations that clearly distinguishes their organizations from non-governmental organizations. These procedural modifications were not only within the discretion of UN procedure but the Member States themselves had been instrumental in supporting these changes in other UN fora. The representative asked for parity. These proposals were absolutely imperative to their future participation in this Committee and that these changes were fundamental to the credibility of their work in the Committee. The representative looked forward to this Committee supporting progressive procedural changes.

29. The representative of Call of the Earth supported the intervention of the indigenous peoples who had taken the floor and suggested that the proposal on the table be discussed in more detail. He pointed out that the indigenous peoples represented at the Committee were diverse, and that an open and transparent discussion was necessary in order to include all points of view. Participation of indigenous peoples was not seriously discussed in the Committee and that indigenous peoples lacked the authority to make decisions about TK which was integral to their cultural heritage. The experience of participation in the CBD should be taken into account.



30. The representative of *Tupaj Amaru* stated that indigenous peoples and local communities should participate in the Committee because of their contribution through the centuries to the progress of civilizations, a contribution which was essential and fundamental to the common heritage of humanity. Indigenous peoples had been victims, plundered of their cultural heritage, GR and TK, and deprived of their right to take part in the fora of the United Nations. No funds were available for indigenous peoples, even though they had contributed to progress. There was no consensus among States on this issue, although the Committee had recognized the need for indigenous people to take part in its discussions. This was a paradox because the delegations of the developing countries would benefit from these contributions. He added that there was an experience of voluntary funding for indigenous people in the United Nations, but that it had not solved the problem because the fund worked in a selective and discriminatory fashion. If a voluntary fund had to be created in the Committee, it would be neither effective nor efficient. He queried the arrangements and available funding for the indigenous consultative forum meeting before the Committee's sessions.

31. The Delegation of New Zealand supported the suggestions made by the representative of the Kaska Dena Council on behalf of a number of indigenous participants but expressed concern about the delay in establishing a funding mechanism, which had first been suggested at the Committee's second session. The Delegation supported the recommendation that a formal proposal be prepared for consideration at its eighth session. It hoped the Committee would then be in a position to adopt the funding proposal so that it would be able to function for its next meeting. It therefore suggested that the document concerning the funding proposal be available well in advance of the meeting, to enable Member States time to consider and adopt it at that meeting. The Delegation supported the suggestion (paragraph 25(iv)) that the Committee continue to encourage voluntary funding and other forms of participation such as inviting members of indigenous and local communities to participate on government delegations. Concerning the second point — actual participation — the Delegation noted that while funding was essential to facilitate the attendance of members of indigenous and local communities, effective participation also depended on other factors, such as being provided sufficient opportunity to participate in deliberations. The rules of procedure had perhaps hindered participation, by limiting the amount of time that members of these communities have to express their views. WIPO was an organization of Member States, but the subject matter that this committee was considering - traditional knowledge - meant that indigenous and local communities had a very high stake in the outcomes. It would seem a waste to not take account of the perspectives and expertise of these people, especially since the Committee had shown interest in customary law and protocols. Respect for customary approaches was included in the draft documents on policy objectives, principles, policy options and legal mechanisms for the protection of TK and TCEs. The Delegation referred in particular to objectives such as the recognition of the intrinsic value of traditional cultures, promoting respect for traditional cultures, and the need to be guided by the aspirations and expectations of indigenous and local communities. At the last session of the Committee, New Zealand had proposed that more time and opportunities be afforded for indigenous and local communities to make interventions or statements during committee session. Despite best endeavors and assurances to all to “keep it brief”, the Committee inevitably ran short of time to hear the views and suggestions of members of the indigenous and local communities that are accredited observers to the Committee. The Delegation therefore proposed that the committee considered some practical changes to the meeting procedure for the Committee to enable the more effective participation of indigenous and local community observers. It submitted these proposals under part 4 of the decision paragraph as another form of enhancing participation. First, greater speaking time would be

facilitated by the opportunity to intervene earlier in discussions, perhaps interspersed with States. For this to work it would be incumbent on all to make interventions focused and not directed to old ground. Most of all, they will need to be brief. Second, changes to seating arrangements would recognize the value that members and indigenous cultures and local communities can add to the discussions. This might be considered a practical manifestation or demonstration of good faith in relation to policy objectives proposed in WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5. Third, an indigenous co-chair should also be considered. The Delegation noted that a precedent for this was set in the meeting that agreed to establish the Committee. Fourth, “side events” which discuss initiatives of, or on behalf of, indigenous or local communities, could be incorporated into the plenary timetable, as had already been done to enable the Committee to learn from the experiences of Member States. Some of these proposals had a precedent in the CBD in its working group on Article 8(j) and TK issues. If agreement was reached in principle there was no reason that these procedures could not be in place for the next session. In fact, the Committee could even agree to relax the speaking order for this session. The Delegation of New Zealand subsequently submitted a formal proposal (WIPO/GRTKF/IC/7/14).

32. The Delegation of the Netherlands on behalf of the European Community and its Member States endorsed the convening of an informal consultative forum for indigenous and local representatives in advance of sessions of the Committee and the creation of a WIPO website to disseminate opinions expressed by accredited observers. They also welcomed the initiatives that had been taken since the 6<sup>th</sup> session of the Committee including the organizations of consultations and workshops at national and regional level, the updating of the website and the organization of the informative consultative forum. On the funding issue, it supported under the current mandate of the Committee a pragmatic approach based on the existing voluntary initiatives on an *ad-hoc* basis. It continued to believe that in the longer term participation of indigenous and local communities should be assured by through a voluntary fund modeled to the extent appropriate on the UN voluntary fund for indigenous populations. It further welcomed the continued work on the possible establishment of structures for a voluntary fund and invited the International Bureau to prepare formal proposals. The elements that were already in paragraphs 17 to 23 of WIPO/GRTKF/IC/7/12 should be further developed. The EU also supported a consultative or advisory role for the UN Permanent Forum on Indigenous Issues. It concluded that final decisions on the modalities and operation of such voluntary fund would have to be related to the future work on IP and GR, TK and folklore after the conclusion of the current mandate in 2005.

33. The Delegation of Norway repeated its principal view that indigenous peoples’ participation should not be financed by voluntary means, but from regular budget. Concerning selection process, it was important to ensure representative participation of indigenous groups, including an appropriate role for the UN Permanent Forum.

34. The Delegation of Canada thanked the Kaska Dena Council for its statement on behalf of many of the indigenous and local communities present at the Committee and added that, in principle, Canada supported the enhanced participation of these communities in the work of the Committee. It stated that Canada had five representatives from its aboriginal organizations at the meeting and considered that the participation and the input from indigenous and local communities was an important aspect of advancing the work of the Committee. At the same time Canada recognized and respected the nature of the Committee and its mandate.

35. The Delegation of Switzerland fully supported the statement made by Italy on behalf of Group B. It was crucial that indigenous and local communities actively participate in the Committee. This was why Switzerland had supported the direct financing of representatives of these communities through WIPO at past meetings. Since no consensus on such direct funding had been found, the Delegation hoped that the voluntary fund would provide adequate funding. Representatives of indigenous and local communities should have greater speaking time available. The Delegation suggested that besides having the opportunity to intervene earlier in the discussions, more time would be available if the sessions were to start more on time, giving all speakers more time to express their views. Modifying seating arrangements may also facilitate discussions. Finally, incorporating panel presentations by members of indigenous and local communities as part of the Committee-plenary would be a further viable step in this regard. The Delegation looked forward to continued participation of representatives of indigenous and local communities in the deliberations and to receiving concrete input and proposals from their part.

36. The Delegation of the Syrian Arabic Republic supported WIPO/GRTKF/IC/7/14, except paragraph 3 concerning practical changes to the meeting procedures as it believed the Chairman had been giving all participants the suitable time to give their statements.

37. The Delegation of Zambia supported the statement made by Egypt on behalf of the African Group. The Delegation stated that it had heard many good statements of support for the indigenous peoples to actively participate in the Committee meetings both by developed and developing countries. However, it had also heard criticism against the New Zealand proposal from a few members. The Delegation considered the New Zealand proposal a step in the right direction. It had found two sets of contradictions in the statements. While supporting the active participation of indigenous peoples, some members stated that they would not want views of indigenous peoples particularly in Panel discussions to be part of the Committee work or outcome. The Delegation found this contradictory. If indeed it is wished that indigenous peoples actively participate in the Committee meetings, how can their views be consigned outside the Committee? The Delegation believed that the views of the indigenous peoples should be an integral part of the Committee. The Delegation added that, secondly, again within the context of what was being discussed, another point had been made that indigenous peoples should or could make statements after Member States. The Delegation considered this point should be left with the Chairman to exercise his own flexibility in order to accommodate the indigenous peoples. The Delegation concluded that the second set of contradictions would be dealt with when discussion on the funding matters of indigenous peoples of local communities resumed.

38. The Delegation of the Islamic Republic of Iran appreciated the proposal of New Zealand. During the sixth session and also in the course of the week, much had been said on the protection of indigenous and local communities. The New Zealand proposal assumed, in advance, that the next General Assembly would extend the continuation of the work of the Committee. If General Assembly did not extend the work of the Committee, addressing the amendments of the procedures at the final session of the Committee would not help the indigenous peoples.

39. The Delegation of Singapore considered WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5 as solidly substantive base documents to be developed further, more fully and with enhanced focus, after due review of all viewpoints already canvassed and to be canvassed in the Committee. As to the proposal of New Zealand, the Delegation supported its spirit and thrust in working for more effective participation of indigenous or traditional and

local community observers. The Delegation did not support the specific practical change set out in item (iii) of paragraph 4 of the New Zealand proposal, but supported all the other practical changes suggested. TK and folklore being by their very nature complex, it would be imprudent not to facilitate optimum participation of indigenous or traditional and local community observers. Taking account of the voices of Ecuador and Brazil in relation to funding and other related issues on modalities of greater participation by such communities, the Committee should and could look to and draw upon the expertise of organizations such as UNESCO and other parallel or related organizations mentioned in striving towards specific collaboration in restoring such issues.

40. The Delegation of Bolivia reaffirmed that it considered of great importance an effective participation of indigenous peoples as they were the holders of TK and folklore and that more than 50% of the population of Bolivia was indigenous. The Delegation considered it vital to increase facilities for a better and greater participation of indigenous peoples and joined Ecuador concerning the financing of indigenous peoples before beginning to consider specific issues. Whatever the means of financing of this participation might be, the funds should effectively address to the greatest extent the representatives of the indigenous peoples and developing countries.

41. The Delegation of Papua New Guinea recalled that its intervention during the debate on TK supported any moves to raise the level of participation by TK holders and indigenous peoples and communities generally in the Committee and other fora dealing with TK. The Delegation supported the proposal from New Zealand. This support was based on the observation that parts of WIPO/GRTKF/IC/7/5 needed some serious input from indigenous peoples and communities. It added that Papua New Guinea had queried the wisdom and raised caution about the possible repercussions to indigenous peoples' lives and communities, about the Committee's previous decision to distinguish TK and TCEs and to deal with them separately. It added that the operative phrase for Papua New Guinea's support for the New Zealand proposal was "indigenous peoples and communities", which was the terminology still retained in the document being discussed before the Committee. The Delegation commented on his understanding of the phrase "indigenous peoples and communities", which was to include the indigenous peoples and communities represented by specific bodies and organizations in the Committee and also indigenous peoples and communities not represented by any organization in the Committee. The Delegation itself comprised the Executive Director of the Papua New Guinea National Cultural Commission who was also a member of the *Talai* of New Britain (which numbered between 230,000 and 240,000), being a Senior Member and Custodian of the culture of that indigenous community. Wearing two hats was not always easy, as many times what government wants is not always what indigenous peoples and communities want. There were around 850 indigenous communities in Papua New Guinea, as well as many other indigenous communities of Melanesia, Polynesia and Micronesia of the Pacific, the multitude of other indigenous communities from other parts of the world, and the many indigenous peoples and communities that were represented by specific organizations in the Committee. Although it could easily give over the responsibility to any of the indigenous group organization to speak on behalf of his people and community, this was not possible due to cultural idiosyncrasies and peculiarities. The issue of greater participation by indigenous peoples and communities was wider than delegates had envisaged. It definitely went beyond the mere accommodation in time and space for the indigenous representatives in the Committee. No amount of seating re-arrangement and loss of coffee time would answer this problem. The proposal of New Zealand was of good intent and still had the support of Papua New Guinea. However, due to matters of practicality, relating to issues of protocol, procedures and funding, it might have been difficult to move

this proposal forward. These impediment did not change the fact that there was a real need for greater participation by indigenous peoples and communities of broader scope, in the work of the Committee. The Secretariat should continue search for a workable approach. In earlier stages of the work on TK and TCEs, some consultations were done with TK holders and cultural experts, which had been fruitful and showed in the documents. However, the fact remained that there was a need for further greater participation by indigenous groups, peoples and communities at these later stages. Even the Committee ensuring that copies of these later drafts were made available to indigenous peoples and communities to produce and make comments and the Committee agreeing to accommodate their comments would be better than not involving them at all. It was the indigenous peoples and communities that had to live with these decisions, while bureaucrats, consultants, etc. could walk away from this and not even remember that they had been in the Committee that day, let alone remember what had been thought and said.

42. The Delegation of Kenya supported the statement made on behalf of the African Group. Indigenous peoples were regularly present at international meetings and the world was celebrating the international decade of the World Indigenous Peoples. However, in terms of development, they were no better off and in some cases were worse than they were ten years ago. A central goal of the international decade was the promotion and protection of the rights of indigenous peoples and their empowerment to make choices which enabled them to retain their cultural identity while participating in political, economic and social life with full respect for their cultural values, languages, traditions and forms of social integration. Today, these objectives remain mere aspirations than reality. It supported item 4(i) of this proposal which provided greater speaking time by indigenous and local community observers. However, it supported Brazil on the question of coffee breaks as they could form a break for informal consultations. It suggested, on a lighter note, that the price paid for a cup of coffee could form a part of the voluntary fund to enhance indigenous peoples' participation in the Committee. On item 4(ii) and (iii), it noted the contribution made by India and added that what was of critical importance was the substance and recognition of the contributions made by the indigenous peoples and not the seating or co-chairing arrangements. It fully supported point (iv).

43. The Delegation of Japan noticed how important and valuable the participants of indigenous and local communities were at the Committee. The Delegation added that although it appreciated the proposal made by New Zealand, what had to be considered was the mechanism to enhance the presence of indigenous and local communities within the existing framework and practice at WIPO.

44. The Delegation of Mexico had studied with interest the proposal in paragraph 25 of WIPO/GRTKF/IC/7/12 on the establishment of a voluntary fund. It believed the work to establish a voluntary fund should be continued especially if the Committee should have a new mandate or if it were instructed to continue to consider these issues further. It therefore agreed to draw up the necessary guidelines for the establishment of the fund and move to discuss how best to get it running. It believed the following selection criteria should be met: the person concerned should be: a member of one of the organizations accredited to WIPO with observer status or accredited to the Committee; an authorized representative of an indigenous or local community or organization; unable to attend the meeting of the Committee without financial assistance; and of sufficient knowledge and experience of the subject to participate fully and properly in the Committee's discussions. Regional representation in the selection of representatives should also be taken into account so that there is proper and balanced geographical distribution. Also to be clarified was whether

continuity was necessary in the representation of those who would benefit from the fund. Resources should also be provided to various organizations so that the greatest opportunity can be provided to the greatest possible number to participate. On the selection procedure, the Delegation believed it was appropriate and that it would guarantee transparency and clarity in the way in which resources were allocated. It therefore agreed that the Secretariat should be invited to draw up a formal proposal for voluntary contribution for the next session of the Committee. The Delegation requested that the floor be given to the indigenous representative who was a member of the Mexican Delegation. The representative stated that indigenous representation in the Committee was marginal and inadequate and did not think that states had shown sufficient sensitivity to the issue or understood the urgency of improving the level of indigenous and local communities' population in the sessions. The Committee was discussing important crosscutting issues which were likely to affect indigenous peoples. A decision should be adopted as soon as possible to set up a voluntary fund to enhance and improve the level of indigenous and local communities' participation. States should find appropriate mechanisms to finance that participation. Many States have made commitment in other fora and bodies via international instruments to guarantee indigenous populations' participation in those fora and bodies. The representative believed that it was important to have broad consultation of indigenous peoples' representatives and organizations with their full participation and in cooperation with WIPO and its Member States. This could be done through indigenous peoples' institutions and procedures in accordance with ILO Convention 169 on Indigenous and Tribal Peoples, which made clear in its Article 6 that these peoples have the right to consultation. The Committee was discussing the faith and the future of indigenous peoples as well as issues related to intellectual property rights, and issues such as whether or not indigenous peoples' GR can be used, as well as the protection of their TK and folklore. Unofficial consultations should be continued if indigenous peoples participate fully. He agreed with the statement of the Call of the Earth that a permanent regional forum should be set up on these issues and recall that on during the third session of the Permanent Forum on Indigenous Peoples, a series of recommendations were made to WIPO and to its Member States to have the organization facilitate indigenous peoples' participation in meetings. These recommendations were also designed to ensure that indigenous peoples could participate properly in the decision-making process in WIPO committees and hoped these recommendations would be followed. Recommendations on enhancing and improving participation of indigenous peoples in the ICG have been heard to improve the quality of dialogue, exchange of opinions and discussions. Indigenous peoples wanted to ensure that in bodies where international cooperation was being dealt with, the participation of indigenous peoples was necessary to ensure that they are more recognized and respected as full partners in intercultural dialogue and discussions between national states and indigenous peoples. That was the best way to seek agreement and consensus.

45. The Delegation of Turkey welcomed the proposal of New Zealand as well as any proposal which would help indigenous and local communities to make more effective contribution to the work of the Committee. He however believed that such participation should not change the intergovernmental nature of the Committee. He fully endorsed what Italy and the Netherlands had said on behalf of Group B and the EU respectively.

46. The representative of UNU-IAS welcomed the very positive nature of the debate on strengthening the participation of local and indigenous communities in the work of the Committee, and in particular New Zealand's proposals to enhance indigenous participation. He added that the value of such measures would be reduced if they were not linked to a wider participatory process designed to ensure that positions presented in any panel discussion, or other interventions were built upon the basis of continuing consultation with local and

indigenous communities. The representative added that research and capacity-building work carried out by UNU-IAS in Central Asia, the Pacific region and Latin America showed that lack of a timely, concerted, well funded process to secure the participation of indigenous peoples undermines the development of national *sui generis* legislation, impedes its effective implementation and in some cases may alienate indigenous peoples and local communities, as opposed to securing their confidence in the processes designed to develop law and policy to protect their rights. Based upon research carried out by UNU-IAS, the representative drew some general observations regarding consultative processes. Any consultation process must be developed primarily by indigenous peoples and their organizations, including framing the consultation, its focus and the desired outcomes. Materials need to be prepared in indigenous and local community languages based upon their own reality. Any process must allow sufficient time for the dissemination of information, development of local community positions, interchange amongst community representatives and to the extent possible the preparation of consolidated proposals at the national, regional and international level. The process should aim to reflect upon the following issues. What is the importance of TK for local and indigenous communities? What are the threats to TK, and how is it being lost? How can TK and innovation systems (TKIS) be protected and strengthened? What is the role of communities in securing such systems? How can national and international law and policy help to support TK and innovation systems? These issues were relevant at the national level and equally important for work at the international level. It was worth remembering that the Committee was not alone in needing to develop participatory processes relating to protection of TK. Attention should also be given to the work being carried out on the status and trends of TK by the SCBD, the work of the CBD Working Group on Article 8(j) and the consultative processes of the UN Permanent Forum on Indigenous Peoples, which had an established process for promoting global community consultation. He added that attention should also be given to capacity development programs of organizations such as UNEP, UNDP, and UNU-IAS, in the development of a number of regional programs on ABS, which included an important component on TK. These and other capacity development programs and ongoing national regional consultation processes could usefully help to inform the Committee process. The representative suggested to the Committee that it considered inclusion in its work for the next Committee of an agenda item to provide an opportunity to consider the potential opportunities which may exist for developing such a global consultative process. To this end it may be considered useful to request the Secretariat to prepare documentation to inform such discussion including issues such as: the extent to which a Voluntary Fund can help to fund the development of national and regional consultation processes to complement participation at the Committee and preparatory meetings; opportunities for collaboration with other relevant consultation programs within the UN system; experiences in the development of national and regional participatory processes; the results of such processes, including any indigenous and local community proposals for the development of mechanisms for protection of TK; possible areas for collaboration in national and regional participatory processes. The representative commented that Committee may wish to invite international agencies including UNEP and UNDP, as well as UNU, UNCTAD, UNESCO and others to support the activities of the Committee through their global and regional capacity development programs, and request that the secretariat of Committee collaborate with such capacity development programs with a view to both informing such processes regarding the Committee deliberations and helping to create opportunities to ensure that the outcomes of these activities may where appropriate be fed back into the Committee's consultations. He added that the Committee may wish to consider framing a series of questions for the CBD, and in particular the Working Group on Article 8(j), as well as for the UN Permanent Forum on Indigenous Peoples requesting that they considered in their deliberations the nature and format for a comprehensive global consultative process for indigenous peoples on the issue of protection

of TK, with a view to determining the scope, nature, and content of any such process as well as the means for carrying it out. The Committee may wish to invite submissions from other international organizations, such as UNU, UNESCO, UNCTAD, UNEP and UNDP, as well as governments, indigenous organizations, NGOs etc. He further added that in order to show its commitment to this issue the Committee might usefully consider designating the theme “securing effective indigenous and local community participation” as the topic for one of the first panel discussions involving presentations by indigenous and local communities, to be held perhaps at the next Committee. He concluded by supporting proposals for greater inter-institutional collaboration and for the progressive integration of work to ensure a holistic and comprehensive approach to the issue of protection of TK and looked forward to participating in such work. The representative wished to draw attention to the recent Memorandum of Understanding entered into between UNU and WIPO, with a view to enhancing collaboration in global outreach activities. In the spirit of this collaboration UNU-IAS stood ready to work closely with WIPO and the Committee to help move forward the debate of these important issues, and most importantly to help ensure an informed, participatory and ultimately fruitful process.

47. The representative of Call of the Earth believed that the Committee had reached a point where it did not seem to know how to take the next step forward to improve the effectiveness of the participation of indigenous peoples. As to whether or not a voluntary fund should be set up, in practice, the participation of indigenous peoples was already being assured through voluntary contributions by various donors. In so far as the Committee had been in operation, WIPO had not provided any direct support and it was considered that WIPO was indebted to indigenous peoples for the direct participation in the Committee’s discussions. The ILO Convention 169 on Indigenous and Tribal Peoples talked about the need to ensure consultation of and participation by indigenous peoples in all matters relating to them. He stated that this was extremely important for the organizations of the UN system and added that WIPO should also seriously consider the establishment of this voluntary fund and should ensure that it had initial capital deposited by WIPO to illustrate its intention to meet the needs of the indigenous peoples and the requirements of donors. He expressed his gratitude to New Zealand for its proposal and for the expressions of support. However he did have two concerns about the New Zealand proposal: first, he believed the focus of discussion on indigenous participation should be on practical and effective specific steps forward with the provision of sufficient funds to ensure the presence of indigenous representatives from the various geographical regions of the world. If specific funds in sufficient amounts were not offered by countries then these proposals would remain a dead letter; secondly, he did not think it was necessary to have a co-chairmanship for the working of the Committee and added that indigenous representation needed to retain its independence. Indigenous peoples had a close relationship with WIPO that could undermine this self-determination of indigenous peoples at a time when issues of such crucial importance were being dealt with. He suggested that WIPO put a biopiracy tax on all patents which were involved in any way with TK; the funds obtained therefrom could be the basis for a fund to ensure the participation of indigenous peoples and local communities. He finally endorsed the appeal of the Delegation of Papua New Guinea for greater sensitivities to be shown in the Committee as the discussions had direct impact on indigenous communities.

48. The representative of the Kaska Dena Council stated that the continued enhancement of their participatory rights of Indigenous Peoples was integral to the Committee. He believed that the discussion under agenda item 4 demonstrated how effective and inclusive the Committee could be and that their mutual appreciation for their integral roles in the Committee had matured under this item. The Committee, led by a WIPO Member State,



asked that indigenous peoples be given the floor before Parties' statements were complete. The Chair in his discretion under Rule 24 of the UN WIPO Rules of Procedures invited the intervention of NGOs within the debate. WIPO Member States were given the opportunity to respond to and support indigenous peoples' proposals immediately and through informal consultations. An Indigenous peoples' proposal was partly taken up by the Member States. The representative commented that better efforts were being made, and that although the situation was not at its best he could accept the compromise that had been heard in the room. Strong support on a number of issues had been heard and the representative believed there was a majority viewpoint. The Kaska Dena Council supported in general the comments of Ecuador supported by Brazil on the specific criteria of the Voluntary Fund and emphasis on the Indigenous Peoples of developing countries. The Secretariat's reference to the CBD's Indigenous participatory voluntary fund was cognizant of this emphasis. All Member States in the Committee had accepted this language at the Seventh Session of the CBD COP, and so it should be considered in the Committee. The representative agreed with the comments by Member States such as Canada, the United States of America and Switzerland who called for the efficient operation of Committee meetings. He further suggested that this issue be approached pragmatically and with innovative practices, as opposed to superficially. He supported the comments of the representative of UNU – IAS with respect to the consultative processes. The Secretariat should document this and take it into consideration in the preparation of the background documents for the eighth session. He looked forward to the UNU – IAS's contributions to the Voluntary Fund.

49. The representative of the Saami Council supported all proposals in WIPO/GRTKF/IC/7/14. Although the discussions on such a crucial issue had lapsed into levity, he still believed it had been a fruitful discussion which highlighted the importance of this matter. He noted that the response by all Delegations to the New Zealand proposal had been positive to its spirit. He noted however that some delegations had expressed concern about some concrete proposals and therefore made the following proposals as a compromise. Indigenous peoples' representatives shall be guaranteed a speaking time that allows them to make their positions known to the Committee. A mixed speaking order should be introduced at the discretion of the Chairperson. Creating such an order was not that dramatic. It was simply an acknowledgement that when the Chair believed that it might actually benefit the discussions in this fora, it might be good that indigenous representatives come in earlier than at the very end. He believed it was important for two reasons: first, it might help this process that Member States will be able to actually react to their positions which never happens when they speak last. Secondly, if they made a concrete recommendation, it could not be discussed if it was not endorsed by a Member State, which was difficult then when Member States had already spoken. He proposed that a separate seating area be reserved for indigenous peoples' representatives. Such an arrangement had precedent in the CBD processes. He supported the proposal in WIPO/GRTKF/IC/7/12 paragraph 25 (iii) that requested that a formal proposal for a voluntary fund be prepared for the consideration of the Committee at its eighth session. This proposal will then be so concrete that finally a decision on the voluntary fund could be made at that session. He believed that all these proposals could be adopted within the existing WIPO and Committee rules of procedure and further believed that an implementation of these suggestions will not change the nature of this body as an intergovernmental committee. He finally responded to the concerns expressed by the Delegation of Ecuador and others by stating that the voluntary fund should focus on making sure that particular indigenous representatives from developing countries can participate in this body. He added that the fact that developed countries were likely to be the greatest contributors to the fund should not result in only indigenous representatives from developed countries being funded and added that the voices of indigenous representatives from developing countries were particularly

lacking in this process. He believed that the voluntary fund will be created under this understanding. He concluded that his organization had managed to make a way to the Committee without the help of a voluntary fund.

50. The representative of the Foundation for Aboriginal and Islander Research Action (FAIRA) welcomed all contributions from Member States. On the question of time, as the participation rate might increase in the future, he believed that the opportunity to acquire an additional five hours of meeting should be seriously considered. On the question of order and seating, the Delegation from Mexico had given the opportunity to an indigenous person to speak from sitting within the state, so this was not such a great challenge. Unfortunately, many indigenous groups present in the Committee did not have a partnership arrangement with their government who are in some cases hostile. He added that provisions should also be allowed for indigenous peoples to speak, not just those who can sit next to their State partners. On the question of the voluntary fund participation, he believed there had to be conditions on the fund as well as and a gender balance, regional balance and a representation of elders and youth. He commented on the other funds available immediately to help indigenous participation while the organization had to go through its procedures if it was to create a welfare fund as such. He suggested that initiatives be taken from the floor for increased participation of indigenous peoples.

51. The representative of *Tupaj Amaru* stated that since the beginning of the work of the Committee, the representatives of the indigenous communities had been advocating the need for the participation of indigenous and local communities in the activities of WIPO dealing with intellectual property and generic resources, TK and TCEs. After five years of debate, he noted with great disappointment the selfishness of the wealthy countries and the inconsistency of their policies to guarantee the free participation covered by the ordinary budget of WIPO. He added that to console the indigenous peoples who are victims of the plundering of their wealth, the Committee urged the governments to include representatives of these communities in their national delegations; that is, they invited them to share a part of the subsidies which they received from the WIPO budget. This paternalistic policy would be an obstacle to the independence and the free expression of the indigenous representatives in the fora of the United Nations. He added that indigenous communities should not be held responsible for failure of neo-liberal policies which handed down TK and wealth to the transnational corporations. The mechanisms of the voluntary funds for indigenous peoples had not worked in the UN or had been working in a selective and discriminatory manner due to the lack of political will of the States. He quoted the document of the Secretariat that stated “the participation of indigenous and local communities in the Committee is financed with voluntary contributions on an *ad hoc* basis coming from a whole range of governmental and non-governmental sources”. For reasons of transparency, the organizations should be informed about the distribution of these scarce funds. The organizations should also know what the criteria are for the distribution of said funds. He added that as to the proposal put forward by New Zealand, it put the question back to front. The states should first solve the financial issue either covered by the WIPO budget or the voluntary contributions fund and afterwards, only, deal with the broad and effective participation of indigenous peoples. He did not see the pressing need to change the rules of procedure already established in WIPO which enabled indigenous groups to talk without restriction. He felt these groups were treated with respect. He shared the observations put forward by Ecuador and Brazil stating that the proposal from New Zealand simply tried to distract indigenous peoples before solving the fundamental issue which is financing and participation. He added that the proposed changes to procedures that had already been established might take a long time to be implemented. He concluded that re-arranging the seats might also be discriminatory. On the selection process,

he commented that indigenous peoples and communities had to be free from any paternalism. The indigenous candidates should be elected by their own indigenous communities. He agreed the criteria of selection. He believed that the financing of five representatives for each session of the Committee was an insignificant amount for an organization such as WIPO and considered it a humiliation for the indigenous communities. He finally proposed to postpone the decision on the New Zealand proposal since there was no consensus on the issue.

52. The representative of the Assembly of the First Nations stated that its organization represented about 50 different nations in Canada made up of 630 communities and 700,000 people. She added that the AFN was participating in a sincere effort to facilitate greater understanding and mutual benefit. While she was confident that the indigenous organizations were speaking on behalf of both men and women, she wanted to make sure that indigenous women were included in the work of the Committee. Indigenous women were both the poorest of the poor, and also responsible for the intergenerational transfer of significant bodies of knowledge. She finally encouraged the parties to consider the proposals made by UNU - IAS.

53. The representative of the Inuit Circumpolar Conference illustrated the importance of effective participation of indigenous peoples in the discussions of the Committee by quoting an Inuit elder who stated: "Down south scientists may sometimes leave to go to another country to make more money or to do interesting work and they call this brain drain. Up here, it is a different kind of a brain drain. Researchers come here to drain off what we know and then they leave. They use notebooks and taperecorders but if a bucket would work they would use that because it would be easier." The representative commented that participation of indigenous communities started at the community level where the loss or lack of control of the protection of their TK began, and continued on to the other spectrum, to this WIPO process. Therefore, the participation of indigenous peoples was crucial at every level. She added that the effectiveness of participation demanded the resources for capacity-building and consultation at the community level, the regional level and as part of government process. She encouraged States to consider increasing the level of resources at the domestic level as well as the international level in order to arrive at the Committee with the ability to engage in these discussions in the most effective manner possible.

54. The representative of the Tulalip Tribes believed that the adoption of the participatory mechanisms of the New Zealand proposal was vitally important for the ability of the Committee to establish a fully collaborative process, the lack of which would pose a serious obstacle to accomplishing the core purposes of the Committee. He urged states to support the New Zealand proposal for a change in seating arrangements for the meetings. He believed that it was clear from the discussion that indigenous peoples were not simply NGOs, but had distinct interests and rights in many aspects of this process. Their distinct status had been recognized in a number of other leading United Nations fora in which the interests and rights of indigenous peoples were the focus of discussions and negotiations, such as the Permanent Forum on Indigenous Peoples and the Convention on Biological Diversity. He added that the ability to sit together as a bloc was important to demonstrate state support of the customary rights of indigenous peoples and respect the right to self-identification. This seating arrangement was necessary to allow indigenous delegates in this process to more effectively form positions during discussions on issues of vital importance to the survival of indigenous peoples and their TK systems, and establish a truly collaborative process. He believed that the Rule 24 of the WIPO General Assembly allowed subsidiary bodies discretion in this matter, and believed that there were no procedural barriers to establish such recognition and seating arrangement. He looked to the states to show the utmost good faith in recognition of

the core principles that had been laid out by the Committee and accede to this request. He finally proposed the following text: “Recognizing that indigenous peoples possess distinct identities and distinct interests and rights in their national systems and in the subject matter of this body, the Committee is invited to establish a distinct block of seating for the indigenous delegates and to adjust the size of this block to accommodate the indigenous delegates at each meeting.”

55. The representative of the Indian Council of South America (CISA) stated that there was already an experience within the United Nations system of voluntary fund. He added that as there were 40 indigenous peoples in his country, Bolivia, and many throughout the world, it was important to know which indigenous peoples would be invited and what subject would be discussed (TK or TCEs). Concerning the New Zealand proposal, he stated that the issue needed to be studied very carefully.

56. The representative of *Fundación Nuestro Ambiente* (FUNA) stated that there was a need to get from the documents prepared for the meeting the real fundamental issues in order to prepare a document to distribute to the holders of TK and folklore. Governmental, intergovernmental and NGOs which could be involved in this process need to recognize the need to mobilize indigenous peoples and communities, so they know what is happening in the Committee and can contribute to it. He stated that there was a need to come out with a proper result and clear objectives. In order to make things more efficient, a committee of experts could prepare a draft. The issue would be dealt with on the basis of a specific document. He also stated that WIPO, a prestigious organization, was playing a preponderant role in international issues and suggested that if indigenous peoples could participate more in the Committee, these people would learn more.

57. The Delegation of the Russian Federation thanked the Delegation of New Zealand for the proposals (contained in WIPO/GRTKF/IC/7/14) and the intention to make the participation of indigenous peoples in the Committee’s work more effective. The Delegation supported the participation of indigenous peoples in the Committee’s work and considered that the Committee devoted sufficient attention to the matter. The main problem affecting the participation of indigenous peoples in the Committee’s work was financial and should also be resolved as a matter of priority. The Delegation supported the idea of holding plenary sessions devoted to reports and presentations given by indigenous peoples, in line with the Committee’s previous practice, and the proposal to grant sufficient time to speakers. In that connection, the Delegation considered that the Committee’s rules of procedure should, in accordance with its status, be observed.

58. The Delegation of Morocco believed that the best way to enhance the participation of indigenous peoples in the work of the Committee was by setting up a voluntary fund to finance their participation. The fund should be set up as quickly as possible. Any mechanism for increasing participation of indigenous peoples should be consistent with the principles that were agreed at the Committee’s fourth session. It concluded that these principles guaranteed equity among delegations from Member States and delegations representing indigenous peoples and also provided enhanced participation by the latter.

59. The Delegation of Zambia stated that regarding the funding issue for the participation of local communities, all had supported the need to have active participation of indigenous peoples in the Committee. It added that it supported the New Zealand proposal. It commented that no African indigenous peoples were present in the room and questioned how these peoples could attend the Committee if there was no funding. It finally appealed to the

members to make a positive decision to enable communities to be present in the next session of the Committee.

60. The Delegation of Turkey fully endorsed the intervention of the Delegation of Morocco.

61. The representative of the United Nations Permanent Forum on Indigenous Issues recognized WIPO's efforts to ensure the effective participation of indigenous peoples in building an international legal system that is truly pluralistic and inclusive of diverse legal traditions, which for indigenous peoples means recognition of collective rights and obligations to shared knowledge. One of the mandates of the Forum was to coordinate various UN bodies and specialized agencies. It did not represent indigenous peoples, but provided technical expertise to WIPO's work on matters relevant to its broad-ranging mandate. The Forum was ready and willing provide expert input to the work of WIPO on intellectual property, TK and folklore, on such issues as how customary and indigenous laws and protocols could be recognized and applied within national, regional and international systems for the protection of TK and cultural expressions. It was important to support close consultation with indigenous peoples and local communities and to create guidelines and ethical codes of conduct, 'best practices' and practical guides relating to intellectual property issues and the access to and use of TCEs and TK by, among others, commercial users, sociologists, ethnologists, anthropologists, and museums and archives. WIPO could contribute to this work. The representative recalled that WIPO representatives attended the Forum's third session where they had the opportunity to hear directly from indigenous peoples, their concerns and also to receive advice on how to build a better relationship and increased cooperation between WIPO and indigenous peoples, and recalled that WIPO was an active member of the Inter Agency Support Group on Indigenous Issues. The representative drew attention to the recommendations of the Forum's third session (WIPO/GRTKF/IC/7/13). The representative stressed the need for collaboration and advice of indigenous peoples, for example on the issue of the rights of indigenous immigrants living in big cities, forming new cultural communities, to continue to use and develop TK and of their share of possible benefits. The Forum had also called upon WIPO and its Member States, funds, foundations and other donors to provide funding to facilitate the participation of indigenous peoples, local communities and the Forum in sessions of the Committee and in related consultations, caucuses, briefings and workshops. The representative commented that the Forum's recommendations provided the international system with a work program to advance the issues related to TK and GR that are crucial for the cultural survival of the World's some 370 million indigenous peoples – peoples who are over-represented in the statistics of disadvantage – and who struggle daily for their very survival. The representative observed that much work was continuing across the international system of the issue of TK – and at least 11 different agencies (UNPFII, WIPO, SCBD, UNCTAD, OHCHR, UNESCO FAO, IFAD; UNDP, WB and the Forum on Forests) are working on the area – all from different angles and at different paces. It was imperative that all the organizations engaging with this issue should work together. The Forum stood ready to assist with that coordinated effort. The representative proposed that a workshop be held to bring together all the agencies currently working on TK as well as indigenous representatives. The workshop would develop a broad, system-wide approach to holistically protect indigenous knowledge; address the issue of *sui generis* protection in this respect; incorporate TK in socio-economic and cultural development policies and projects. The workshop should be organized jointly by WIPO and the Forum. It could materialize quite easily and cheaply if agencies pay their own costs and in addition each bring one indigenous representative. The representative stressing the broad significance of TK not only to Indigenous Peoples and other tradition based communities, but to States and agencies, in fact to us all. Traditional knowledge forms an invaluable part of

mankind's heritage, a treasure of its intellectual efforts through millennia. TK was crucial moreover to social progress and a dignified life for millions of people. If the TK is not respected and protected and taken into account in development policies, planning and projects, these would only partly succeed and may be, at worst, a waste of time and money. It was necessary to respect indigenous peoples, respect their views of the world, their priorities, and their TK to further development – be it TK holders' farming systems and expertise, their understanding of how and why plants grow, animals thrive and propagate etc.; be they TK holders' knowledge and understanding of human illness and health, of what it is that makes us ill and what the appropriate remedies and treatments are to make us recover. This was essential for planning and developing policies that further the living standards of these people, and the socio-economic development, prosperity and quality of life for millions will be at stake.

### *Conclusions*

62. The Committee requested that, on the basis of document WIPO/GRTKF/IC/7/8 and the comments made upon it, a formal proposal for a Voluntary Fund be prepared for its consideration at its eighth session; and encouraged continuing voluntary funding of representatives of indigenous and local communities, and other forms of enhancing their participation in the Committee and other WIPO activities.

63. Concerning the proposal of New Zealand set out in document WIPO/GRTKF/IC/7/14,

(i) Regarding item 1 (speaking time), the Committee expressed the view that time should, wherever possible, be given for general statements, including such by all participants including representatives of indigenous and local communities, at the beginning of the Committee's sessions, and that more speaking time should be allotted, at appropriate occasions during the sessions, to representatives of local and indigenous communities.

(ii) Regarding item 2 (a change in seating arrangements), the Committee noted that the present arrangements were the traditional ones for intergovernmental bodies and that any changes in that respect should be based on instructions to the Secretariat. No such specific instructions for changes received support from the Committee, and therefore no decision was taken in this respect at the present session of the Committee.

(iii) Regarding item 3 (co-chairmanship by a representative coming from a local or indigenous community), the Committee noted that such a measure presupposed a change in the Rules of Procedure. There was no consensus in this respect and the proposal was not approved by the Committee.

(iv) Regarding item 4 (panel presentations), the Committee agreed that, immediately before the commencement of the sessions of the Committee, half-day panel presentations should be organized, chaired by a representative from a local or indigenous community.

## AGENDA ITEM 5: TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

*Protection of traditional cultural expressions/expressions of folklore*

64. At the invitation of the Chair, the Secretariat introduced WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/4.

65. The Delegation of the Netherlands, speaking on behalf of the European Community and its Member States, thanked the Secretariat for the high quality of the documents provided under this agenda which covered in a distilled manner a wide spectrum of information, references, experiences and opinions which had been provided to the Committee over the past six sessions. The EC and its Member States agreed with the approach taken, in particular that TCEs/EoF were being dealt with separately from TK and GR and felt this was a constructive way forward. The EC and its Member States underscored the realization that in the field of TCEs/EoF, it was impossible to impose a rigid set of rules, as the subject matter and the way it was experienced across the world was as diverse as the communities themselves. Moreover, the fact that TCEs/EoF were, in the European experience, in the public domain and thus free for exploitation and inspiration was not conducive to suddenly imposing restrictions. It was necessary to avoid situations which made it difficult or impossible for those who would like to be inspired by or use TCEs/EoF for legitimate purposes. The draft policy objectives set out in WIPO/GRTKF/IC/7/3 were noted with interest. The overview of objectives and principles in the document related mainly to decisions to be taken first at the national level. This was logical and prudent and did not prevent convergence from developing progressively among different countries and regions as a result of shared information and experience such as that emerging from the work of the Committee. In this context, it was appropriate that national entities be set up to accompany indigenous and local communities specifically in their quest for recognition and equitable and respectful treatment of their TCEs/EoF as proposed in paragraphs 23, 46, 47 and 49 to 51 of Annex II to WIPO/GRTKF/IC/7/3. It had already been shown in the Committee from the experiences of New Zealand, Australia and the United States of America that national entities were important and practical partners for indigenous and traditional communities for the protection of their TCEs/EoF. The EC and its Member States agreed with paragraph 43 of WIPO/GRTKF/IC/7/4 that for many TCEs/EoF improved access to and better use of current IP systems, as well as non-IP domains such as unfair competition, laws of blasphemy and so on, already provided an important step forward. In any event, the EC and its Member States supported the need for flexibility in any potential new measures that may be proposed specifically for the protection of TCEs/EoF and their necessary complementarity to the existing system of IP protection. The Committee should learn from what had not worked in the past. Although it had been declared by some that TCEs/EoF should not be documented nor registered, it was believed by the EC and its Member States that some form of grouping of information and description of subject matter per community, including where shared by another community, might lead to a fairer and a more practical framework for all concerned (see paragraphs 35, 48, 59(c) and 68, Annex II, WIPO/GRTKF/IC/7/3). With respect to the core principles, the elaboration of specific principles also played an important role. The principles set out in the documents were interesting and well documented, but did expose some difficulties (such as on the duration of protection) which would have to be overcome. The EC and its Member States supported the proposed definition of scope of subject matter as expressed in paragraph 28 of Annex II of WIPO/GRTKF/IC/7/3, and the notion that specific choices as to the appropriate terms be made at the national level. With regard to the Policy Options and Legal Mechanisms set out in WIPO/GRTKF/IC/7/4, the detailed information provided very useful and appropriate examples of solutions which had already been tested by some countries. Those countries

which so wished would be able to identify measures which could be used by them as building blocks in a system which was adapted to specific needs of the indigenous communities with which they have the closest links. The EC and its Member States supported the preparation of the Practical Guide as indicated in paragraph 28 of WIPO/GRTKF/IC/7/3, especially if the Guide were based upon the 'Practical Steps' set out in WIPO/GRTKF/IC/6/3. The EC and its Member States supported the idea of providing suggestions for textual amendments to the current interim draft provisions before February 25, 2005, and then the production by the Secretariat of a further draft of objectives and principles for the protection of TCEs/EoF for consideration by the Committee at its eighth session. The EC and its Member States supported the establishment of an expert level working group before the Committee's next session, but it was important to know more about the operational modalities of the suggested expert working group, such as its composition, the budgetary implications and working methods. The EC and its Member States had noted the recommendations made by the Permanent Forum on Indigenous Issues (WIPO/GRTKF/IC/7/13).

66. The Delegation of Azerbaijan stated that it would take an active part in the work of the Committee concerning TCEs/EoF and GR. These were questions of great interest. Efforts were under way in Azerbaijan to protect TCEs/EoF through a legal framework for protection of traditional cultural goods. It was hoped that there would soon be a legally binding international instrument which would enable national states to regulate problems that occurred in the use of TCEs/EoF. The Delegation provided information on a national Law on the Protection of Folklore which had come into force. The Law was based on model provisions and other documents prepared by WIPO. It regulated the relationships between users and providers of TCEs/EoF and provided legal protection against misappropriation, undue use or use for detrimental purposes. It was stressed that the protection of folklore in the Law was based upon IP principles, such as copyright. The Delegation stated that the Law should not be limited to expressions of folklore but should be extended to intellectual property. It was important that a legal mechanism be set up which should not be an obstacle to the use of TCEs/EoF. It should be remembered that all laws protecting TCEs /EoF should be based upon four principles. First, folklore was part and parcel of cultural heritage, and should be protected against any infringement which could prevent its preservation and protection. It was necessary to set up legislation inspired by IP. Second, striking proper balances between protection of TCEs/EoF and encouragement of their use. This was important because protection of TCEs should not be an obstacle to their development. Third, the system should be flexible and supple and not run counter to those interested in folklore. There was also a need to protect TCEs/EoF and use IP instruments. Fourth, the protection of copyright and neighboring rights must also be planned. Finally, the Delegation expressed hope that there would be an international mechanism to solve the problems associated with the protection of TCEs/EoF. It was convinced that WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/4 would play a very useful role.

67. The Delegation of the Syrian Arab Republic commended the Secretariat for WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5. The Delegation emphasized the importance of flexibility in the application of protection to TCEs in different countries. It remarked that it was timely to establish an international protection system through an internationally binding treaty. Such a treaty would establish the highest international standards for the protection of folklore based on the best existing systems. The Delegation highlighted the importance of future work by experts. The selection and the choice of international protection standards should be neutral and represent the interests of all the parties concerned. Transparency in that regard, as emphasized by the Secretariat, should also be ensured.



68. The Delegation of Japan expressed its appreciation to the WIPO Secretariat for the quality of the documents and supported the perspective shown in WIPO/GRTKF/IC/7/3 that any “single ‘one-size-fits-all’ or ‘universal international template’ might not be able to achieve the objective of the comprehensive protection of TCEs/EoF in a manner that suited the national priorities, legal and cultural environment and needs of traditional communities in all countries”. The Delegation also supported the perspective that “provisions for the protection of TCEs/EoF adopted at the international level would have to accommodate legislative and jurisprudential diversity within current national and regional approaches” (WIPO/GRTKF/IC/7/3). The Delegation also supported the observation that “the focus of the Committee’s work should be on those elements and forms of creativity not currently protected by IP laws.” From this point of view, the Delegation strongly supported the ‘Principle of flexibility and comprehensiveness’ and the statement that “protection should allow sufficient flexibility for national authorities to determine the appropriate means of achieving the objectives of protection” and that protection may accordingly draw on a comprehensive range of options, such as criminal law, the law of torts, cultural heritage laws, customary laws, contract law, and so on. In order to respect the ‘Principle of flexibility and comprehensiveness’ introduced as a ‘General Guiding Principle’ in the document, the Delegation recorded that the outcome of the Committee’s work should be considered as guidelines or model provisions, which would allow diversified approaches of national authorities, rather than a binding international instrument or instruments. The Delegation recognized that some parts of the provisions under the ‘Principle on management of rights’ in WIPO/GRTKF/IC/7/3 did not suit the general guiding principle of ‘Principle of flexibility and comprehensiveness’. The ‘Principle on management of rights’ seemed based upon the presupposition that authorizations were required for all exploitation of TCEs/ EoF. If so, it would seemingly deny the other approaches to protect TCEs/ EoF, such as remuneration schemes, trade practices and marketing laws, contracts and cultural heritage preservation laws and programs. Although the Delegation could agree with the proposition that a responsible authority should be tasked with awareness-raising, education, advice, guidance, and monitoring, it had to state its view that some of the descriptions of the tasks of management authorities which seemed to be based only on the rights of authorization were not appropriate. In addition, the Delegation was concerned that too detailed provisions would curtail flexibility of a diversified approach to protect TCEs/EoF. Specifically, it believed that modalities for designing the system of ‘equitable sharing of benefits’, mentioned at (ii) in the ‘Principle on management of rights,’ should be determined by each national authority. The Delegation also pointed out that provision B.5(iv) (WIPO/GRTKF/IC/7/3, Annex I) allowed only direct benefit sharing, and therefore excluded the possibility for national authorities to adopt comprehensive benefit sharing systems. Concerning the ‘Principle on scope of protection,’ the Delegation pointed out that prevention measure should be one of the options adopted by each national law according to the ‘Principle of flexibility and comprehensiveness’. As WIPO/GRTKF/IC/7/3 (paragraph 17 (p)) showed, the scope of protection should be designed with the recognition that “varying and multiple levels and forms of protection” were appropriate for different kinds of TCEs/EoF and depending also on the objectives intended to be served. In regard to the ‘Principle on term of protection’, it was not believed appropriate to provide a single, uniform term of protection for TCEs/ EoF because the basic protection measures were different depending on the objectives and subject matters of different kinds of TCEs/ EoF. For example, it was considered that permanent protection, as long as the TCEs/EoF continued to be maintained, may be applicable to the protection of TCEs/EoF of cultural or spiritual value or significance (such as sacred expressions). However, performances of TCEs/EoF, which were protected under the WIPO Performances and Phonograms Treaty, or contemporary interpretations, arrangements, adaptations

of pre-existing cultural materials, could be provided with exclusive rights of authorization for a limited term. In short, the Delegation indicated that it would insist that the introduction of a protection term should be considered distinctly in relation to different kind of TCEs/EoF and in respect of each objective of protection, rather than in a single uniform manner. The ‘Principle of sanctions, remedies and enforcement’ should also be considered for each different protection measure, considering that protection of TCEs/EoF should allow flexibility for national authorities to determine the appropriate means of achieving the objectives of protection.

69. The Delegation of Egypt welcomed WIPO/GRTKF/IC/7/3 as an important step forward in the work of the Committee and towards establishing a foundation for an international binding system for the protection of TCEs/EoF. Egypt regarded this subject as one of great importance. The Delegation indicated it would submit more precise written comments before the proposed date. It commented that there was not in the document adequate focus on the documentation of TCEs/EoF. Documentation of TCEs/EoF facilitated their protection and clarified rights and their application. This was referred to indirectly in the sixth objective in the document, but there was a need to clarify and emphasize this further. There was also an insufficient reference in the document to combating illegal use and misuse of TCEs/EoF, or to the term ‘misappropriation’ which appeared frequently in WIPO/GRTKF/IC/7/5 on TK. Concerning beneficiaries of protection, the Delegation suggested that nationals of an entire country should be able to claim protection over ‘national folklore’ regarded as belonging to the State or all the people of a particular country, as is the case in Egypt. The Delegation referred to paragraph 46 of Annex II of WIPO/GRTKF/IC/7/3. The concept of ‘national communities’ could be added to the scope of potential beneficiaries. It was also important to recognize that the State could be the beneficiary of protection or at least exercise relevant rights, as Egypt and the African Group had previously mentioned. The scope of protection suggested in the document was important and required further discussion and thought. With respect to the exceptions (principle B.6), exceptions found in current IP law were not necessarily appropriate to TCEs/EoF. With respect to application in time (principle B.10), the Delegation could not accept any continuing misuse of TCEs/EoF after new forms of protection had come into force. Concerning regional and international protection (principle B.12), the Delegation stated that TCEs/EoF were often part of the shared cultural heritage of countries. Their regional and international protection was therefore a complex issue and it was necessary to be very careful. Countries would have to consult with each other before adopting any legal measures in this regard. The Delegation concluded by affirming that the document in question was very rich in ideas and that the Delegation would study it further and submit written comments.

70. The Delegation of New Zealand supported the continuation of the important work of the Committee on TCEs/EoF and the need to reach some consensus on policy objectives and guiding principles before determining the legal mechanisms for the protection of TCEs/EoF. It agreed that the document should remain open for comment until the proposed date, and indicated that it would submit detailed comments. The Delegation’s current comments would emphasize certain particularly important principles, and would introduce the likely nature of its more detailed written comments. Generally speaking, most of the principles seemed appropriate. The Delegation said the guiding principle of flexibility for national policy and legislative development highlighted that it was unlikely that any single “one size fits all” or “universal” template would be found to protect TCEs/EoF comprehensively in a manner that suited the national priorities, legal and cultural environment, and needs of traditional communities in all countries. Also important was the suggestion that, as part of the guiding principles, the work on TCEs follow the established approach in the IP field whereby

international standards establish general principles and give scope for wide variation within national laws and leave the choice of legal mechanisms as a matter for the exercise of national discretion. The range of legal mechanisms being developed by WIPO would provide a menu of options for domestic law-makers to choose from or provide inspiration for custom-built mechanisms. The principle of responsiveness to the aspirations and expectations of relevant communities was essential. When the principles were developed further, a key challenge would be the interface between any new protective mechanisms and existing rights, particularly in the IP area. Further thinking was needed on this issue, particularly in view of the frustrations expressed by indigenous participants in the Committee concerning the concept of the public domain and the misappropriation of symbols or knowledge that they did not knowingly place in the “public domain” as the IP system defined it. The Delegation also questioned whether some principles were absent. All the objectives listed seemed relevant, but some were more directly associated with protection of TCEs/EoF at the IP interface than others. Objectives such as respect and safeguarding traditional cultures were important, but seemed less likely to be directly achieved by an IP-type intervention than other objectives such as encouraging community innovation and creativity, precluding invalid IP rights and promoting community development. Perhaps it would be useful to distinguish between the objectives that could more directly be achieved by protection at the IP interface, and a second level of objectives which the protective mechanisms developed should take into account and not run counter to. This second level of objectives related in many respects to other policy areas. The Delegation emphasized the importance of the Secretariat completing work on the ‘Practical Guide’ on the protection of TCEs, and thanked it for preparing the “Questionnaire on Establishing Effective Systems for the Protection of TCEs” (WIPO/GRTKF/IC/7/INF/4) to assist States and others with the national or regional consultations on the subject. The Delegation also supported the application of resources to enable the development of the ancillary practical materials that had been previously discussed by the Committee, including guidelines and best practices for archives, museums and other repositories of TCE subject matter and for commercial users of TCEs as referred to in WIPO/GRTKF/IC/7/3. The Delegation offered examples of guidelines from New Zealand’s national museum, Te Papa, and the National Library concerning access to and treatment of Maori TCEs in New Zealand. Turning to the decisions to be made on the further elaboration of the document, New Zealand supported further drafts of principles and policy objectives being prepared for the Committee’s next session, but reserved its position on whether or not these were the ultimate objectives and principles on which to proceed. The Delegation also noted that the policies, legal or administrative mechanisms which might flow from the principles and objectives would ultimately form only one part of a range of measures across many areas of policy and law that might contribute to the objectives of indigenous and local communities in regard to their TCEs. It was necessary to be clear, therefore, that the principles and objectives to be developed would relate only to the protection of TCEs at the IP interface, not the protection of TCEs in general. There was work to be done in other policy spheres. It was also noted that the Committee’s ability to make a decision or recommendation on these issues at the next session would depend on whether or not States had had the opportunity to undertake domestic consultations. Domestic discussions were likely to be driven by issues and objectives that did not necessarily mirror those being considered by the Committee. The Delegation could also support the establishment of a process to consider drafts before the next session. Such a forum, provided it was kept at a workable size, would provide an opportunity for more interactive discussion between experts. It was stressed, however, that it would be essential to include indigenous and local communities in such a group. The Delegation then introduced an indigenous representative of the Moriori people of Rekohu (also referred to as the Chatham Islands) and legal advisor to many Maori tribes in New Zealand, to provide observations about additional principles that were important from an indigenous perspective. (The

Delegation noted that his views were not necessarily those of the New Zealand government, but were put forward to provide a broader basis for discussion.) The representative said that in developing the principles and objectives in WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5, the Secretariat had stated that it had drawn from an extensive range of information and processes and had referred to the need to “strike a balance between the rights and interests of communities, users and the broader public”. This included taking into account international human rights standards, IP mechanisms of protection, customary laws and protocols and other relevant factors. While the sentiments expressed in the documents had an appearance of inclusivity, the term “protection” as defined in paragraph 24 of WIPO/GRTKF/IC/7/3 and paragraph 36 of WIPO/GRTKF/IC/7/5 referred to “protection such as that typically provided by IP laws”, and this gave pause for thought. This gave the definition of protection a more narrow and limited focus which was problematic for indigenous peoples. Mr. Solomon queried whether one could speak about genuine and effective protection of TCEs/EoF and TK within such a limited definition of protection. In this regard, he noted with approval the call by the African Group that the IP system needed to be supportive of the expectations and aspirations of indigenous peoples to protect their TCEs/EoF and TK. It followed that this should include embracing a broader, more inclusive and holistic definition of “protection” for TCEs/EoF and TK than that currently envisaged. When developing principles and objectives for protecting TCEs/EoF, a broader range of international instruments and declarations relating to cultural and intellectual property rights of indigenous peoples had to be considered, such as the Draft Declaration on the Rights of Indigenous Peoples and ILO Convention 169. The Draft Declaration had had input from literally thousands of indigenous peoples over some 20 years and offered valuable insights into their aspirations and expectations in relation to what they considered important to protecting their TCEs/EoF, TK and cultural and IP rights. Regard should also be had to principles and objectives elaborated in the many extant declarations by indigenous peoples themselves such as the declaration of Belem 1988 and the Mataatua Declaration. In addition there were many useful codes of ethics, principles and guidelines promulgated by NGOs that had relevance in this context. One such document was the Code of Ethics of the International Society of Ethnobiologists that was developed over a period of 10 years between scientists, researchers and indigenous peoples and was ratified by the Society in New Zealand in 1998. On the “public domain” and its impact on the TCEs/EoF and TK of indigenous peoples, a major issue confronting Moriori and Maori tribes in Aotearoa/New Zealand was the misappropriation of TK and expressions of TK (TCEs/EoF) such as images, designs, symbols, language and stories by non-indigenous users both locally and internationally. In the past two years alone, increasing amounts of Moriori and Maori TCEs/EoF and TK had been accessed from the “public domain” and used by companies and individuals to promote their commercial products and services. In none of these cases had the user sought to consult with the knowledge holders or to seek their prior informed consent to such use. Nor had they sought to share any benefits from the added-value that these traditional designs and creations gave their products and services. Invariably, when approached these users were often oblivious to the cultural offence that had been caused (particularly when such TCEs/EoF or TK had been applied in culturally inappropriate ways). These companies also offered as a justification for their actions that they were doing nothing “legally” wrong because they were not seeking IP rights over the TK or TCEs/EoF. This was a serious issue for Moriori and Maori tribes and indeed indigenous peoples the world over. Often the TCEs/EoF and TK of these peoples had found their way into the public domain through an original act of misappropriation or otherwise without the knowledge or consent of the TK holders concerned. Now that the knowledge was in the “public domain” there was very little that could be done under the current system of IP rights to effectively protect that knowledge from being misused in culturally inappropriate and offensive ways. If TCEs/EoF and TK were going to be

provided effective as opposed to token protection, then he urged the Committee to seriously consider what special measures were needed to protect TCEs/EoF and TK in the public domain. The advent of the digital age had created a whole new threat to the misappropriation of TCEs/EoF and TK and had considerably enhanced the capacity for that knowledge to be accessed and used without consent. For many indigenous peoples their TCEs/EoF and TK were all that remained of their cultures and identity as they had been deprived of their lands and other resources. The Committee had to do all it could to provide full and effective protection of this knowledge base for not only the benefit of indigenous peoples but indeed all of mankind.

71. The Delegation of Norway supported the objective of ensuring that TCEs/EoF enjoyed sufficient and adequate protection against misappropriation. The Delegation recalled its earlier position that any system for the protection of TCEs/EoF should be flexible in order to accommodate the diversity of circumstances and needs within different countries. Protection should not be provided so as to undermine legitimate IP rights. The goal should be strictly to protect against misappropriation. The Delegation felt that the approach taken in WIPO/GRTKF/IC/7/3 was useful and that it provided a good basis for further work. It agreed with those who had said that this document, as well as WIPO/GRTKF/IC/7/5, brought the Committee's discussions to a new stage. Norway supported the proposed objectives and principles although it queried the wording of some proposed principles. The Delegation foreshadowed written comments to be submitted before the proposed deadline. The Delegation supported the flexible approach taken to the protection of TCEs/EoF and was in favor of the emphasis put on derogatory and offensive uses of TCEs/EoF. The Delegation also supported some kind of intersessional work to prepare for the Committee's eighth session, depending on how such work was organized.

72. The Delegation of the United States of America stated that it was pleased to be participating in the work of the Committee and thanked the Secretariat for the documentation prepared for this session. The Delegation provided information on the recent opening in Washington, D.C., of the National Museum of the American Indian, which formed part of efforts by the U.S.A. to recognize the value of TCEs, support customary practices, contribute to safeguarding traditional cultures and in general implement the various policy objectives and guiding principles enunciated in the Committee's discussions ([www.AmericanIndian.si.edu](http://www.AmericanIndian.si.edu)). The Delegation stated that the meeting documents represented the array of policy objectives, substantive issues and legal mechanisms in this area but merely served as a starting point for further examination of the policy goals that should be implemented and the substantive issues that should be resolved. The future work of the Committee should focus on the best way to reach these goals and discussions should involve the communities of tradition bearers who would be affected. The Delegation supported the identification of the principles that should guide further discussions before the implementation of any general solution at the international level. The Secretariat was commended for having identified a number of important policy objectives such as "encouraging community innovation and creativity" and "promoting intellectual and cultural exchange", which reflected previous discussions in the Committee which the Delegation had supported. The Delegation also supported in particular certain guiding principles highlighted in WIPO/GRTKF/IC/7/3 such as "balance and proportionality", "respect for and cooperation with other international and regional instruments and processes" and "flexibility and comprehensiveness". The general approach of setting out guiding principles was supported and it was hoped that the objectives and principles set out in the documents would provide a useful resource for directing further discussions of the Committee. As had been mentioned by the Delegation of Japan, there were, however, a number of reservations with substantive

aspects of the documents, and these would be addressed in detail in written comments to be submitted before the suggested deadline. These concerned, for example, the focus on the 'protection' of TCEs/EoF implying that a strict exclusive rights model might best serve the needs of all cultural groups. Indeed, the use of terms such as 'protection', 'beneficiaries', 'term of protection', and others suggested that the ultimate result of the Committee's discussions would be a 'rights-based' instrument. The Delegation would support a multi-faceted approach given the variety of issues and differences between the various communities of the world. While continuing efforts to address substantive issues in accordance with the guiding principles identified by the Secretariat were supported, the Committee's efforts should be directed towards achieving results that were balanced and proportional to the nature of the problem in this area. It would prove difficult to craft any kind of international framework or instrument that would be proportional, meaningful and effective without a full understanding of the harm involved. Any scheme for addressing TCEs/EoF should not conflict with or compromise existing IP rights in any way. The ultimate conclusion of the Committee's work should also be flexible and comprehensive, allowing Member States to leave effective customary laws in place, while fully addressing the scope of problems. Where national or regional laws or agreements were already in place and seemed to be working, such as in the case of countries implementing the South Pacific Model Law, for example, the Committee should be careful to permit these systems to remain intact and not require new and different approaches. The United States of America had established several non-IP legal measures in this area and these might prove a useful guide. Nevertheless, a number of other substantive issues remain complicated; open-ended problems such as terminology, the precise parameters of the subject matter of TCEs/EoF, the role of sovereign nations in the management of TCEs/EoF and others. The Delegation stood ready to address these issues and, as in the past, strongly supported national-level action by each Member State or regional action where appropriate, in accordance with agreed objectives. This included the full implementation of conventional IP mechanisms in accordance with existing international agreements, as well as other non-IP *sui generis* or customary mechanisms, including laws concerning misappropriation, fraud, unfair competition and trade secrets. The Delegation recommended that the Committee consider hosting an informal meeting at the outset of the next Committee session to demonstrate the diversity of views in this area. A number of practitioners of TCEs/EoF, folk cultural experts and representatives of various groups had expressed their concerns that the Committee might be headed towards a singular, international scheme of protection for TCEs/EoF. These groups had provided a number of specific examples of the complexities that would arise with such an approach and they could be called upon to provide this information to the Committee directly. Such an informal meeting could provide information for all Committee Member States towards understanding the vast variety of needs, how they transcended national boundaries and the complexity necessarily involved in trying to craft a solution. Finally, the work of the Committee should focus on the best ways to reach these goals and these discussions should involve the TCEs/EoF custodians who would be affected. Consequently, the Delegation questioned the effectiveness and practicality of establishing any inter-sessional expert or working-level consultative process to review and examine further draft objectives and principles before the next session of the Committee. Given the intense interest in the work of this body, the Delegation could not imagine how a subsection of the body could provide comments that would accurately reflect the views of the Committee membership. Moreover, in light of the budgetary considerations, such a process could divert funds from other critical activities. The Delegation therefore urged the Committee participants to respond with full and meaningful comments on the documents in the time provided to fulfill this consultative need.

73. The Delegation of Indonesia sought some clarification on some of the items contained in WIPO/GRTKF/IC/7/3. Like many countries in Asia, the Delegation stated, Indonesia did not recognize the term 'indigenous people', which sounded close to colonialism. The use of the term 'traditional communities' instead of 'indigenous people' was therefore proposed. The Delegation supported the minimalist approach as mentioned in paragraph 11 (p. 6), but considered that as long as classical codification grew naturally and did not inhibit creativity and variation of the culture, it should not be prohibited. The Delegation suggested amending paragraph 17(a) (p. 7) to read: 'recognize and encourage the use of customary laws and systems and traditional governance and decision-making as far as possible, *as long as they are in conformity with the national law*'.

74. The Delegation of Canada thanked the Secretariat and the Committee for its useful work in the area of the protection of TCEs/EoF. The documents prepared for the seventh session and the ongoing work of the Committee had provided useful tools for enhancing Canada's own legal and policy understanding of the issues relating to the protection of TCEs/EoF at the international level. Domestically, Canada was also working to better understand these issues. The Delegation acknowledged, however, that Canada was still at a fact-finding stage, and that more work was required before its own legal and policy analysis would be complete, including the need to speak with Canadians about the significance of the many issues being raised at WIPO. In recent years, Canada had undertaken a number of initiatives to better understand the issues surrounding TCEs/EoF from a national perspective. It was thought that this work would enable Canada to better evaluate the potential application of the draft objectives and principles being developed by the Committee. For example, in August 2004, Canada had launched the National Gathering on Indigenous Traditional Knowledge. This Gathering had been the third in a series of three National Gatherings with the goal of engaging indigenous communities across Canada in a dialogue on the key issues relating to artistic expression, cultures and tourism and TK. It was being shaped and guided by an Indigenous Advisory Committee. Together, these national gatherings would help build and enhance policies, programs and services on issues like TK that were relevant to, and supportive of, the needs of indigenous peoples. In June 2004, Canada had provided support to and participated in the annual conference of the Creator's Rights Alliance in Montreal, Canada. The subject of the conference had been TK and contemporary art. Canada was also supporting a series of eight workshops across Canada by the indigenous caucus of the same organization to explore the views of indigenous artists on the IP regime, amongst other things. The next workshop would take place in November 2004. Canada had also accepted invitations from its Aboriginal communities to hold IP workshops across Canada. These workshops served various purposes, including informing Canadian Aboriginal peoples about the benefits and limitations of IP to protect their TK and TCEs/EoF. They also provided the Government with a better understanding of the concerns of indigenous Canadians regarding the protection of their TK and TCEs/EoF. There would be more of these workshops in the near future. Given the complexity of the issues surrounding the protection of TCEs/EoF, Canada supported continuing the discussion in this area within the boundaries of the Committee. The Delegation encouraged the Secretariat to prepare a revised draft of its policy objectives and principles for the Committee to consider at its eighth session. Canada looked forward to the opportunity to provide further comments on such work in conjunction with other Member States, but reserved the right to determine whether these were the appropriate objectives and principles on which to proceed. On the substance of the future work, the Delegation suggested that to be fully informative and effective, future work should respect the diversity of the legal and cultural systems of States as well as within indigenous and local communities. In Canada, there were considerable variances amongst customary laws and

protocols and so Canada could only support an approach to TCEs/EoF that was incremental, flexible and allowed maximum domestic experimentation based upon the broadest input from stakeholders at the national level.

75. The Delegation of China appreciated very much the efforts made by the Secretariat in preparing these two documents, which distilled systematically the outcome of the discussions at the previous six sessions, and made new progress on key issues. The “policy objectives” and “core principles” had caught the Delegation’s particular attention. The Delegation endorsed them in principle, and believed they laid a foundation for consensus that Member States might eventually reach. To the “policy objectives”, the following addition was suggested: “To prevent TCEs/EoF from unfair use and other injurious acts”. As regards the “core principles”, the following considerations must be taken into account: (i) these principles covered very extensive areas, involving a whole range of both IP and non-IP doctrines, theories and legal systems as well as the customary laws of the indigenous people; (ii) the principles left much room and flexibility for policy and legislative alternatives at national, regional and international levels; (iii) more in-depth exploration and greater efforts to seek solutions were needed in those principles in terms of the handling of the relationship between respect of customary laws, on the one hand, and measures of IP laws and those concerning the protection and conservation of cultural heritage, on the other; (iv) the respect for the moral rights and values of traditional communities; (v) the distinction between “creativity” as one of the conditions for TCEs/EoF protection and “originality” in copyright protection; and (vi) the development of legal mechanisms and specific measures for the recognition and protection of the rights of foreign right-holders, as well as dispute resolution mechanisms. Consequently, the Delegation considered it necessary to invite national experts in relevant fields to evaluate the above two documents before it could present further comments and proposals. In summary, the Delegation endorsed the mandate as set out in the above-mentioned two documents, including the involvement of a group of experts in the development of draft objectives and principles for TCEs/EoF protection prior to the Committee’s eighth session.

76. The Delegation of Bangladesh stated that Bangladesh was a living museum of folklore or ‘traditional cultural expressions’. Among the 140 million population approximately three per cent belonged to an indigenous or ethnic group. Although the whole population could speak one language, Bangla, there were also different regional dialects and ethnic languages. The Bangladeshi people were therefore a composite nation with rich cultural, ethnic, ecological and environmental diversity. The sources of the country’s laws were mainly British common law, Muslim laws and Hindu laws. The country’s copyright laws had been updated and the patent and trademark laws were also in the process of finalization. However, there were no effective laws for the protection of GR, TK and TCEs/EoF. Bangladesh had for a long time been nourishing its folk culture and TCEs of the indigenous people. There was a folk arts and crafts foundation, and a folklore department in the Bangla Academy, which was a national organization to promote the Bengali language. Recently, the Government had formed an organization under the name ‘Bangladesh Cultural Heritage Foundation’ (BCHF) to address particularly the country’s traditional cultural heritage. In order to protect and exercise the TCEs of the ethnic groups, the Government had taken sincere efforts and established five tribal cultural institutions around the indigenous populated areas. As there were no laws in Bangladesh to protect TCEs/EoF, WIPO was requested to undertake an exclusive study on the identification, recording, valuation and protection of TCEs/EoF in Bangladesh.



77. The Delegation of Bolivia stated that if a process of consultations was undertaken through a group of experts, the experts should be selected taking into account equitable geographical representation and selection criteria guaranteeing a broad variety of points of view including higher-level IP measures and, in particular, *sui generis* protection systems. Similarly, it hoped that experts from indigenous and aboriginal populations could participate in the consultation process. As regards protection and the fight against undue or unlawful appropriation of TCEs/EoF, the Delegation considered that those subjects should be broadly strengthened in the presentations that would be made during the following session of the Committee. Further comments would be made in more detail on the documents under consideration before the proposed deadline.

78. The Delegation of the Islamic Republic of Iran stated that the documents under discussion were a good basis for further discussion towards reaching a reasonable legal instrument for the protection of TCEs/EoF. The Delegation stated that it knew that the aim of the Committee was not to establish guidelines but rather to develop an international instrument. Regarding the policy objectives set out in WIPO/GRTKF/IC/7/3, and with particular reference to the objective 'Meet the actual needs of communities' (paragraph I(iii) of Annex I to the document), the role of cultural identity of a whole society and its interrelation with the aspirations and expectations of indigenous and local communities was noted. Regarding paragraphs I(iv), (v) and (x), empowering the communities' customary practices and cultural diversity in a social framework of each society with its own characteristics and structure should also be noted, the Delegation stated. The objectives in these sections could have a broader scope. On paragraph (vii), concerning respect for and cooperation with other relevant international agreements, this was not an objective but rather a tool for fulfilling the objectives, and it should rather be reflected as a 'Principle'. The principles set out in Part II of the Annex had been well structured and the consistency of the principles with the elements had been noted. As an example, due to the diverse nature of TCEs/EoF in different societies, the principle of flexibility should reserve at least a minimum standard of stability. On the specific substantive principles set out in Part II. B of the Annex, the Delegation reiterated its previous position on including the concept of 'mixed traditional cultural expressions' within the scope of subject matter. On the term of protection (principle B.7), it was noted that certain other delegations had expressed concerns. The Delegation was of the view that the term of protection should be clarified in an instrument with its definition, nature and specification. On paragraph 32 (iii) of the document, the Delegation supported this paragraph with an approach towards not just creating guidelines but with a view to preparing the material in the form of a consolidated text. The nature and composition of the working level consultative process referred to in paragraph 32 (iv) should be clarified. It was obvious, the Delegation stated, that examination of future draft objectives and principles should be carried out with representatives of Member States.

79. The Delegation of Papua New Guinea stated that Papua New Guinea was a Pacific Island State with only 6 million people but who spoke at least 850 different languages. With language as an indicator of cultural groupings, this meant that the country had roughly 850 cultural groups. For a number of reasons, 8 % of the population remained rural dwellers, which meant that they still led very much a traditional life. Their livelihoods depended on the land, they depended on each other and this meant that their GR, TK and TCEs were important in their lives. The Delegation alluded to the sentiment which had been expressed by a number of speakers that for indigenous peoples in many situations, after everything else had been taken away from them or because they were left out of mainstream life, culture was all they had left. For the bulk of its people, the Delegation stated, culture was all they had left. During the earlier consultations for the formulation of what was now known as the Pacific

Islands Model Law for the Protection of Traditional Knowledge and Expressions of Culture, Pacific Islanders had expressed the very strong sentiment that Pacific culture be treated as 'heritage'. It was their way of life which had been handed down from the past. Papua New Guinea shared these sentiments, the Delegation added. In those earlier consultations on the Model Law, Papua New Guinea, along with other Pacific Islands, welcomed the move to make their cultures accessible to outsiders but also expressed the very strong wish that any steps taken towards treating their cultures as an economic resource should be done with the outmost care. In this regard, the Delegation wished to commend the Secretariat for the fine documents WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5. While these documents might have their shortcomings, as had been pointed out by earlier speakers, the Delegation believed that to a large extent they encapsulated the wishes and concerns of indigenous peoples, which have been important guides for all. The Delegation referred to the two documents which resulted from a recent WIPO Regional Seminar for the Asia-Pacific region on intellectual property, GR, TK and expressions of culture, held in the Republic of South Korea from October 11 to 13, 2004, also alluded to by the Delegation of the Philippines. The Delegation referred specifically to the 'Technical Comments' issued by the participants in that regional seminar, which included comments, observations and recommendations on the draft policy objectives and guiding principles as presented in WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5. As Papua New Guinea had played an active role in the formulation of these documents, the Delegation restated its commitment to the comments, observations and recommendation as set out in them. The Delegation also made this restatement on behalf of those countries of the Asia-Pacific Region which had been represented at the regional seminar in the Republic of Korea.

80. The Delegation of Kenya supported the general statement made by Egypt on behalf of the African Group. The Delegation took note of the draft legal options, policy objectives and core principles set out in WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/4, and welcomed the documents as a basis for further discussion. The draft options, policy objectives and principles had been drawn from a diverse set of policy and legal approaches that had already been employed in a number of countries for the protection of TCEs/EoF. The draft documents were valuable and could stimulate discussions towards developing an international dimension of rules, disciplines, guidelines and best practices governing the protection of TCEs/EoF. The Delegation welcomed the call for further comments on draft objectives and principles as requested in paragraph 32 of WIPO/GRTKF/IC/7/3, and also requested the Secretariat to produce a further set of draft objectives and principles for the protection of TCEs/EoF for consideration at the next session of the Committee. The Delegation supported developing an expert consultative process to review and examine further draft objectives and principles together with the Secretariat for consideration by the Committee at its eighth session. The Delegation had taken note that the principle concerning sanctions, remedies and enforcement (B. 9) provided no guidance on any practices. More information on practical measures was needed, however. The misappropriation of TCEs/EoF was a major challenge and it was necessary to be clear on how to implement and handle sanctions, remedies and enforcement. These principles had been one of the challenges presented to the Government by local and indigenous communities but there had been no concrete solutions. Providing more practical experiences would provide options which could be used at the national level to enforce the protection of TCEs/EoF.

81. The Delegation of the Russian Federation joined in the thanks expressed to the Secretariat for the documents prepared, which, as had rightly been pointed out by the Delegation of Zambia, were worthy of being translated into all the Committee's working languages. The Russian Federation supported the basic principles and guidelines (such as the

principles of balance and flexibility) laid out in WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/4. In the course of future work, new forms of wording might be proposed, which could be discussed, in particular by interactive means between sessions of the Committee. The Delegation considered that further work on the issues under discussion could be carried out in accordance with the proposals laid down in paragraph 32 of the document and it was ready to participate in such work. The Delegation had no objections to the proposed expert working group's method of work, as suggested by the Secretariat, if the Committee approved it. In that regard, the experience of the work done between sessions by, for example, WIPO's PCT Reform Working Group, could be referred to as an example.

82. The Delegation of Zambia stated that, with regard to the possible intersessional expert consultative process, no other delegation had expressed any opposition to the Chair's suggestions, which indicated that, in principle, members of the Committee were agreeable to them. The main problem was financing and the Secretariat had advised that there could be no funding from WIPO. Those members who had attended the recent WIPO General Assembly would remember that it had not been possible to agree on an increase in the PCT filing fee in order for WIPO's funding levels to increase. Neither had this item been budgeted for. In terms of the number of participants in such a process, the Delegation suggested a level of three people from each regional group, which gave a figure of between 25 and 30 people. The Delegation stated that what remained was for a Member State or States to offer to host and/or provide funding for such a process. The Delegation suggested this in particular to those Member States more capable to provide funding for this important work.

83. The Delegation of Trinidad and Tobago commended the Secretariat for WIPO/GRTKF/IC/7/3 which presented draft objectives and principles which, as was stated in the document, might not be entirely new to the Committee. However, the manner in which the document had distilled earlier documents and deliberations of the Committee, and the manner in which the objectives and principles had been ordered and structured, deserved gratitude and commendation. The Delegation noted with interest the attempt, at page 12, to arrive at an appropriate and accurate means of describing the intended "beneficiaries of protection". The Delegation supported the view expressed at paragraph 26 that there might be need for further discussion of this issue at some stage. The Delegation had no problem accepting the suggestion by the Secretariat that "for present purposes" the Committee use "the broad and inclusive term 'indigenous peoples and traditional and other cultural communities'". Trinidad and Tobago, the Delegation stated, like most of the other member countries of the Caribbean Community and Common Market (CARICOM), was a relatively young community of mainly transplanted peoples from Europe, Africa, India and other Asian countries, slowly evolving, for the past four centuries or so, an unmistakable Caribbean civilization (some say West Indian civilization) that was yet in the very early stages of becoming. So much of who or what people from Trinidad and Tobago were could still be described as English or French or Spanish. So much of what they did was still rooted firmly in cultural constructs from West Africa or India. Their lifestyle revealed them as, at one and the same time, traditional and modern with no clear line of demarcation separating the popular and contemporary from the traditional and folk. On any day, one could witness a traditional Hindu wedding, for example, or an Orisa wedding ceremony, being conducted mere doors away in the same town or village from a modern glitzy marriage ceremony whose wedding party appeared to have stepped right off the pages of the latest fashion magazine. Likewise, traditional Ram Leela performances and the Muslim festival of Hosay, on an annual basis, competed for cultural space with contemporary Carnival celebrations, contemporary musicals and modern dramatic presentations. Caribbean peoples did not fit into tidy, convenient cultural categories, but saw themselves as representing a distinct "cultural community". The

Delegation welcomed, therefore, the means employed in the document under discussion for describing the intended beneficiaries. The Delegation appreciated the very practical need to treat issues concerning the legal protection of TCEs as “parallel and separate” from those concerning TK (paragraph 23). It was recognized that there were instances in which it was not really possible to make a clear distinction between the TK that went into the fashioning of a particular traditional culture product and the culture product or TCE itself. The Delegation would later revert to this issue with particular reference to the National Musical Instrument of Trinidad and Tobago, the steelpan. The Delegation supported the proposals in the document for the way forward. With respect to the expert consultation process, given the acknowledgement in paragraph 25 that both governmental and non-governmental representatives appeared to recognize a need to treat the “particular concerns of indigenous peoples,” the Delegation supported the earlier call made by some delegations to ensure that indigenous peoples were appropriately represented in any expert consultative process. In this regard, the Delegation referred to the presence in the Caribbean of the Caribbean Organisation of Indigenous Peoples (COIP), which was a formal association of indigenous peoples from several countries of the Caribbean region. The indigenous peoples of the Caribbean had been meeting regularly in formal consultation sessions and in large scale festival gatherings. The first of those gatherings had taken place in 1992 during the Fifth Caribbean Festival of the Arts (CARIFESTA V) which had been hosted by Trinidad and Tobago. The Second Gathering, also hosted by Trinidad and Tobago, had been held one year later as part of official celebrations to commemorate the United Nations International Year of the World’s Indigenous Peoples. Since that time many other gatherings had been held, which had served to cement bonds within COIP. COIP was now well placed to add its voice to the expert deliberations if and when some form of consultative process should take place. The Delegation, in closing, pointed out that it had used throughout its submission, for convenience, the term “traditional cultural expressions” exclusively. This in no way implied any negative feelings about the term “expressions of folklore”. On the contrary, the Delegation used and appreciated both terms even though reservations expressed by some about the latter were understood.

84. The Delegation of Switzerland stated that it had studied WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/4 with great interest. The three drafts proposed in the first document, i.e., general policy objectives, general guidelines and specific substantive principles, appeared to be of great interest and contributed to the advancement of the Committee’s work. While supporting the general principles, Switzerland considered that in order for the Committee’s work to move forward and become more specific, the definitions could go further and be made slightly more precise. The Delegation also supported the tasks listed in paragraph 32.

85. The Delegation of Morocco congratulated the Secretariat for the quality of documentation presented, particularly WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5. The Delegation wished to make some initial comments but reserved the right to submit detailed comments in writing at a later stage. The Delegation emphasized the importance of protecting TCEs/EoF in view of the diversity and variety of such expressions in many countries, including in Morocco. The prevention of the abuse and exploitation of those expressions and ensuring their protection required, first and foremost, the identification and classification of such expressions and knowledge, as well as the preparation of an international inventory to that effect. The Delegation referred to principle B.3 on “Beneficiaries” in WIPO/GRTKF/IC/7/3, and noted that it needed a more detailed and focussed examination as the list of beneficiaries was, in its view, much longer than what was suggested, especially taking into account that the management of such rights and the identification of beneficiaries in developing countries were often undertaken by national public authorities. The

determination of the scope of protection should take into account the wide range of TCEs/EoF since protection should be, in the Delegation's view, related to the type of the protected subject matter. Principle B.6 concerning "Exceptions and Limitations" also required more detailed study, pointing out that such exceptions and limitations should not be applied as a whole due to the specificity of expressions of folklore as compared to other forms of creativity. Concerning principle B.7 on the "Term of Protection" in WIPO/GRTKF/IC/7/3, the Delegation stated that the diversity and variety of expressions should also be taken into account as it could be difficult to apply the same term of protection to all those expressions. Principle B.11 on the "Relationship with Intellectual Property Protection" was welcomed and the Delegation stated that its country was convinced that providing protection to TCEs/EoF should complement, and not be dissociated from, the existing protection provided under IP law. With regard to "International and Regional Protection" in principle B.12 in WIPO/GRTKF/IC/7/3, the Delegation noted the need for wider consultation involving all interested parties before the establishment of legal protection mechanisms. Finally, the Delegation noted that issues concerning sanctions, remedies and implementation mechanisms were not clearly addressed in the documents and required further clarification.

86. The Delegation of Ecuador stated that it was concerned about the proposal in paragraph 32 of WIPO/GRTKF/IC/7/3 concerning an expert-level consultative process. If this was intended to mean a working group that was one thing, but the paragraph seemed to refer to a consultation process before the next Committee session. If a working group was proposed, it should be open-ended. All Member States should be able to appoint an expert to serve on the Working Group. Such experts should be able to participate in the working group or a consultative process whether or not they were distinct or the same thing.

87. The Delegation of Algeria considered that, with the production of the excellent WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5, the Committee had reached an important stage in its work. The Committee had established aims and principles which the majority of delegations shared. It remained to convert the raw materials into legal instruments for the use of all those interested in the protection and development of TCEs/EoF. The Delegation said, however, that if the requirements imposed were considered, i.e. that of accelerating the work done in order to make progress toward producing an international legal instrument, it was necessary to pay careful attention to paragraph 32 of WIPO/GRTKF/IC/7/3 and to the proposal for intersessional consultations. The Delegation considered that the body which might be responsible for such intersessional work with the Secretariat should be representative and effective. It could represent those NGOs accredited to the Committee's sessions, as well as regional and international intergovernmental organizations. Expanded and unlimited membership risked, however, placing a burden on the intersessional body, whereas the membership should be effective so as to make progress. The Delegation suggested that the contributions made by all parties should be sent in the form of an e-mail to the website of a working group consisting of eminent experts in the field, which would work under the current chairmanship and with the Secretariat.

88. The representative of UNESCO stated that the work of the Committee complemented the normative work undertaken by UNESCO which had resulted in the adoption in October 2003 of a Convention for the Safeguarding of the Intangible Cultural Heritage. UNESCO appreciated the cooperation it had received from WIPO in the discussions and negotiations that had led to the adoption of this Convention. The representative provided information on the Convention, such as its scope of coverage, the national, regional and international measures ratifying States could put in place and the various administrative organs and funds established by the Convention. She advised that five States had already ratified the

Convention, which would enter into force three months after the 30<sup>th</sup> ratification. The representative stated that the Convention might enter into force during the course of 2006. While the Convention provided for the safeguarding of the intangible cultural heritage, it did not cover IP protection, the domain of WIPO. In this respect, Article 3 stated that the Convention did not affect the rights and obligations of States parties arising from any international instrument relating to IP. The protection of cultural heritage was, therefore, a domain which called for continued coordination between WIPO and UNESCO. For this reason, UNESCO welcomed the initiative of WIPO to provide for the specific protection of TCEs/EoF and TK which would fill a legal vacuum and complement the UNESCO Convention. Adequate protection of TCEs/EoF posed challenges that went beyond the scope of the UNESCO Convention. The concerns of local communities, indigenous peoples and other tradition bearers called for an IP-style form of protection. IP law offered a number of protection mechanisms that seemed worthwhile to explore further. WIPO's working document pointed rightly to the fact that IP-type protection did not necessarily limit itself to individual and exclusive proprietary rights. The representative concluded by stating that, more than two decades after the adoption of the 1982 Model Provisions, WIPO and UNESCO might once again combine their extensive conceptual and practical experience with existing mechanisms and standards in order to develop workable solutions that provided adequate protection concerning the specific nature, characteristics and forms of TCEs/EoF.

89. The representative of ARIPO thanked the Secretariat for the detailed documents which provided an approach for the possible development of an international instrument on GR, TK and folklore. ARIPO stressed the usefulness of WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/4 and welcomed the draft policy objectives and principles for the protection of TCEs/EoF, which were useful for further discussion and norm-setting. The representative recalled that during the 9<sup>th</sup> Session of the Council of Ministers of ARIPO, held in Dar es Salaam, Tanzania from August 4 to 10, 2004, the Organization had adopted an integrated policy framework for the protection of folklore and TK within ARIPO Member States. This framework provided a comprehensive approach based on shared common objectives and principles that would enable ARIPO to develop an appropriate legislative framework to enable TK and TCEs/EoF holders to benefit from their knowledge and cultural expression. ARIPO therefore concurred with the structure and approach that was set out in WIPO/GRTKF/IC/7/3, particularly in Annex I, as a basis for the future outcome of the work of the Committee. ARIPO was of the view that the objectives and principles should not be open-ended and that the work of the Committee should proceed towards international standards which would not only enhance international protection but also avoid free-riding and misappropriation, and reduce distortions and impediments to international trade in products and services incorporating TK and TCEs/EoF. In order for the Committee to achieve concrete outcomes, ARIPO believed that it was essential for there to be a clear distinction between objectives and principles that were crucial for the protection of TCEs/EoF and TK and those that were not crucial. As to a possible expert consultative process, ARIPO remained to be guided as to the status and the role that regional organizations such as ARIPO and OAPI would have and play in any such process. Such regional organizations played leading roles in their respective regions. WIPO should find the most appropriate and effective means of ensuring that experts participated in the meetings that were organized. Furthermore, ARIPO wished to know the terms of reference of the suggested expert process, apart from collecting and updating WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5, which tasks the Secretariat had the capacity to undertake. In conclusion, the representative stated that ARIPO associated itself with the statement made by the Delegation of Egypt on behalf of the African Group that the draft policy objectives and principles should not be seen as an end in themselves but should lead to the development of an international instrument.

90. The representative of the Organisation of the Islamic Conference (OIC) provided information on the OIC and, in particular, the Research Centre for Islamic History, Art and Culture (IRCICA), a subsidiary organ of the OIC established in 1980 to conduct research, publishing, documentation and other scholarly activities concerning Islamic culture and civilization. Since 1990, IRCICA had focussed in particular on the development, revival, preservation, promotion and protection of traditional crafts. IRCICA paid considerable attention to the Committee's work as it was interested in seeing measures put in place to ensure the protection of craft items. Unfortunately, the creative designs of artisans were used by others without any permission and legislative and administrative measures were needed. Artisans also needed training to enable them to use such measures.

91. The representative of FILAIE stated that his Organization, which represented the interests of performers from 21 countries, had always been very favorable to TCEs/EoF being protected. Any solutions for the protection of TCEs/EoF would reform the framework of IP. The representative referred particularly to the WIPO Performances and Phonograms Treaty, which defined a "performer" as one who interprets or performs literary or artistic works or expressions of folklore. The Secretariat's document, as everybody had said, was a magnificent document which had also been published well in time for the meeting. FILAIE had, however, some doubts about certain aspects of the document. First, expressions of folklore had always been regarded as *res nullius* which tempted people to misappropriate them. This was intolerable particularly when intellectual and industrial property were reportedly becoming one of the driving forces behind worldwide economic development. In Spain, for example, IP generated about 6% of GNP. Everything that could be done to regulate the situation regarding TCEs/EoF would be welcomed and supported without reservations. However, there were some doubts of a legal nature concerning whom should be protected and who would be the beneficiaries of protection. This was a major problem because one spoke of a community which had expressions of folklore but often the community was not located on the territory of just one State because of its traditional lifestyle and because of its economic background, for example. The community could be on the territory of more than one State, and this was something that had to be taken carefully into account. The concept "expressions of folklore" needed to be defined, legally speaking. It was uncertain whether one was talking about a work which had been combined from several sources as a result of which one had a single work. There were other questions. What was the relationship between a derivative work and the original cultural expression? It was also necessary to know the type of administrative sanctions which would be applied to abusive uses of cultural expressions. Performers should have a leading role because they knew the forms of traditional and cultural forms of expression used by them. Legal systems could be established through mechanisms based on authorizations or prohibitions. FILAIE was concerned about the latter and believed that an authorization-based system might provide a more appropriate form of protection. Another concern of FILAIE was the use of the concept "public domain", that should not be applied to the folklore expressions. The representative concluded by urging that a practical legal solution be found on the basis of what had already been done, so that one could take advantages of the progress already made, and by emphasizing that this subject was of great importance and interest to FILAIE.

92. The representative of FAIRA thanked the Secretariat for producing the relevant documents which were based on a great deal of valuable materials, including documents such as 'Our Culture, Our Future', which the Aboriginal peoples of Australia had been involved in putting together over a long period of time. The representative referred to the question of measures for enhancing the participation of indigenous and local communities in the work of

the Committee, and expressed the view that if such measures were put in place only in 2006, while the Committee's work was to continue and decisions were to be made in 2005, then this was akin to 'putting the cart before the horse'. Nevertheless, FAIRA was pleased with the way that the Chair had approached the question of indigenous participation. In relation to the contents of WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5, the representative agreed with the comment made by the United States of America that these documents should not be seen as pre-empting or establishing rights. They should not preempt or establish by default what the rights of indigenous peoples were in relation to the protection of IP, TK and TCEs/EoF. Further, what were quite useful documents which had the support of indigenous peoples should not only end up as guidelines. The idea of an intersessional committee of experts to be established, including regional representation which may involve indigenous peoples, raised some concerns, the representative added. From personal experience, there were always difficulties in getting adequate regional representation from among indigenous peoples. Indigenous representation authorized by States would lead to rebellion from indigenous people. The Permanent Forum on Indigenous Issues could play a greater role in coordinating the development of indigenous peoples' views on indigenous knowledge across a number of agencies in the future. Any expert process should allow for indigenous peoples' participation. The representative concluded by raising certain concerns with the relevant documents. First, the meaning of 'protection'. Did this mean that Member States would become responsible for the protection of indigenous peoples' knowledge? Second, FAIRA had concerns with the use of the term 'property' and with issues concerning the ownership and management of TCEs/EoF and TK. The representative also, thirdly, stressed the importance of culture to the dignity of indigenous peoples who often witnessed misuse by the private sector and sometimes by the State of aboriginal designs, concepts, words, which was a denial of the peoples' culture identity. This could even be likened to an exercise of genocide and could have serious consequences.

93. The representative of *Tupaj Amaru*, referring to WIPO/GRTKF/IC/7/3, in particular Annex 1, stated that a reference to political aims was tantamount to referring to the lack of political will on the part of States in relation to the preservation and protection of expressions of folklore, which faced the major challenges of globalization that did not receive the special attention required from the international community. Not for the first time, the intrinsic value of the traditional cultures of the indigenous world was invoked. As had been stated by the Delegation of the Netherlands on behalf of the European Community and its Member States, in the western world TCEs/EoF were regarded as being in the public domain, were used and marketed, and no sanctions existed against their unlawful use. By contrast, in the indigenous world such expressions had spiritual value, reflected the indigenous identity and were the living memory of indigenous peoples and communities. In 1984, in meetings of the Group of Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore, representatives of Latin American countries had considered that the term "folklore" was archaic and had the pejorative connotation of being associated with the "creations of inferior and obsolete civilizations". The representative paraphrased the Uruguayan writer E. Galeano in saying that it could be said that the dominant Creole class in America, obsessed with western culture, considered beautiful indigenous costumes to be ridiculous disguises, appropriate only for carnivals or museums. The dominant élites in power were ashamed of the Indian race and considered the native languages to be mere guttural sounds and the native religion pure idolatry. The dominant culture recognized Indians as subjects for anthropological study but did not recognize them as historical subjects. In the view of those taking part in the cultural alienation process, the Indians possessed a folklore but not a culture, practiced superstitions but not religions, spoke dialects not languages, and made handicrafts not art. The representative stated further that, based on western ethnocentrism, TCEs/EoF had



been exposed to the veracity of market laws and were not protected by IP. By its very nature and the sphere of its application, IP law had proved to be insufficient to protect the traditional creations of folklore that were handed down from generation to generation. It was not the first time, the representative continued, that reference had been made within WIPO to the protection of TCEs/EoF but, in the opinion of WIPO experts on IP and the protection of folklore, the traditional creations of indigenous peoples such as popular tales and legends, songs, tunes, musical instruments, dances, and designs or models were the product of a slow process of creative development and, owing to their presence in a particular community, were much older than the duration of copyright protection granted by States with respect to the works of the authors. The representative considered that there would be no legal protection for TCEs/EoF in terms of their spiritual values, religious beliefs, indigenous identities and living memories, nor would there be respect for their holders, as long as States failed to establish a binding international instrument or instruments. The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, drawn up jointly by UNESCO and WIPO in 1982, had been ignored by States and had been forgotten. The Delegation of the Andean Community had called on the Committee to put a stop to international piracy. Artistic property, including symbolic manuscripts and even the human remains of ancestors, continued to be subject to piracy and formed part of private and public collections in Europe and America, which were frequently the subject of speculation on the world's antiquities markets. Cultural assets and material and spiritual treasures continued to leave indigenous territories and were being transported, in their precarious state, through airports, customs storehouses and international public auction centers, according to C. Bubba, a Bolivian Hisbol researcher. In its historical and social dimension, art was constituted by humanity, its memory and its image of the past, present and future. Owing to the destruction of the cultural and intellectual heritage, in particular TCEs/EoF which incarnated the view of social, political and religious life, Andean peoples, who were natives of and originated from the Inca and Aymara, Maya and Aztec empires had lost their memory, soul and identity. The cultural property owned by indigenous peoples was considered one of the invaluable contributions made to past and present civilizations, and was, as it had always been, exposed to the attacks of time and the white man of the technological era, as well as running the risk of total extinction unless the international community took steps to preserve them. The integrity of artistic creations and the expressions of indigenous folklore as a living tradition were seriously threatened by the laws of market globalization. The accelerated introduction of high technology was ever more sophisticated in all spheres of social and cultural life, in particular in the field of sound, audiovisual recording, broadcasting, cable television and so on, and tended to distort and even destroy the cultural and intellectual heritage of indigenous peoples. It was not sufficient, the representative added, for States to declare such creations and expressions national property, the cultural heritage of humanity or the universal heritage, if the elements of the diversity of cultural property were not identified in time and space, and if each indigenous group was not recognized as the collective owner of its own creations. In the light of the revelations and complaints made by indigenous peoples, it was known that in 1976 a number of aboriginal tribes in Australia had protested that certain photographs that had appeared in a book on anthropological studies represented objects which had a secret and sacred significance for those communities. The tribes argued that appropriate permission had not been granted to publish the photographs. Another example was that of the traditional ceremonies of North American Indians filmed in secret and in violation of their spiritual beliefs, by foreign ethnologists for commercial purposes. In addition to such harmful trade with cultural and spiritual property, there were an infinite number of varieties of medicinal plants, discovered by indigenous peoples, that were being exploited by large multinational companies without the authorization or consent of their true owners. In terms of their commercial value, the

plundering undertaken with impunity and the unlawful trafficking of cultural and artistic property, of which the original owners had been deprived, represented an irreparable loss to their cultural and spiritual heritage. It was indeed sad to observe that many indigenous communities remained with no evidence of the civilizations of their ancestors and were deprived of the privilege of passing on to their children and grandchildren the history of their peoples. Taking into account these comments, the representative considered that there was an urgent need to devise appropriate legal instruments in order to preserve and protect effectively the ancestral intellectual creations of indigenous communities and nations in the world. It was the responsibility of States and the whole international community to ensure that all TCEs/EoF and TK were safeguarded so as to produce a common heritage for humanity. As to protection and preservation of cultural property owned by indigenous peoples, in particular the creations of folklore, handicrafts, human remains and so on, national legislation and international instruments had developed without taking into account the lifestyle and age-old traditions, philosophical conceptions and customary laws which governed the social relations of the Aboriginal world. By contrast, the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, 1972, contained larger amounts of good sense. In Article 1 of the Convention the cultural heritage was considered to include architectural works, monumental sculptures or paintings, and elements or structures of an archeological nature. Contrary to other instruments, the Convention was extended to the works of humanity or joint works of humanity and nature as well as the areas including archeological sites that had an exceptional universal value from a historical, aesthetic, etiological or anthropological point of view. The representative considered that the concept of creations had a much broader legal scope, insofar as it involved many artistic creations and cultural values that expressed elements characteristic of the indigenous heritage that was in a constant state of development. Despite the progress made in the field of protection of cultural property, the definition formulated by States did not include religious beliefs, scientific and philosophical intuition (indigenous world view), the content of ancestral legends or verses, purely practical traditions, human remains, sacred and mythological places, and so on. Within the scope of the terms stipulated in international law referring to restitution, compensation and rehabilitation, indigenous peoples and nations claimed compensation for their cultural heritage which had suffered countless losses as a result of colonial invasion and occupation, genocide, slavery, systematic discrimination, the mutilation of entire civilizations and the unlawful plundering of their artistic and spiritual property, i.e., the very reason for their existence and the driving force behind their resistance. In terms of its nature and importance, the complex issue of restitution, compensation and rehabilitation — or particular aspects of compensation — had not been given sufficient attention by United Nations bodies. The indigenous peoples urged the international community to examine and adopt as a matter of urgency effective legal standards and instruments so as to guarantee the protection, preservation, possession and restitution of cultural property, as an inexhaustible source of the creative expression of indigenous and local peoples and communities.

94. The representative of the Kaska Dena Council thanked the Secretariat for WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/4 which were truly progressive documents requiring reactions and comments from the communities he represented. The representative did not agree with some Member States that had suggested or expressed concerns that the Committee was progressing too far or advancing too fast without being cognizant of the weight of the required decisions. The Secretariat had clearly asked for further direction on how the Committee should continue. For these reasons, the Kaska Dena Council fully supported the decision paragraph 32 in WIPO/GRTKF/IC/7/3, as well as the corresponding paragraph in WIPO/GRTKF/IC/7/5, which called upon the Committee to reflect and provide concise and relevant comments to the Secretariat on policy objectives, policy options and

legal mechanisms for protection of TCEs/EoF. The representative added that it would be necessary to amend these decision paragraphs to properly reflect and be consistent with concrete proposal that had been made by a number of Member States, such as New Zealand, Bolivia, Trinidad and Tobago and Canada, which had called for the inclusion of indigenous peoples in any expert or working level consultative process that further reviewed these documents. In addition, the Secretariat should continue its efforts to encourage voluntary donors to support the participation of indigenous peoples' representatives in any such consultative process. As each application for accreditation included persons that indigenous peoples' organizations had designated as experts or advisers, these applications were an indication of whom indigenous peoples considered experts. The Kaska Dena Council would make further written comments on the documents.

95. The representative of the Saami Council welcomed WIPO/GRTKF/IC/7/3 which was of a high quality. The Saami Council had many times reiterated that it supported the elaboration of an international regime on the protection of TCEs. It had also, however, repeatedly stated that an international regime developed under the auspices of WIPO — however helpful in certain instances to protect indigenous TCEs — could never provide fully adequate protection of indigenous peoples' cultures. The representative therefore called on WIPO to cooperate with other relevant UN system organizations – most notably the Permanent Forum on Indigenous Issues – in order to accomplish a comprehensive protection system for indigenous cultures and elements thereof, including TCEs. Moreover, for an international regime to be adequate for indigenous peoples, it should meet some minimum standards, the representative stated. In this context, the Saami Council underlined that it had been party to the joint intervention made previously in the session on indigenous participation. Consequently, all comments should at this stage be regarded as preliminary. A full discussion on possible elements in an international regime could only be conducted when there was adequate indigenous participation in the Committee. On Annex I of WIPO/GRTKF/IC/7/3, the Saami Council noted with satisfaction that the document articulated that the main stakeholders with regard to TCEs were indigenous peoples and not States. Any international regime must protect also those TCEs that had been brought into the so-called public domain without indigenous peoples' free, prior and informed consent. It was important, as stated in paragraph 1(iv) of Annex I, that indigenous peoples themselves should control their TCEs, in accordance with their customary laws and practices. In this context, the representative fully agreed with the core principles concerning the need to respect indigenous customary laws relating to TCEs, as expressed in Annex I. It was crucial for any international regime to be clear on the crucial relevance customary laws had for an operational protection of TCEs. Therefore, the Saami Council was deeply concerned that work on a study on customary law that this body had already decided should be conducted had not commenced. It was simply not possible for the elaboration of an international regime to move forward without the study on customary laws having been carried out in order to serve as a background for the work on the international regime. The Saami Council objected to paragraph 1(ix) of Annex I which suggested that an international regime should promote access to TCEs. It should be underlined that since indigenous peoples should control their own TCEs, as stated in Annex 1, one could not, and should not, at the same time promote access to such TCEs. Indeed, the indigenous peoples themselves would under such circumstances decide to what extent indigenous TCEs could be accessed by others. The Saami Council disagreed with the proposals made in paragraph B.4 (b), under the heading "Management of Rights". This paragraph suggested that authority to exploit TCEs could be granted, in addition to by the indigenous peoples themselves, by an authority allegedly acting on behalf of the indigenous peoples. It was known from experience that State authorities which were supposed to represent indigenous peoples did not always have the indigenous peoples' interests as their

main concern. Indeed, the interests of the State were often quite contrary to the interests of indigenous people. Thus, only indigenous peoples themselves could approve access to their TCEs, in accordance with their own customary laws and practices. Moreover, the paragraph suggested that authorization should be granted after merely 'consultations' with indigenous peoples concerned. This was out of the question. Such a standard would fall way below established international law on this area. Indigenous TCEs could only be accessed with the free, prior and informed consent of the peoples concerned, and this must be reflected in any international regime. The Saami Council could support the proposal on an intersessional mechanism, on the understanding that any such mechanism included adequate indigenous participation. Responding to the comments made by the Secretariat, the representative further stressed that indigenous peoples must appoint their own representatives to any such body. Moreover, he reiterated that the UN had to take a holistic approach to TCEs. Other relevant UN system organizations, such as the CBD, the Office of the High Commissioner on Human Rights and most notably the Permanent Forum, should be invited to the intersessional meeting. Responding to the comments made by the Delegation of Indonesia that there were no indigenous peoples in that country, the representative begged to differ as he said he had met indigenous peoples from Indonesia. In any event, Indonesia's intervention did not change the fact that there existed indigenous peoples who should obviously also be referred to as such in any WIPO document.

96. The representative of the Call of the Earth congratulated the Secretariat on the excellent quality of the documents provided for this meeting, which would be distributed among the relevant peoples and communities for their reactions. However, handling TCEs/EoF separately from TK was inappropriate given the way TCEs/EoF and TK existed in indigenous communities, and would not ensure proper protection for TCEs/EoF and TK. Dances and songs were not separated from TK such as traditional methods for the production of clothes, handicrafts or knowledge about traditional materials and processes. Call of the Earth considered that such separation was artificial and it attempted to undermine the holistic and integral nature of cultural expression, the creativity of indigenous peoples and future innovation. In addition, it encouraged misuse and misappropriation further isolating TK. The Call of the Earth would be providing further comments on the documents within the deadline suggested. The representative also urged that any group of experts which was going to be established include representatives of indigenous peoples bearing in mind geographical distribution. In conclusion, the representative drew attention to the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. The Call of the Earth had the impression that this could in various areas be linked to the work of this Committee. It was therefore suggested that the Secretariat prepare an information document which would identify synergies, if they exist, and differences, if there are any, between the UNESCO Convention and the work of this Committee.

97. The representative of the Tulalip Tribes stated that the principle of balance and proportionality, discussed in WIPO/GRTKF/IC/7/3, was of concern to indigenous communities because in many systems indigenous peoples were under a rights-based system. In the United States of America, for example, there was recognition of preexisting rights, which were not rights granted by the country but were recognized as having existed before those rights. When speaking about balance and proportionality, one was dealing with balancing rights against interests because a balancing equation was essentially a civil society concept. So, the representative stated, he was not sure that these principles would truly protect indigenous peoples because there was no recognition and respect for existing rights. This also related to the concept of the public domain, which was mentioned throughout the relevant document. The representative referred to the intervention he had made at the fifth

session of the Committee, as well as a paper on this question that was contained in an UNCTAD publication on protecting and promoting TK. The representative also referred in this regard to the interventions made by the Delegation of New Zealand. The public domain concept originated in England and was adopted into international law, but there had been no indigenous participation in this and there was no indigenous agreement with the concept. It was important that future discussions at WIPO concerning the public domain properly took into consideration the rights and concerns of indigenous peoples. The Tulalip Tribes of Washington proposed that the Committee, in cooperation with the Permanent Forum on Indigenous Issues and other experts, undertake work analyzing the concept of the public domain in relation to TCEs/EoF and TK. The representative suggested a new overriding framing principle that should apply throughout the document, a principle existing in international law: “Nothing in the application of any principle shall release the State from respecting existing rights and obligations towards holders of TCEs/EoF and TK or prejudice the further elaboration of these rights and obligations.” The representative explained that when one elaborated an international IP regime, the framework of that regime should not dictate to higher level principles. By adding this principle it could be kept in mind that the framework of IP protection needed to take into account existing international human rights and systems of indigenous rights.

98. The representative of the Indian Council of South America (CISA), who said he was also representing the Aymara community of Qollasuyu, Bolivia, stated that CISA had followed with great interest the work done by the Committee to protect TCEs/EoF. It had also familiarized itself with the draft policy objectives in WIPO/GRTKF/IC/7/3 which proposed the recognition of the value and promotion of respect for the cultures of indigenous peoples. Among the core principles, the representative wished to highlight the importance of the principle of “Recognition of the specific nature, characteristics and traditional forms of cultural expressions”. In that context, CISA wished to explain the profound significance of the indigenous music of the Andean peoples. To date, the indigenous communities had preserved ancestral traditions intact. Music was a collective creation of the community and its performance by the community was subject to strict rules owing to its fundamentally spiritual nature. Music and dancing were part of the ceremonies and rituals devoted to the forces of nature and the cosmos, and were carried out on particular dates in the agrarian calendar, such as when crops were sown, harvested and so on, and also in relation to the cosmos; for example, the Festival of the Cross on May 3 was related to the zenith of the four stars of the Southern Cross. Musical instruments, flutes of various kinds and drums were used at different times of the year according to the rules of indigenous cosmogony. Thus, the *zampoña*, a type of pan flute, was used only at harvest time, while the *pinkillo* (a flute with a mouthpiece) was used from the end of October onwards with the start of the rainy season. With the migration of indigenous peoples to city centers, a folklore based on the musical creations of indigenous communities had been developed, the performance of which used indigenous instruments outside the traditional rules. The music known as Andean was known throughout the world and had great commercial value. The indigenous communities which had originally created that music were, however, struggling to survive. For that reason, it appeared to be important to recognize indigenous, traditional and other communities. In the past few years, what had happened to the sacred *Chakana* was a cause of suffering to such communities. It had been turned into a symbol which populations related to corruption, lies, wastefulness, business for family profit and against State resources and so on. The media used phrases to refer to the division and corrupt nature of *Chakana*, a matter of great offence and concern to indigenous culture. The symbol was identified as Andean and it was seen as being performed by native Indians in power, although that view was not at all true. However much it might appear so in racial terms, it could not be considered such. For that reason, a

respectful request was made for the party “*Perú Posible*” not to continue using *Chakana* for the purposes of political identification. The party should seek another symbol which was more eye-catching, modern or globalized but in all cases should cease to use *Chakana*. CISA was sure that an inhabitant of Lima would look badly upon political parties that used the face of the Lord of the Miracles to identify itself and, in addition, would subsequently appear to be related to corruption.

99. The representative of the Max Planck Institute (MPI) congratulated the Secretariat for the excellent documents which could not have been written at the current stage much better or more comprehensively. In particular, the approach of flexibility which reflected and respected the immense diversity in the field of TCEs/EoF was probably the only realistic and yet the most appropriate approach. At the same time, the draft specific principles were as concrete as possible. At this stage, they offered national legislators a complete and well-considered menu from which they simply had to choose what was best from their points of view. From the standpoint of a neutral observer, it was now up to the Member States and the indigenous peoples to take the next steps, in particular by introducing functioning systems of protection in their own countries. If they were not sure whether the system would work because this was still a new area, trial and error processes might be more helpful than waiting further. Indeed, the representative stated, it was not sufficient to simply call for the preparation and adoption of an international instrument as long as national systems had not been established or existed only on paper. International law relied on well working national or regional laws, she added. Although international law might and should be developed in parallel to national and regional regimes, in particular by taking into account negative or positive experiences made at national and regional levels, now more Member States, together with their indigenous communities, had to make their own protection systems work and to be ready to talk about substantive law issues at a technical level. More specifically on WIPO/GRTKF/IC/7/3, the representative agreed that it was important to have protection against the adaptation of TCEs/EoF since adaptation was a very common form of misappropriation of TCEs. Of course, customary uses should be excluded from such protection. Regarding any authority that might be established for the management of rights and similar tasks, and regarding the role of the State, careful consideration was needed to ensure that the authority and the State fully represented the indigenous communities rather than State’s own interests. If one compared with copyright, rights management societies, called collecting societies, which represented private interests, were organized on a private law basis but not, except in some cases, on a State basis. Regarding the duration of protection for performances of TCEs/EoF, the document, the representative believed, referred only to the duration of the TCEs/EoF themselves, and it provided that performances of TCEs/EoF would be protected for the limited time as provided for in the WPPT, that is, for 50 years as for other performances. Otherwise, the representative believed that the criteria for the indefinite duration proposed in the WIPO document were very well considered, reasonable and consistent with the whole concept of the protection of TCEs/EoF. When the document referred to the sharing of benefits, it might be preferable to refer rather to an obligation to pay a remuneration for the use even when there were no benefits. This was also a principle applied in the copyright field which recognized that the mere use of a work could generate a fee even if there were no benefits to the user. Finally, the representative alluded to the proposals in the document concerning registration and notification, and considered that more experiences as to the possible disadvantages or advantages were needed.

*Conclusions*

100. The Committee took note of the detailed comments and drafting suggestions made on the draft objectives and core principles as set out in Annex I of document WIPO/GRTKF/IC/7/3; called for further comments on the draft objectives and core principles, including specific suggestions for wording, before February 25, 2005; and requested the Secretariat to produce, on the basis of that Annex and all subsequent inputs and comments from Committee participants, a further draft of objectives and principles for the protection of TCEs/EoF for consideration by the Committee at its eighth session.

101. The Committee noted that all comments on the objectives and principles received within the agreed timeframe would be posted on the WIPO website as received and would also be included in a compilation, to be distributed with the documents for the eighth session.

102. The Committee also noted the suggested outline of policy options and legal mechanisms for protection set out in Annex I of document WIPO/GRTKF/IC/7/4, and noted the comments made during its current session on that document. It agreed that this material should be updated as appropriate in the light of revisions to the draft objectives and core principles, and in the light of comments received.

103. The Committee also took note of the contents of documents WIPO/GRTKF/IC/7/11 ('Update on Legal-technical Assistance and Capacity Building Activities') and WIPO/GRTKF/IC/7/INF/4 ('Establishing Effective Systems for the Protection of Traditional Cultural Expressions/Expressions of Folklore: Draft Questionnaire').

## AGENDA ITEM 6: TRADITIONAL KNOWLEDGE

*Protection of traditional knowledge*

104. At the request of the Chair, the Secretariat introduced WIPO/GRTKF/IC/7/5 and WIPO/GRTKF/IC/7/6.

105. The Delegation of the Netherlands, speaking on behalf of the European Community and its Member States, reiterated the readiness of the European Community to participate constructively and in a positive manner in the Committee's discussions on TK protection. The European Community supported the further work towards the development of international *sui generis* models for the legal protection of TK. Within this context, it welcomed both documents which summarized the existing legal mechanisms and experiences with TK protection, and made an attempt to formulate specific objectives and core principles on TK protection, based on existing practices. The European Community also welcomed that the documents did not consider the international dimension as a distinct issue, since that dimension should indeed form an integral part of the substantive consideration of TK protection. However, it also stressed that, in line with the European Community's preference for internationally agreed *sui generis* models, the final decision on the protection of TK should be left to the individual Contracting Party. The European Community supported the flexibility and consistent approach of WIPO/GRTKF/IC/7/5. In its view, measures to protect TK needed to strike a fair balance between the rights and interests of TK holders and the

interests of those who used and benefited from TK. TK protection should also be consistent with existing IP systems and agreements, without prejudice to specific rights and obligations already established under binding legal instruments. On the follow-up, the European Community supported the suggestion of working on an interim draft that should be prepared on the basis of the input of members and observers to be submitted to WIPO before February 25, 2005, as suggested in paragraph 44. This might include consultations within an Expert Group under the condition that such consultations should be made as broad as possible. However, as the European Community had stated in respect of the possible Expert Group on TCEs/EoF, it would be important for the Community to also know more about the precise operational modalities of the Expert Group on TK, and its composition, budgetary implications and working methods. The European Community encouraged the Secretariat to update and further develop the menu of options and legal mechanisms in WIPO/GRTKF/IC/7/6, which was a useful supplementary resource to WIPO/GRTKF/IC/7/5. At this stage, the European Community and its Member States did not prejudge the legal status of the outcome of the work on the protection of TK.

106. The Delegation of India stated its belief that there was a need to deal with all aspects of IP relating to TK, GR and folklore holistically, since they were closely interlinked. The absence of international standards had been a cause of serious concern, impeding the benefits derived from the use of TK from reaching traditional communities and other holders of TK. It thanked the Secretariat for preparing the suggested draft objectives and principles on protection of TK contained in WIPO/GRTKF/IC/7/5 and WIPO/GRTKF/IC/7/6. They would assist the Committee's discussions on the protection of TK at the international level. It referred to the statement made by Egypt on behalf of the African Group and noted that it too had difficulties in going along with the assertion in Principles A.6 and A.7, that any regime for the protection of TK should, of necessity, be consistent with and supportive of existing IP systems. It would have thought that in the light of any common understandings that might emerge at the international level, it might be necessary to adapt existing IP systems. It felt, therefore, troubled by the stark assertion that TK protection should necessarily be fully consistent with existing IP systems. It recalled that the genesis of the Committee could be traced back to the shared understanding that the IP system should be supportive of the protection of TK and not run contrary to its objectives and principles. If TK could not be accommodated within the existing discourse of IP regimes, then there was a need to devise a mechanism to make it so. If this could not be done in an equitable and timely manner, the Delegation was afraid that the credibility of the existing IP regimes might itself be called into question in the future. That would reconfirm the belief held by many that the formal IP system, by legitimising misappropriation of TK and GR, might indeed be part of the problem rather than a possible solution. For existing regimes to be part of a credible solution, they might have to be re-defined. The IP regimes needed to become more sensitive to the aspirations of TK holders. Among other things the patenting process would have to take full account of the existence of TK. Disclosure, prior informed consent and benefit-sharing were the three basic tenets to make the patent system transparent and credible. Other ideas might be important, but could not be allowed to shift the focus away from these core issues. Solutions to the protection of TK in IP law had to be sought in terms of positive protection and defensive protection. It noted that the substantive principles in the Secretariat documents had outlined both forms of protection of TK. The Committee needed to develop systems to formally recognize TK and accord them the same level of protection - both positive and defensive - as were available to innovations based on modern science. The Delegation noted that many States had already developed or were in the process of developing national systems for the protection of TK, GR and folklore. Although the document outlined a "common international approach" on protection of TK, the extent of actual international protection



foreseen was limited to a general standard of effectiveness for foreign holders of TK in “national systems” (Principle 14, Annex II). It felt disappointed that, notwithstanding an overwhelming demand for the development of a legally binding international instrument, the policy objectives and core principles drawn up in the document were merely an international layer of national systems. What the Committee needed to elaborate upon under its renewed mandate was a legally binding international regime to prevent misappropriation of TK. Needless to say, such a framework, while taking a holistic view of the entire IP system, should also provide for disclosure, prior informed consent and a benefit-sharing mechanism. Disclosure of TK was essential for a full description of how the invention had come about. It clarified the prior art against which the purported inventive step needed to be measured. Its disclosure ought, therefore, to be required anyway. The Delegation failed to understand why such disclosure should pose any serious problem. It queried why inventors should not be required to indicate the genetic resource on which their claimed invention was based and why such disclosure should be considered extremely burdensome. It informed the Committee that the Indian Patent Act had a specific provision requiring mandatory disclosure of the source and geographical origin of the genetic material contained in an invention and noted its wish that the revised draft address this issue. The Delegation pointed out that the issue of misappropriation of TK was a very real threat. According to one study done in March 2000, on 762 randomly selected US granted patents under A61K 35/78 and other IPC classes, having a direct relationship with medicinal plants in terms of their full text, 374 (or 49%) were found to be based on TK. In another estimate done by a team of Indian experts in April 2003, it was found that there were more than 15,000 patent references - against 4896 references found in 2000 - in the patent databases of the USPTO, EPO and UKPO on medicinal plants used in the Indian systems. For the Delegation these were alarming figures which raised the issue of misappropriation of TK. The Delegation quoted the poet T.S. Eliot who had written “after such knowledge, what forgiveness”. It was confident that *cognoscenti* in the Committee would recall that Eliot had been acutely aware of tradition and the limited role of individual talent in innovativeness and creativity. Eliot’s concerns were therefore at the very heart of issues concerning the Committee in these deliberations and were thus less literary than perhaps they might appear. The reference had thus deserved the Committee’s indulgence. The Delegation therefore agreed with the Secretariat’s analysis that preventing misappropriation of TK was of utmost importance. Paragraph 39 of Annex II in fact stated that suppression of misappropriation was the “main organizing principle.” Gaps in the international property system had also been identified as a critical element in misappropriation. However, none of the legal tools suggested in paragraph 41 of Annex II to address the problem involved the use of patents or other intellectual property rules. The principles of benefit-sharing were merely a “best endeavor” clause. In its own reading, the crucial role that the patent system could play in supporting their implementation had not yet been addressed in these documents and it would like to see these addressed. It noted that in paragraph 14, page 4, the core principles outlined were “intended to give the necessary flexibility to national and regional authorities over the choice of precise policy options and legal mechanisms”. It had been stated in the document that “an approach of flexibility for national policy and legislative development underpins this document”. It had also heard comments from the floor that a “one size fits all approach” was not feasible in drawing up an international instrument on TK. It had been surprised by this approach, given that a very different principle guided the discussions on other important instruments that were being negotiated in WIPO. The idea of policy flexibility at the national level was usually frowned upon by delegations, and the Delegation wondered why they believed that the opposite approach was appropriate in this case. Paragraph 22 of WIPO/GRTKF/IC/7/5 had listed substantive issues that a regime for protection of TK would have to deal with. This list should

be seen as indicative. Finally, the Delegation observed that additional issues raised by Member States would naturally have to be incorporated in the revised draft.

107. The Delegation of the Philippines emphasized that it highly appreciated the efforts of the Committee to provide an extensive analysis of the issues related to the legal protection of TK. It thanked the Secretariat for a comprehensive presentation of the policy objectives and core principles on the protection of TK in WIPO/GRTKF/IC/7/5 and the outline of legal elements and policy options in WIPO/GRTKF/IC/7/6. Annex II of WIPO/GRTKF/IC/7/6 included the Philippines Indigenous Peoples' Rights Act, which provided legal protection to the indigenous knowledge, systems and practices of indigenous peoples and indigenous communities. The Delegation supported the core principles of recognizing the rights of TK holders and hoped that the Committee's discussions would lead to an effective protection against the misappropriation and misuse of TK. It emphasized the core principles of free and prior informed consent of TK holders and the objective of providing equitable benefit-sharing arising from the use of TK.

108. The Delegation of Peru stated that the document was a very good basis for discussion and that it would submit detailed comments. It felt that in terms of preliminary ideas concerning positive aspects and certain lacunae in the documents, mention should be made of the emphasis placed on the prevention of misappropriation. Although the Delegation was not sure about the similarity to rules on unfair competition, the fact that the guiding principle was present was a positive step. Similarly, the inclusion of the principles of prior informed consent and fair and equitable benefit-sharing was important. As to policy objectives, the focus on positive aspects, in particular empowerment and the promotion of innovation, was interesting. In Peru, work had been done to see how indigenous communities and peoples could be included in the work of the Office of Inventions and New Technologies, an agency of the national institution which sought to involve such communities in order to increase awareness and participation in its work (Law 27811). The Delegation agreed with the views of other delegations and with the opinions which it had itself expressed on behalf of the Andean Community: as long as a binding international mechanism did not exist, cases of biopiracy would continue to occur. In this context it recalled that Peru had introduced the case of *maca* to the fifth session of the Committee. Consequently, it had enacted a new Law (No. 28216 of May 1, 2004) which complemented the previous law, setting up a National Commission for the Protection of Access to Biological Diversity. Through joint work involving public and private institutions, representatives of the academic sector and communities themselves, the Commission sought to establish a biological diversity register and protect against acts of biopiracy, by monitoring cases occurring abroad, which related to the undue appropriation of biological material and TK belonging to indigenous peoples. However, such work was difficult and costly for a country such as Peru. Only with an international instrument would it be simpler to achieve effective protection for TK of indigenous communities.

109. The Delegation of Japan expressed its belief that when protecting TK, it was important to raise both predictability and transparency about the kind of TK that was dealt with and protected. It also noted that each item of the policy objectives, general principles and specific principles which the Committee was now discussing should be consistent with the existing IP systems and with the CBD. As regards paragraph 44 of WIPO/GRTKF/IC/7/5, it supported a written procedure for further developing the draft principles. As to Principle A.6, the Delegation noted that one of the objectives of the CBD was the sustainable use of GR and for that purpose Article 15.2 CBD described that each Contracting Party should endeavor to create conditions to facilitate access to GR. In this context, it considered that the wording of

principle A.6 should be to create conditions to facilitate access to GR as well as to determine access to GR. It recalled that Principle B.1 referred to TK protection by unfair competition prevention law. In the Japanese unfair competition law the purpose of the law was to ensure fair competition among businesses. It considered that this purpose of protection had a universality when one was discussing unfair competition law. Therefore, it requested the Secretariat to take this point into consideration when considering TK protection by unfair competition law. Regarding Principle A.4 it reiterated that it was necessary to have flexibility, given the variety of TK and the customary laws throughout the world, when considering the international and regional dimension of the protection. In this regard, the form it considered here was a guideline or recommendation, rather than the rigid form of protection, so as to have a system which corresponded to the situation in each country. Regarding Principle B.8, it understood the necessity of wording in the Annex, but at the same time it noticed some disparity with when the protection of TK was introduced. Sometimes it had also noticed that the time of the introduction of protection became controversial, depending on the form of protection. It did not have any concrete proposal to amend the principle, but simply felt that prior use might be enough at this stage. The Delegation said WIPO/GRTKF/IC/7/6 was compatible with WIPO/GRTKF/IC/7/5 and should have more consistency. For example, in respect of general scope of subject matter in the former document corresponded to different items in the latter document. The Secretariat should enhance the correspondence between the documents, such as Principle B.8 on exceptions and limitations or Principle B.10 on application in time.

110. The Delegation of Brazil expressed its appreciation to the Secretariat for the preparation of WIPO/GRTKF/IC/7/5, which contained a useful overview of policy objectives and core principles for the protection of TK. The Secretariat had made an honest effort to reflect the views expressed in previous meetings of the Committee, including some specific concerns expressed by different delegations at the last sessions. The proposed objectives and principles in Annex I were acceptable as a basis for future work by the Committee. This was a valuable attempt to set forth a comprehensive listing of possible objectives and principles for protection, which should be examined carefully. It observed that several of the provisions contained in Annex I, while representing a useful, first attempt to capture certain important aspects of the issue, might need to be improved and, in some cases, considerably reformulated. Brazil was among those countries which had in recent times adopted national legislation on the protection of TK. It was now revising that legislation. It saw the protection of traditional indigenous knowledge as a way of contributing to the effective realization of indigenous peoples' rights. It approached the protection of TK within a broader framework of human rights and indigenous rights law, which transcended the realm of IP law. It therefore did not think that efforts to protect TK should be seen as necessarily an attempt to extend the scope of IP regimes. The Delegation observed that the rights of Brazilian indigenous peoples over their TK were inalienable, unrenounceable, imprescriptible prior rights that preceded the advent of State law and certainly the advent of the Paris Convention. Hence, even though WIPO/GRTKF/IC/7/5 went to great lengths in elaborating a concept of a "combined and comprehensive approach" to the protection of TK, it was important to acknowledge that a system of IP protection, even an extended or adapted form of protection, could not be expected to do full justice to the holistic character of the TK of Brazilian indigenous peoples. For these reasons, norms on the protection of TK should not be subordinated to the existing IP regime. Another important aspect of this issue to bear in mind was the widespread perception that was to be found today among indigenous peoples and the general public that the existing IP system and the way in which it operated had to a large extent contributed to aggravating the problem of "bio-piracy" and misappropriation of TK. Under these circumstances, it was difficult to understand how the system, particularly if left unchanged, could be seen to offer

the ultimate response to the problems the Committee was seeking to address. If the Committee really wanted to tackle misappropriation in the IP system, it should not be shy about forthrightly acknowledging where the IP system had gone wrong and proven to be deleterious to the interests of TK holders. It would be important, in this regard, to clearly identify any gaps and insufficiencies of the currently existing system that may be fomenting misappropriation and should therefore be rectified. The effective protection of TK, in effect, required the establishment of effective safeguards to check the operation of the existing IP regime, so as to ensure that it did not run counter to rights of indigenous peoples and the preservation of their heritage. In this regard, though the Secretariat was to be commended for its work in preparing the draft list of objectives and principles and for its attempt to comprehensively reflect the concerns and views expressed by different actors in this debate — the inclusion of the “protection against misappropriation” as a principle of protection, in particular, was noteworthy — it found WIPO/GRTKF/IC/7/5 to be decidedly shy, if not too ambiguous and vague, in addressing some of the more crucial concerns that had been driving the debate on the protection of TK in different international fora and which led to establishment of the Committee in the first place. The Committee should keep this in mind as it proceeded in its work as a constant reality check, so that it did not lose sight of its most fundamental objectives. provisions that were too ambiguous or vague would ultimately prove irrelevant as a tool of protection. Regarding Objective (x), it suggested that rather than referring to the promotion of access to TK, the objective should refer to the need to ensure that access to TK takes place in a manner that is fully respectful of the rights of indigenous peoples over their knowledge and, in particular, of the fundamental principle of prior informed consent, as well as under mutually agreed terms. Regarding Objective (xiii), it suggested that the words “and derivatives thereof” should be added at the end of the sentence, after “associated genetic resources.” On the Principle A.5, entitled Principle of Equity, the Delegation felt that this principle was very important one, supported its inclusion in the list of core principles, but disagreed with how it had been elaborated. Paragraph 2 of the principle primarily emphasized the need for fair and equitable benefit-sharing in respect of commercial use of TK, as a means of realizing the principle of equity. The principle of equity was broader than this. Its realization could not be limited to fair and equitable benefit-sharing. Equity was also related to the need to ensure that the rights of traditional and indigenous peoples over their knowledge were duly recognized and that prior informed consent, in particular, was fully respected. It also expressed some reservations with respect to the formulation of paragraph 1, which insisted on establishing a balance between the rights of TK holders and the interests of those who “used and benefited” from TK. Given the nature of the concerns that the Committee was seeking to address, the stark realities of the constraints that the custodians of TK had faced and continued to face in seeking to protect and preserve their heritage and the manner in which they had been victimized by existing institutional arrangements, it did not think this was an appropriate way to frame the principle of equity. The principle of equity was meant to ensure that societal interests at large were recognized and safeguarded under the IP regime. In its view the fact of the matter was that the interests and rights of so-called “users of TK”, such as private companies that engaged in activities like bio-prospecting, were already looked after aplenty by the existing IP system. These actors had already been able to reap many benefits from accessing, often freely, the TK and associated resources to be found in mega-diverse countries. Indigenous and traditional communities, on the other hand, often constituted some of the most disenfranchised and impoverished segments of society. Recognizing the rights of indigenous peoples and traditional communities over their TK, would, in this context, help to ensure that the IP system was responsive to broader societal interests and concerns in all countries. An elaboration of the principle of equity should thus stress the need for recognition of the rights of TK holders, rather than emphasize the balancing of those rights with actors whose interests

were already favored, and often unfairly so, by the existing IP system. In this regard, equity could also be applied more broadly as a principle that should govern the interaction between the existing IP regime, including the patent system and other categories of industrial property rights, and efforts to protect TK and associated GR. In particular, ensuring that IP rights were not illegitimately taken out over knowledge and associated GR, including their derivatives, that had been illegally accessed and appropriated from indigenous and traditional communities and mega-diverse countries should constitute a central concern of any attempt to adequately realize the principle of equity. Regarding Principle A.6, it supported the position expressed by the Delegation of Egypt on behalf of the African Group. It had reservations with respect to paragraph 2 of this principle, which stated that the protection of TK should be consistent with, and supportive of, existing IP systems. Like the paragraphs on the principle of equity, this section would have seemed to be glossing over the harsh realities of the problems and concerns the Committee was seeking to address. The principle, to begin with, would have seemed to be suggesting that a regime for the protection of TK should not interfere with the functioning of the existing IP system. This would have seemed to disregard the fact that the existing IP system was often considered to be a major culprit in respect of the problem of misappropriation of TK and “bio-piracy”. The protection of TK could not be supportive of existing IP systems if existing IP systems were not made to be supportive of the protection of TK. It suggested that this paragraph should therefore be reworded, so as more appropriately to capture the essence of the problem which the Committee was trying to address. It could, for example, state that existing IP systems should be supportive of and not run counter to the objectives of TK protection. It noted, moreover, that the reference to “enhancing the applicability of relevant IP systems to TK subject matter” seemed to prejudice the question of whether existing IP systems were at all relevant to the protection of TK. It noted that many indigenous communities had begged to differ with this proposition, as it did as well. The Delegation supported Principle A.8, entitled Principle of respect for customary use and transmission of TK, which should not be qualified in any way, and proposed that the words “as far as possible and as appropriate” be deleted. Regarding Principle B.1, entitled ‘Protection against misappropriation’, the Delegation welcomed the inclusion of “protection against misappropriation” as a core substantive principle. Paragraph 3 of the principle at times seemed to refer to overly subjective criteria for characterizing acts of misappropriation. It suggested that paragraph 3(iii), in particular, should be reformulated so as to describe as misappropriation the act of “acquiring, claiming and asserting IP rights over TK-related subject matter when those IP rights are not validly held in the light of the TK and any conditions relating to its access.” The Delegation emphasized that paragraph 5, entitled Recognition of the customary context, was of the utmost importance and intrinsic to the effective realization of the principle of prior informed consent. The importance of respect for customary norms and practices should not be qualified, so “as far as possible and appropriate” should be deleted. On Principle B.4, entitled Eligibility for protection, even the TK that had been disseminated beyond the traditional context and might be found, for example, in databases or publications, should be protected. In Principle B.6 was not formulated satisfactorily, and its first paragraph should be redrafted to reduce emphasis on the use of compensatory liability rules, which may not be, in many cases, an appropriate means to protect TK and ensure fair and equitable benefit-sharing. More generally, the paragraph should emphasize the importance of benefit-sharing instead of “compensation.” It should clarify that benefit-sharing vis-à-vis the TK holders was an obligation that arose as a condition for the granting of access to TK, through application of the principle of prior informed consent. Paragraph 3 should be redrafted to clarify that the “users” of TK beyond its traditional context should be obliged to identify the source and origin of the knowledge and to acknowledge the holders as the source of the knowledge. Under Principle B.7, the Delegation could not accept the proposition that mechanisms for obtaining prior informed

consent should not create burdens for “users” of TK. It would be entirely correct and appropriate for mechanisms of PIC to at least impose a “reasonable” burden on users of TK. This paragraph, in any case, did seem overly prescriptive and should perhaps be deleted. The reference to the Bonn Guidelines in its view was not appropriate and it would also not be appropriate to prejudge the outcome of negotiations in the CBD on the international regime on access and benefit sharing, which would include associated TK within its scope. On Principle B.8, entitled Exceptions and limitations, the Delegation called for further study of the suggested exceptions and disagreed with the exception in paragraph (iii). Given the basic equity considerations that should be guiding this normative endeavor, the Committee was, after all, trying to look after the interests of impoverished, disenfranchised sectors of society. There was a case for asking even prior good faith users to submit to the requirements, including PIC and benefit-sharing, of the new regime of protection that the Committee was developing. It therefore reserved its right to propose modifications to this paragraph. On Principle B.9, on the duration of protection, it felt that the rights of indigenous communities over their knowledge were inalienable, unrenounceable and imprescriptible. This provision should be flexible enough to take account of the fact that TK systems were not static but evolved constantly over time. Even TK, the use of which had come to be widely disseminated outside of the traditional context, should in its own view remain protected. On Principle B.10, concerning application in time, the Delegation expressed concern about the last sentence, which established an exemption for long-standing prior use in good faith, as it was unconvinced that this was the best way to address the issue. A mere encouragement to acknowledge the source of TK and to share benefits seemed insufficient. Even such prior good faith users should be obliged to submit to the requirements of the new regime of protection. Regarding Principle B.12 on consistency with the general legal framework, the same concerns applied as for Principle A.6. Considerable redrafting was required to clarify that existing IP systems should be supportive of the protection of TK. The best way to ensure consistency and mutual supportiveness between the existing IP system, in particular the patent system, and the protection of TK was the establishment of a mandatory disclosure of origin and prior informed consent requirement for patent applications. It foreshadowed that further written comments and drafting before the deadline of February 25, 2005, which seemed appropriate. The Secretariat should prepare a revised draft and a compilation of drafting suggestions by Committee members.

111. The Delegation of the United States of America expressed its appreciation for the extensive documentation and its responsiveness to many requests for a fuller exploration of the issues involved in TK. The Delegation looked forward to sending more comprehensive comments by the requested deadline, but, in general, supported many of the policy objectives set forth in the documents, in particular the importance of meeting the actual needs of TK holders and the core principle of “flexibility for national policy and legislative development,” as currently set forth in the document. It echoed the concerns expressed during the discussion on TCEs/EoF that the document focused on “protection” only to the exclusion of “preservation,” conservation,” or “promotion” goals which had also been mentioned in the Committee and which might meet the needs of certain TK holders as an alternative to an exclusive rights model. It felt that many other issues had yet to find consensus among TK holders, let alone within the Committee. Its government was working on an ongoing dialogue with the United States of America tribes to reach a broader understanding of indigenous issues that affect them. As a starting point, it was encouraging tribes to take stock of their full range of values, record that information in a manner that best suits their needs for protection, conservation and/or promotion, and engage the United States of America in discussion about the existing domestic IP measures that are available to tribes and their members for TK. In recent months, a federal *ad hoc* Interagency Working Group had been formed under the

leadership of the Department of State for the purpose of conducting outreach to tribes on the full range of indigenous issues, with the aim of engaging tribes and their members in articulating their views on the issues. The effectiveness of this effort would first be measured in the near-term by the number of local and regional tribal contacts reached through the existing agency networks. It recalled that there were currently more than 40 agencies. Indigenous leaders found that many indigenous values needed to be furthered by means other than existing IP law. Indeed, the broad discussion of the rights of indigenous peoples in the United Nations and the Organization of American States (OAS) might help indigenous leaders understand that their values could be addressed through distinct legal pathways, including IP laws domestically and internationally, other forms of property law, as well as human rights law. While it was not in favor of internationally binding *sui generis* systems, such systems developed at the domestic level were another mechanism that could be explored for enhancing IP protection of TK where existing national systems fell short. For example, in the latest revision of the OAS draft declaration, the text had been liberally sprinkled with references to the protection of culture, language, and spirituality – values that could not be addressed by current IP-like exclusive property rights. The Delegation referred to the paper that had been distributed at the Committee in July of 2003, which had made clear that IP law was not the sole vehicle for addressing indigenous values. It was in this light that it questioned whether the approach suggested by the current document was the right direction and urged the Secretariat to incorporate other measures that had been discussed in the Committee, including preservation, conservation or promotion measures and use of non-IP legal means. Finally, the Delegation continued to request, as it had done with the TCE/EoF agenda item, greater clarification as to what harms had been suffered under the *status quo*. Without a full understanding of the harm involved, it would prove difficult to craft any kind of international instrument that would be meaningful and effective. The Delegation noted that, as reflected in the document, the United States had established several legal protection measures that addressed issues which had arisen within the country, but it was not clear whether the same problems had arisen elsewhere or whether other issues were of concern. It requested a representative of the Tulalip Tribes of Washington, to share his practical experiences with the Committee. He gave an example of the complex array of issues of TK that the Tulalip Tribes were facing. The Tulalip Tribes sustained their livelihoods from the Smohomish River watershed, which was in severe environmental degradation after more than a hundred years of development. Resources to sustain the Tribe from the river were no longer in abundance and the tribal way of life was at risk. To restore ecological functions science lacked the history and habitat data that would provide the knowledge required to rebuild this watershed. The Tulalip Tribes, using TK from its people as well as science, knew how to develop a recovery plan to rebuild the watershed. But to use the information would expose certain knowledge that the Tribe holds as sacred. Spiritual, cultural and traditional practices were at risk when this information was exposed to the public. The Tribes were looking for assurances that in the use of their knowledge for the sustainability of their culture and to the benefit of society that knowledge would not be misused. The Tribes needed methods to protect themselves from misappropriation. This is why the Tribes' participation was importance. Sustaining cultural practices and preserving the knowledge under customary law and under United States law was difficult as best. Currently, they were working with the United States to address these needs. He believed that the Tulalip Tribes needed to define what their culture and knowledge was and to dictate its future and the future of their people. Looking at a way that preserves a culture and the interaction between their people and the landscape, the utilization of species really defines the culture. The Tulalip Tribes were looking for solutions, solutions at the national level and solutions in the Committee.

112. The Delegation of Canada stated that the documents prepared for the use of Member States on this agenda item were excellent and commended the Secretariat for its work in this area. It recalled that in the past, the Committee's documents and the resulting substantive discussions in Committee had provided Canada with useful information and guidance for its own domestic policy work and analysis in this area. With regards to decision item (ii) in paragraph 44 of the document, the Delegation anticipated that Canada would provide more detailed comments on the current document and WIPO/GRTKF/IC/7/6 by February 25, 2005. In those comments, Canada would seek to explore more fully how the draft policy objectives and principles on TK that were currently being developed by the Committee related to Canada's own domestic considerations. Canada supported the flexibility that had been offered in the Secretariat's current approach to the protection of TK. It allowed for the consideration of existing IP protection mechanisms alongside possible *sui generis* options, and as such recognized and respected the diversity of legal systems amongst Member States and of customary laws and protocols amongst indigenous and local communities. It foreshadowed that Canada would support continuing with this flexibility in any future work undertaken by the Committee on this issue. With this in mind, the Delegation expressed its strong support for a number of the draft policy objectives that had been articulated in the document, including the "recognition of the value of traditional culture and folklore to human development; the promotion of respect for dignity and integrity and the preservation of traditional culture; the need to make efforts to meet the needs of communities as identified by them; the repression of misappropriation of TK and other unfair commercial practices; and the promotion of TK, where appropriate for community development. "In the same manner, the Delegation supported the following fundamental core principles outlined in the documents: "the principle of effectiveness and accessibility of protection; the principle of recognition of the specific characteristics of TK." The Committee should continue its work on draft policy objectives and principles relating to protection of TK: this work constituted an important step forward in the international discussion on this issue. At the same time, Canada needed to ensure that this international work took into consideration its diverse domestic concerns and circumstances. In particular, Canada needed to receive and consider input from Aboriginal people as to whether the draft objectives and principles presented here are the appropriate ones upon which to proceed. On the suggestion of developing an expert or working-level consultative process, Canada considered that input from experts on TK could be useful to move the discussion on the international protection of TK forward, particularly where it included input from indigenous and local communities. It also took note of the comments by some other Committee members that it was still unclear how the input from indigenous and local communities could best be considered, particularly where there were diverse indigenous views and interests in the national domain. One way to do so in the immediate future was for all submissions received by February 25, 2005, to be posted on the WIPO website for public review as soon as they were received. This would not only allow Member States, but also indigenous and local communities to immediately take note of the detailed comments being made on the Committee's work. It would also provide more opportunity for all interested parties to review and consider their respective positions in preparation for the eighth session of the Committee in June 2005.

113. The Delegation of Venezuela thanked the Secretariat for the high caliber and technical content of the documents currently before the Committee and for making presentations on work of the Committee before the General Assembly and at the information meeting convened on October 15, 2005. This had been valuable assistance to the Delegation. It shared the concerns expressed earlier by Brazil, India and other delegations. The Delegation felt that TK should be given adequate and preventive protection and considered WIPO/GRTKF/IC/7/5 to be a good basis for discussion. The document was based on the



outline given by the African Group, and while it had not seen much reflection in the content of the African Group concerns, it was a step forward in order to bring about proper protection and prevent misappropriation. It emphasized that misappropriation was one of the greatest concerns and was worried that there might not be enough input in the document in order to prevent misappropriation. Both documents made a distinction between national and international approaches for TK protection and this was not brought out sufficiently clearly. With regard to PIC and adequate benefit-sharing it noted that this had been reflected in the document and saw that patents might play an important role, which was not mentioned in the document. With regard to WIPO/GRTKF/IC/7/6, it was surprised that when discussing modifications of existing IP systems that could improve TK protection, only one or two improvements had been mentioned which had been discussed by the Committee in the past. With regard to the consultative expert group it had in mind the option mentioned by Ecuador and felt that it should be an open-ended meeting so that everyone could express their views and interests.

114. The Delegation of Norway stated that this useful document had brought the work to a new stage. The Delegation reiterated its support that TK should be protected. Protection against misappropriation was the most important element of protection. It underscored the importance of how effective protection against misappropriation could be achieved and pointed out that the approach taken in the document was very useful in this regard. The Delegation cited five examples of how the document was useful in achieving the objective of protection against misappropriation. First, the goals and principles listed in the document could create a basis for TK protection without any necessity to document TK. This paid respect to the concerns of indigenous peoples and other TK holders. Second, the objectives of protection did not conflict with legitimate IP protection. Third, the document was able to fully integrate defensive and positive protection of TK. Fourth, the document was consistent with other ABS frameworks. Fifth, it allowed flexibility for diverse national and sectoral needs of TK holders. The Delegation concluded with a comment on flexibility: flexibility did not mean that there was no effective protection. In fact, the very need for flexibility was the need to make protection effective by tailoring it to the stakeholder needs. The Delegation referred to plant varieties, where a *sui generis* system for plant varieties and GRs in general had been established, namely the FAO International Treaty on Plant Genetic Resources for Food and Agriculture. This Treaty was a good illustration of how the sectoral needs of TK holders and farmers in the agricultural sector could be recognized.

115. The Delegation of New Zealand stated that its position on WIPO/GRTKF/IC/7/5, in particular the general principles, was very similar to that on WIPO/GRTKF/IC/7/3, so its earlier comments could apply *mutatis mutandis*. This document, too, should be left open until February 25, 2005. The alternative sources of principles, important from an indigenous perspective, which New Zealand had raised in relation to TCEs/EoF, might also be relevant to the further development of the draft on TK. In addition to these, the considerable body of jurisprudence developed by the New Zealand Court of Appeal and Waitangi Tribunal on the principles of the Treaty of Waitangi, might provide an interesting resource for the further development of the documents on principles and objectives. The Delegation offered to provide further information on these principles during the session of the Committee. The Treaty of Waitangi was New Zealand's founding document which established a relationship between the government and the Maori tribes of New Zealand. On the issue of convening of an expert group to work on a further draft, it felt that there was not enough time to facilitate this process before the next session of the Committee.

116. The Delegation of the Russian Federation stated that WIPO/GRTKF/IC/7/5 contained all the necessary elements for the preparation of a legal instrument for the protection of TK. There had been certain critical remarks on the general approach to settle the question, especially since the comments made were those countries with protecting TK, such as Brazil and Peru. Therefore, it expressed its wish that the participants with constructive remarks and criticisms should submit their comments to the Secretariat in time for the Secretariat to send them out to the other participants electronically. This would enable participants to come better prepared to the eighth session.

117. The Delegation of Turkey fully supported the development of a *sui generis* protection system and it supported Annex I of WIPO/GRTKF/IC/7/5. It stated that for the protection of TK, GR and folklore, a system containing international minimum standards was necessary. On principle A.5, taking account of the CBD, equitable benefit-sharing should be provided. Prior informed consent should be required before the grant of a patent. The geographical origin of biological material should be disclosed in the patent application. The Delegation supported paragraph 2 of Principle A.6, and believed that TK should be taken into account as community rights and the sovereignty of the countries over their GR and TK should be accepted. It noted that these were preliminary opinions and that they would be further detailed by February 25, 2005.

118. The Delegation of the Islamic Republic of Iran noted that TK and TCEs/EoF were interlinked and sometimes overlapped. Since the Committee was addressing neutral principles, it should follow a neutral approach in the new draft document. Generally, the international dimension in the current document assumed a certain flexibility at the national level regarding the recognition of foreign rights in national legislation. However, the international approach should be highlighted in the next draft with a view to developing a legal framework. On the draft policy objectives, the Delegation observed that items (iii), (iv) and (viii) were identical to those in WIPO/GRTKF/IC/7/3, i.e. the role of the cultural identity of a whole society and its interrelation with the aspiration and expectation of indigenous and local communities. On the draft core principles, the Delegation suggested that in principle A.1, protection should meet the expectations of TK holders in each society with the general circle of its national level norms; in principle A.4, the approach should be with a view to an agreement that reaches beyond the national level. In the current document, flexibility appeared one-sided and featured only at the national level, whereas flexibility should have a minimum substantive standard so as not to harm the functions of TK holders. On principle A.5 there needed to be a broader approach and any possible obligatory measures in this regard should not be ignored. The Delegation supported the proposal in paragraph 44(iii).

119. The Delegation of Ecuador thanked the Secretariat for the enormous amount of documentation provided to the Committee on the protection of TK. Referring to WIPO/GRTKF/IC/7/5 and WIPO/GRTKF/IC/7/6, the Delegation repeated its previous observation of the fact that TK was in many instances directly related to the use of GR. That should be borne in mind since the relationship with GR, at the time the Committee had been set up, was the reason for the inclusion of TK in the subjects for analysis by the Committee. Consequently, as a first observation the Delegation said that the current texts demonstrated a lack of evidence of that relationship. In its view that relationship should be taken into account when determining international rules and assessing the international dimension of TK, since ignorance of the relationship would constitute neglect for the problem. In addition, numerous cases of biopiracy had illustrated the relationship and many occasions on which illegal and unlawful use of TK occurred were conditioned by it. It thus concluded that the treatment of

TK from the perspective of IP rights as a matter of unfair competition was not an essential priority, and disagreed with the grounding of protection in that perspective. The Delegation considered that the only effective way of providing complete protection for TK was through an international *sui generis* system of IP rights. In that connection, it was therefore necessary not to identify which questions related to IP in general, but rather to determine clearly the rights which, at the international level, should be respected, i.e. obviously IP rights which WIPO was, in a technical sense, responsible for analyzing. One question which the document reiterated, was the suggestion, illustrated with examples, that the best method, under the term flexibility, was to adopt national and/or regional measures in order to avoid the misuse and/or undue appropriation of TK. In that regard, the Delegation stated that on different occasions it had insisted that an international system was necessary, based on IP rights, a system that could be *sui generis* and was the only effective means of protecting TK. That view did not conflict with the fact that, in other fora and by other means, assistance could be provided to protect those rights by means of competition law standards, law on damages, criminal law, rights of access and benefit-sharing, contractual and environmental law, and the laws relating to the interests of indigenous peoples. All those were valid but did not correspond to an essential question considered by the Committee, which concerned IP rights at the international level, through which TK should be protected, irrespective of whether it was linked to GR or not. Furthermore, the same documentation showed that if a path were followed towards standards which were possibly only adopted at the national or regional level, in addition to those standards being ineffective in avoiding biopiracy as an international phenomenon, there would be a real possibility that divergent and mutually incompatible standards were established, something which would create obstacles and generate uncertainty between States and also especially among indigenous and traditional communities which were trying to defend their rights. As could be appreciated by other Committee members, the suggested method, i.e., the method of introducing legislation or amending existing legislation at the national or regional level as a first step was not acceptable to Ecuador which, in the same way as the other members of the Andean Community, had the requisite legislation. It was also not acceptable because the claimed idea of harmonizing legislation could be a means of perceiving what was constituted by the international dimension of the protection of TK through IP rights. It was necessary to be very clear as to what were the national spheres of competence, what constituted an international regime, what a method of harmonization was and also what constituted the international dimension. In conclusion, the Delegation noted that it shared the sentiments expressed by the Delegations of Brazil, India and the Andean Community in that regard of this last matter.

120. The Delegation of Egypt, speaking on behalf of the African Group, expressed the appreciation of the African Group to the International Bureau for the preparation of WIPO/GRTKF/IC/7/5 which contained an overview of policy objectives and core principles in relation to the protection of TK. The African Group welcomed this document and considered the policy objectives and core principles in Annex I of the document to be a useful basis for the future work of the Committee. It also appreciated the attention given by the Secretariat, in the preparation of the document, to the opinions and positions expressed by Member States during past sessions of the Committee, and in particular to the submission made by the African Group at the last session of the Committee. It also noted the openness of the Secretariat to take into consideration a diverse range of ideas and opinions on the issue at hand, and it encouraged the Secretariat to continue doing so in the future. Regarding the substance of the policy objectives and core principles under consideration, the African Group wished to further develop some of the preliminary comments which it had foreshadowed in its general statement and to make some additional ones. First, the Delegation reiterated the difficulty of the Group in going along with the assertion according to which TK protection

should be consistent with and supportive of existing IP systems. In fact, it had noticed that this assertion was the only one to appear both as a general guiding principle and as a specific substantive principle. As it had mentioned in its general statement, such an assertion would subordinate the protection of TK to the operation of existing IP systems, while it believed in the need to make the existing IP systems supportive of the protection of TK, including by introducing the necessary changes in these systems. In fact, a lot of the work that the Committee had done had been focused on identifying some of these changes. If the goal of the Committee's work now was, through these policy objectives and core principles, to "make" TK protection consistent with existing IP systems which had not been made to be supportive of TK protection, then the Committee would be making *fausse route* and not responding to the aspirations of TK holders. The Delegation was happy to see that other delegations shared the Group's views in this regard. Second, the African Group reaffirmed its satisfaction to see the emphasis given to the prevention of misappropriation of TK in the principles mentioned. Nevertheless, it appeared that the document shied away from examining the role of the patent system in this regard, despite the fact that envisaging changes in this system was important in the prevention of misappropriation of GR and TK. One such change was the prohibition of patents on life forms. This was a well-known position of the African Group, which had figured in its submission to the last session of the Committee. Another one related to the establishment of a disclosure requirement of the source of TK involved in the claimed invention and evidence of compliance with all access regulations in the country of origin, in particular in relation to prior informed consent and equitable benefit-sharing. The African Group also welcomed the inclusion of the principle of equity in the list of core principles as Principle A.5. However, it agreed with the comments made by the Delegation of Brazil concerning the current wording of paragraph 1 and 2 of this principle. It felt particularly troubled by the reference to the need for protection to reflect an equitable balance between the rights of TK holders and TK users. In its view the purpose of the protection under discussion in the Committee was precisely to recognize the rights of TK holders so as to establish a balance with the rights enjoyed by TK users under the existing IP system, given that it catered disproportionately to the rights and interests of TK users and the expense of TK holders. Regarding Principle B.8 on exceptions and limitations, the Group's preliminary opinion was that this was a matter which should be approached with caution and should preferably to be decided by the TK holders themselves. Limitations and exceptions were necessary in existing IP systems as they concerned private rights granted for a limited duration and from which often a material benefit could be derived. This was not necessarily the case when protection of TK was sought. Concerning Principle B.10 on application in time, it thought that it was important to reaffirm the inalienable rights of TK holders to their knowledge regardless of the specific timing of introduction of protection. It also felt concerned that the last sentence of Principle B.10, could lead to a situation where misappropriation continued with only an "encouragement" to the TK user to acknowledge the source of TK and to share benefits with the TK holders. On the principle of flexibility and comprehensiveness, it had noticed the importance given to respecting differences in national circumstances and the legal contexts and in allowing sufficient flexibility at the national level. Some delegations had particularly insisted on this matter arguing that the diversity of national circumstances made it unfeasible to establish an international instrument. As the Delegation of India had mentioned, it was surprising to see the importance given to the preservation of national policy flexibility when dealing with these issues, particularly in light of the fact that in other Committees this idea was simply refuted. It underlined that the policy objectives and core principles under discussion in the Committee were not an end in themselves. In this regard, the African Group was firmly convinced that the protection of GR and TK would not be fully effective unless an international legally binding instrument was concluded. It reserved its right to make further comments on the policy objectives and core principles in

Annex I in the coming months. Finally, African Group once more thanked the Secretariat for providing it with this document which had generated such a rich debate and had helped the Committee focus on the substance of the protection, regardless of differences concerning the legal status of protection.

121. The Delegation of China appreciated the tremendous efforts made by the Secretariat in preparing the two very informative documents before the Committee. It endorsed the proposal that a basic framework for an international consensus or international instrument should be first developed by focusing on policy objectives, guidelines and specific substantive provisions. These two documents gave a full overview and summary of the opinions expressed by all Member States at the previous six sessions of the Committee and in relevant activities. It felt that the document well reflected the practices and experiences of Committee members, including some Member States using *sui generis* systems and relevant measures to protect TK. It was not opposed to the idea that during the drafting period of an international framework one should take the existing laws and regulations into fullest possible consideration, “try to adapt to” the various existing laws and regulations, and respect all existing measures and principles in TK protection. In its view, however, “to try to adapt to” the existing laws and regulations did not mean that one should only proceed within the existing framework of laws and regulations, with which no conflict was allowed. It indicated that it would submit further specific comments by the proposed deadline. The Delegation endorsed the overview of policy objectives. Out of the 15 policy objectives specified in the document, Objective 7 concerned the “repression of unfair and inequitable uses”. The Delegation had noted that all the specific substantive provisions were based on the “protection against misappropriation of TK”. These included the establishment of the principles for protection against TK misappropriation, composition and definition of acts of misappropriation of TK, as well as implementation, measures and management of a system for protection against misappropriation of TK. According to the Delegation’s preliminary understanding, “unfair and inequitable uses” and “misappropriation” differed very much from each other in their connotations. Since the overview of policy objectives constituted the soul of the international instruments that the Committee would formulate on TK and TCEs, it believed that “protection against misappropriation of TK” should not only be specified in the part concerning substantive specific provisions, but should also be reflected in the part concerning policy objectives. If other Committee members agreed, it wished to propose that the protection against misappropriation of TK be included in the TK policy objectives. Concerning the general principles, it referred to the comments of many delegations on Principle A.6 which concerned the principle of consistency with existing legal systems. The Delegation accepted that in the drafting period one should take the existing laws and regulations into fullest possible consideration, and try to adapt to the various existing laws and regulations. However, “to try to adapt to” the existing laws and regulations did not mean only proceeding within the existing framework of laws and regulations, with which no conflict is allowed. As a result, it proposed that this principle be amended to “respect for various existing legal systems for the protection of TK”. It had also noted that in the substantive provisions, Provision B.7 concerned the principle of “informed consent”. The Delegation had not yet carefully examined the possibility whether this principle should only be treated in the substantive provisions and could not be upgraded to the level of core principles. From the viewpoint of legislative techniques, however, it wondered whether all “principles” should be grouped under one same title or heading. WIPO/GRTKF/IC/7/5 and WIPO/GRTKF/IC/7/6 were extensive and informative. Nevertheless, as both documents were supposed to become regulatory instruments to be commonly respected by all Member States, and especially in view of the needs of some specific groups to whom these provisions were to be applied, it would be necessary to further refine the documents with a view to

summing up similar parts or deleting duplications. The Delegation hoped that the Secretariat could also provide a basis in this regard, if possible.

122. The Delegation of Trinidad and Tobago, commenting on the draft provisions, noted that the term “TK holders” had been used for the beneficiaries of protection. This generic term was a very good way to deal with this question. Yet Principle B.5 provided that protection should concern “indigenous and traditional communities and peoples”. It recalled that concerning WIPO/GRTKF/IC/7/3 under Agenda Item 5, the Delegation had described the Caribbean as a part of the world with slowly emerging culture, representing a set of distinct cultural communities. The beneficiaries of protection should therefore be described in WIPO/GRTKF/IC/7/5 as “TK holders”. In contrast, in WIPO/GRTKF/IC/7/3 the beneficiaries were “traditional and other cultural communities”. Principle B.3 indicated that the scope of subject matter “may include agricultural, environmental, medicinal knowledge and knowledge associated with genetic resources”. According to the Delegation’s understanding, the words “may include” did not mean one was excluding anything. In separating “TK” and “TCEs,” the Delegation noted that TK may also include the knowledge and know-how which was included with traditional songs, dances and performances. It illustrated this point with the Trinidad and Tobago traditional Steelpan, which was given birth to in 1930s until the 1950s: there were in the meantime fourth and fifth generation designs of the Steelpan. The rest of the world was now aware of the Steelpan. It could deconstruct the methodology of the Steelpan and come up with six patents which had been filed on methods of tuning a Steelpan, all of which Trinidad and Tobago was challenging. It viewed the Steelpan as TK *stricto sensu*, in which a community had developed a means of creating a new musical instrument. That cultural community was a custodian of, and had ownership rights over, that TK, but very often it was not seen as TK, because the Steelpan was seen as an EoF. The Delegation appealed to the Committee to take into account the close connection by which TK was sometimes expressed as an EoF, so that the scope of subject matter could also include things that could be seen as EoF/ TCEs. The Trinidad and Tobago Steelpan also had implications for application in time. Different parts of the world had appropriated the Steelpan without acknowledging the source of the invention. The Delegation insisted upon the moral rights of the creators of the Steelpan. When these provisions were to take shape as a legal instrument, the specific paragraph or provision in Annex I, stating that the recent acquisition of uses may continue, was fine with the Delegation. However, the Committee needed to consider the many instances in which TK may have been misappropriated in the past and needed to be looked at in more precise terms in the future.

123. The Delegation of Bolivia emphasized the value of the documents as a step forward in the progress of the Committee’s work. While they were valuable, it felt that some of the items should be elaborated more in detail. It expressed the problems it had in accepting the formulation of Principle A.6 which mentioned that the protection of TK should be concordant with actual IP systems, when, in its view, this reality should in fact be reversed. It was worried that the documents did not address the disclosure of source or origin, which was without doubt a necessary measure which would allow to protect relevant resources from illegal or improper use. The documents were a necessary step, but not yet quite sufficient, for the establishment of an international juridical system and the effective *sui generis* protection of TK. It emphasized that an holistic and integral vision should be applied to the treatment of TK and GR. Consequently, it supported the views that had been expressed by the Delegations of Brazil, India, and the African Group and informed that it would submit more detailed written comments during the commenting period.

124. The Delegation of Botswana supported the statement made by the African Group. It emphasized that the Committee was aspiring for a win-win situation which could only happen if the Committee achieved the goal it had set itself at the sixth session, namely to end up with an international instrument or instruments. Therefore, the Delegation could well take on WIPO/GRTKF/IC/7/5 and WIPO/GRTKF/IC/7/6 as a basis for future work. It saw a great potential in these documents when it had read them carefully. The way they were structured could take the Committee towards its declared goal of an international instrument or instruments, taking into account the general guiding principles which would provide consistency. When looking at the legal essence of protection, the Delegation could find a promising model of protection in these provisions. That model of protection would provide the maintenance of flexibility, policy space, and legal evolution. The Delegation concluded by requesting the Secretariat that the next document should elaborate further on the variables contained in this document, namely benefit-sharing, compensation and equity. This would further qualify and justify the independent status of these three concepts, which were linked even though they seemed to create an impression that they were independent. In the next version of the draft provision, the Delegation also wanted to see more on conservation, promotion and preservation of TK vis-à-vis access to TK.

125. The Delegation of Kenya supported the statement made by the African Group and observed that, while WIPO/GRTKF/IC/7/5 outlined the objectives drawn from existing national legal measures and practical experience, the actual international protection was limited to a general perspective for foreign holders of TK. In as far as the document was consistent with the proposal by the African Group at the sixth session it might lack the constitutionality of the core objectives, principles and elements of an international instrument on TK, as articulated by the Group. It noted that this document focused on the need to prevent of misappropriation, but it might have left some gaps on the adequacy of the intended regime. In this regard, since these gaps in the international IP system had been identified as critical to misappropriation, none of the legal remedies proposed involved the use of patents or other IP rules. The Delegation expressed reservations on this and considered that the patent system was critical in supporting the implementation of the principles of prior informed consent and fair and equitable benefit-sharing which had been developed at length in the document. It noted that the Delegation had considered the proposed outline for the draft recommendations for patent authorities in paragraphs 8 and 9 of WIPO/GRTKF/IC/7/8. It suggested that the Secretariat draft a further outline and recommendations incorporating the comments so far received and those yet to be received prior to first January 2005 and circulate the same for comments before the eighth session.

126. The Delegation of Mexico congratulated the Secretariat on the elaboration and the quality of the document presented. The Delegation emphasized its total support to the protection of TK and stated that the current documents contributed legal elements which would help to clarify in detail TK protection and its relation with IP. It considered that the documents were a good basis for the further elaboration of a more specific draft. In this way the Delegation found appropriate the proposal for an expert meeting and supported the proposal for working in the form of written proposals concerning WIPO/GRTKF/IC/7/5 and WIPO/GRTKF/IC/7/6. It supported the proposal for a joint WIPO-UNESCO working group on the protection of intangible cultural heritage. It suggested the use of the term “indigenous peoples” when referring to the question of representation in the Committee and to the stakeholders in TK protection. The Delegation introduced a representative of the indigenous people of Nahuatl of the Estado Guerrero de México. The representative feared that the voice of indigenous peoples, which had been heard over the past ten years or so, would run the risk of being lost among the voices of hundreds of government delegations, although he hoped

that it would be heard and would manage to arouse awareness and sensitivity, so as to provide recognition and acceptance of the fact that greater indigenous participation was necessary on an equal footing, in order to achieve fair and equal representation in the immediate future. He reiterated the appeal by his Government for the term “indigenous peoples” to be used. It was with this term that such peoples wished to be recognized as legal subjects of collective interest, in the same way that such recognition had already been achieved in relation to other international instruments and fora, and not with the exclusive and discriminatory concept of interested parties. The subjects that had been discussed all related to the interests of, and problems faced by, indigenous peoples, since they were all subjects relating to the protection and recognition of the rights, collective TK and heritage not only of indigenous peoples but also of humanity in general. He reiterated that indigenous peoples were the owners of such knowledge and so recognition was required since those peoples were sources of origin and collective knowledge. TK was inalienable and not subject to prescription, as it was passed on from generation to generation and any use, access, study or protection should be based on the prior and informed consent of indigenous peoples. Agreeing with the Delegation of Brazil, he said that the protection of TK could not be subordinated to the IP rights derived from copyright or patents, since IP rights for TK were collective rights which could belong to a whole community or people, or various indigenous peoples, and even went beyond national borders. For example, the Maya indigenous people were present in Mexico and Guatemala and the Yaqui indigenous people lived in Mexico and the United States of America. In that sense, custodianship of such TK was collective and went beyond States’ territorial borders. For that reason, *sui generis* forms of protection should be adopted. TK relating to artistic works, traditional medicine, the use and handling of, and sustainable collective access to, natural resources had been passed on from generation to generation and had contributed to the benefit not only of indigenous peoples but also of nation States, if not of the whole of humanity.

127. The Delegation of Azerbaijan pointed out the high quality of WIPO/GRTKF/IC/7/5 and thanked the Secretariat for preparing the documentation. TK deserved proper legal protection and the creation of a possible future instrument. Minimum standards of protection should be drawn up for TK protection. The provisions contained in WIPO/GRTKF/IC/7/5 were fully acceptable for the drawing up of these minimum standards of legal protection. It stated that the acquisition of TK should be seen as a breach of property rights rather than an act of unfair competition. The approach to TK protection should be the same as to non-traditional forms of IP. For example, the use of the term “right holder” would be appropriate in the document.

128. The Delegation of Switzerland considered that the documents provided the Committee with an excellent overview of the possible policy objectives, core principles as well as policy options and legal elements with regard to the protection of TK. The overview would provide the Committee with an excellent basis in continuing the work on this issue. One highlighted element to be analyzed in depth was the terminology, in particular finding a working definition of the TK terms. The Delegation supported the schedule of further foreseen work in paragraph 44 and would submit further comments in writing prior to February 25, 2004.

129. The Delegation of Panama expressed its satisfaction with the Secretariat for the documents provided under this agenda item, which contained detailed information, provided clarification and put forward valuable opinions which should be borne in mind. Panama had its own inter-institutional group on in which indigenous communities were represented. The group was already working to analyze the documents and would submit its contributions and comments with the aim of making progress in the discussions and maintaining the momentum



required to match the interest in achieving international protection for the three pillars of TK, use of GR and folklore.

130. The Delegation of Algeria endorsed the statement made by African Group. It had often been the case that when tackling the individual elements of an international instrument, the thread running through the work or task in question was lost. It emphasized that the aim of the Committee's work was to produce a binding international instrument to protect TK. In that context, it wished to comment on the principles of flexibility and comprehensiveness as well as compatibility with the systems in force which other delegations had already referred to but in different senses. The holders of TK needed to have recourse to an international legal system for protecting such knowledge and not simply to national systems which could prove to be ineffective as they covered different areas. They would prove ineffective since it was a question of the resources which individual States or indigenous communities did not have but which those people who were responsible for unlawful appropriation often possessed. The challenge was to find the appropriate measure of clear international obligations allowing real international protection for TK on a vertical level. The Delegation foreshadowed further written comments on the draft instrument.

131. The Delegation of Morocco recalled its comments Annex 1 of WIPO/GRTKF/IC/7/3, noting that many also applied to the present document. As regards the international dimension, the Delegation stated that national rules should not be the only basis, since national legislation might be incompatible with international law. Therefore the Committee should concentrate on the international dimension, which would guarantee effectiveness of protection. It agreed with the proposals contained in paragraph 44. It was convinced that this document set out a global vision on elements that might be contained in an international instrument. That international instrument should find a balance between users and right holders. It stressed that there should be regional consultations so as to speed up the process for the protection of TK and the development of international instruments.

132. The representative of the Secretariat of the Convention on Biological Diversity (CBD) recalled that at its last session, the Committee had been briefed on the outcomes of the seventh meeting of the Conference of the Parties (COP) to the CBD had been held in Kuala Lumpur in February 2004, and provided an update on the implementation of those outcomes in the spirit of furthering the respective mandates of the two organizations and of ensuring complementarity and harmonization of their efforts. He recalled that the COP decisions of greatest relevance to the Committee were those on access to GR and benefit-sharing (ABS); TK, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity; and technology transfer and cooperation. At the 2002 World Summit on Sustainable Development, governments had called for action to "negotiate within the framework of the CBD, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources". Following the WSSD's request, the COP had considered the process, nature, scope, elements and modalities of such an international regime on access and benefit-sharing. The COP had decided to mandate the existing Working Group on ABS to negotiate an international regime with the aim of adopting (an) instrument(s) to effectively implement the provisions of Article 15 (on access to GR) and Article 8(j) of the Convention (regarding the protection of TK, innovations and practices of indigenous and local communities relevant to the conservation and sustainable use of biological diversity). The COP had also agreed on the terms of reference for such negotiation and requested the Executive Secretary to make necessary arrangements for the Working Group to be convened twice before the next COP and to report on progress at this meeting.

The COP will meet the next time in the first half of 2006. The COP had specifically invited WIPO - among other organizations - to cooperate with the Working Group on ABS in elaborating the international regime. One of the elements to be considered for inclusion in the international regime, which relates to the work of the WIPO, was the issue of disclosure of origin/source/legal provenance of GR and associated TK in applications for intellectual property rights. WIPO conventions and treaties were also identified as existing instruments and processes, which needed to be examined in the development of the international regime. A number of additional elements were also relevant to the work of this Committee. For a complete overview of these, the representative invited the Committee to consult Decision VII/19, which was available on the website of the Convention (at <http://intranet.biodiv.org/decisions/default.aspx>). He recalled that collaboration had been ongoing between WIPO and the CBD Secretariat, including on the issue of disclosure requirements related to GR and TK in IP applications. In response to the invitation by the sixth meeting of the COP (Decision VI/24C, paragraph 4), a technical study had been prepared by the Committee and had been tabled at the seventh meeting of the COP. He had no doubt that the study would be most useful during the negotiation of the contemplated international regime. In Decision VII/19, Section E, the COP had noted with appreciation the technical study and considered its contents to be helpful in the consideration of IP-related aspects of user measures. Building on this work, the COP, had also requested the Working Group to identify issues related to the disclosure of origin of GR and associated TK in applications for IP rights, including those raised by a proposed international certificate of origin/source/legal provenance, and to transmit the results of this examination to the WIPO and other relevant forums. The COP had further invited WIPO “to examine, and where appropriate address, taking into account the need to ensure that this work is supportive of and does not run counter to the objectives of the Convention, issues regarding the interrelation of access to GR and disclosure requirements in intellectual property rights applications, including, *inter alia*: options for model provisions on proposed disclosure requirements; practical options for intellectual property rights application procedures with regard to the triggers of disclosure requirements; options for incentive measures for applicants; identification of the implications for the functioning of disclosure requirements in various WIPO-administered treaties; and IP-related issues raised by a proposed international certificate of origin/source/legal provenance. The COP had also invited WIPO to regularly provide reports to the CBD on its work, in particular on actions or steps proposed to address the above issues, in order for the CBD to provide additional information to WIPO for its consideration in the spirit of mutual supportiveness. Finally, with regard to ABS, the COP had also invited UNCTAD and other relevant international organizations to examine the issues in, and related to, these matters in a manner supportive of the objectives of the CBD and to prepare a report for submission to the ongoing process of the work of the CBD on access and benefit-sharing. Regarding TK, the main issues considered by the COP included: the composite report on the status and trends regarding the knowledge, innovations and practices of indigenous and local communities relevant to the conservation and sustainable use of biodiversity; the Akwe: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessment regarding developments proposed for to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities; participatory mechanisms for indigenous and local communities; and development of *sui generis* systems for the protection of TK, innovations and practices. Phase II of the Composite Report (Decision VI/10) would focus on the status and trends of TK, regarding retention or loss of TK, as well as the causal factors that underpin these trends. This information may assist WIPO in identifying both protection elements that assist in the retention of TK and elements that contributed to the loss of TK, in order to provide a context for the comprehensive development of an international

regime that would effectively protect TK. In Decision VII/16 on Article 8(j) and related provisions, when addressing the development of *sui generis* systems for the protection of TK, innovations and practices, the COP had recognized the need for continued collaboration with other relevant organizations working on issues related to the protection of TK, innovations and practices of indigenous and local communities, such as WIPO and others to ensure mutual supportiveness and avoid duplication of efforts (Preamble, Section H, Decision VII/16). The SCBD had noted that work on TK was being carried out by at least nine UN agencies including FAO, OHCHR, SCBD, UNCTAD, UNDP, UNESCO, UNPFII, WHO and WIPO, and therefore requested all agencies - and specifically the UNPFII (recalling its mandate to coordinate indigenous issues across the international system) - to increase cooperation and harmonization, and to ensure that this issue was comprehensively addressed with due regard to avoiding overlap and duplication in these agencies' respective efforts. He announced that in its future work, the SCBD would consider non-IP-based *sui generis* protection, including such issues as the recognition of (indigenous) customary law, to further enhance and compliment the work of WIPO, which had taken an IP-based focus, in order to fully explore the potential of, and conditions under which, the use of existing as well as new forms of protection could contribute to achieving the objectives of Article 8 (j) and related provisions of the Convention (taking into account the work of WIPO and the UNPFII (paragraph 6(f), Section H, Decision VII/16). In addition, the COP had invited WIPO to make available to the Working Group on Article 8(j), the results of its work on issues relevant to the implementation of Article 8(j), in particular in relation to the protection of TK and its recognition as prior art (paragraph 11, Section H, Decision VII/16). The COP had also reacted favorably to a recommendation of the UNPFII and requested the Executive Secretary "to consult and coordinate with the Secretariat of the Forum and to collaborate with the UN Agencies and relevant organizations with a view to organizing a workshop on cultural, environmental and social impact assessments based on the Akwé: Kon Voluntary Guidelines and aimed at the further strengthening of the understanding of the link between environment and cultural diversity, with the participation of representatives on indigenous and local communities. The Secretariat was planning to organize such a workshop in the first half of 2005. The workshop might bring together approximately 40 experts, including of course a geographically balanced representation of indigenous and local communities. An invitation would also be issued to WIPO to further its collaboration in matters of mutual interest. Furthermore, the COP had requested the Working Group on ABS and the Working Group on Article 8(j) and Related Provisions, respectively, to explore the need and possible options for indicators for access to GR and in particular for the fair and equitable sharing of benefits arising from the utilization of GR, and associated innovations, knowledge and practices of indigenous and local communities, and for the protection of innovations, knowledge and practices of indigenous and local communities. Although the Working Group on Article 8 (j) was yet to fully consider this issue, the recently held *Ad Hoc* Technical Expert Group on Indicators for assessing progress towards the 2010 biodiversity target, had recommended that the status and trends of linguistic diversity and numbers of speakers of indigenous languages be considered as an indicator for the retention of TK noting the limitations of this singular indicator and acknowledging that other indicators would need to be developed to give a complete picture of the status of TK. Also, relevant to the ongoing work on TK was the Expert Meeting on Traditional Forest-Related Knowledge and the Implementation of Related International Commitments, organized by the International Alliance of Indigenous and Tribal Peoples to be held in Costa Rica from December 6 to 10, 2004. The SCBD looked forward to participating actively in this important and timely meeting. Regarding technology transfer and cooperation, the COP adopted a program of work on technology transfer and cooperation in order to develop meaningful and effective action to enhance the implementation of

Articles 16 and 19 of the Convention. The work program included four program elements: technology assessments, information systems, creating enabling environments, and capacity-building and enhancement. Activities which were most relevant to WIPO were planned under program elements 2 and 3. Programme element 2 addressed the development or strengthening of national, regional and international systems for the gathering and dissemination of relevant information on technology transfer and cooperation and technical and scientific cooperation, including the establishment of effective networks of electronic databases of relevant technology. At the international level, these systems, using the Clearing-house Mechanism, would provide, *inter alia*, information on the availability of relevant technologies, data on patents, models of contracts and associated legislation, identified technology needs of Parties, as well as case studies and best practices on measures and mechanisms to create enabling environments for technology transfer and technology cooperation. Activities established in this context of particular relevance to WIPO included: the development of advice and guidance on the use of new information exchange formats, protocols and standards to enable interoperability among relevant existing systems of national and international information exchange, including technology and patent databases. (Activity 2.1.3); implementation of proposals for enhancing the Clearing-house Mechanism as a central mechanism for exchange of information on technologies, as a core element in its role to promote and facilitate scientific and technical cooperation, for facilitating and promoting technology transfer and for the promotion of technical and scientific cooperation as adopted by the COP, in full synergy with similar initiatives and mechanisms of other Conventions and international organizations (Activity 2.1.4). Creating enabling environments, under Programme Element 3, involved identifying and putting in place institutional, administrative, legislative and policy frameworks conducive to private and public sector technology transfer and cooperation, taking also into account existing work of relevant international organizations and initiatives. Activity 3.1.1 provided for the preparation of technical studies that further explored and analyzed the role of IP rights in technology transfer in the context of the CBD and identified potential options to increase synergy and overcome barriers to technology transfer and cooperation, consistent with paragraph 44 of the Johannesburg Plan of Implementation. The benefits, as well as the cost of IP rights, according to the planned activity, should be fully taken into account. The main actors identified to carry out this activity were the SCBD, WIPO, UNCTAD and other relevant organizations, prior to the eighth meeting of the COP. In conclusion, he noted that the various elements of the most recent decisions of the COP, particularly as regards access and benefit-sharing and TK, called for a continued close cooperation between the CBD Secretariat and WIPO. He stated the view of the CBD Secretariat that the Memorandum of Understanding signed between the Secretariat of the CBD and WIPO in June 2002 certainly provided a good basis for this collaboration between the two organizations. In conclusion he noted that the Secretariat looked forward to a fruitful collaboration during the next biennium.

133. The representative of FAO recognized the high quality of WIPO/GRTKF/IC/7/5, which provided for a mutual respect for the mandates of the various international organizations working in this field. In particular, paragraphs 21 and 33 of Annex II recognized the role of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) in relation to farmers' rights. He noted that farmers' rights were so far only enshrined in one internationally binding treaty, namely the ITPGR, where they were made the responsibility of national governments. He further noted that Principle A.7 provided a savings clause, ensuring that the process in the Committee "shall not be interpreted to effect the interpretation of other relevant processes". This was very important and referred specifically to farmers' rights. He noted that in certain paragraphs of the document, the ITPGR should be mentioned in addition to the CBD. The ITPGR and the CBD were, in fact, the only internationally binding

instruments on access and benefit-sharing for GR. For example, Principle A.5 referred only to the CBD and a reference to the ITPGR should be added.

134. The representative of UNCTAD observed that in preparing these documents the Secretariat had gone into uncharted territory in the field of TK protection and had produced material which made an important advance. She provided an update on related UNCTAD activities, including the publication of a book on TK containing 46 expert papers. UNCTAD had held a Workshop on TK with the Commonwealth Secretariat in order to look at IP and non-IP measures and to match the objectives of protection with the tools of protection. The report and the background papers were on the UNCTAD website. On WIPO/GRTKF/IC/7/5, she pointed out that TK was a multi-faceted issue and required a holistic approach. UNCTAD takes such an approach and brings together preservation, protection and promotion, with a specialization on promotion. She queried whether the objectives in Annex 1 were intended to be objectives that could all be achieved within WIPO or whether it was a general shopping list of objectives at the national level. She felt it would be worthwhile bringing out more the human rights aspect, namely recognizing the rights of indigenous peoples, and recognizing the importance of biodiversity, including agrobiodiversity. She mentioned that 90% of the world's agrobiodiversity had become extinct in the last 5000 years. Referring to the intervention by the Tulalip Tribes, she stated that environmental degradation was putting the entire tribal life at risk and that once the community was gone, so was the TK. The cultural diversity crisis accompanied the biodiversity crisis, including the agrobiodiversity crisis. It had been estimated that 90% of the world's languages and the cultures they embodied would all extinct in this century. She suggested that all these factors should be considered as part of an integrated approach and proposed doing integrated impact assessments of policies and instruments that could be developed in the Committee. Whatever was developed in the Committee should take into account the preservation and promotion of TK.

135. The representative of the Saami Council stated that the document and its Annexes could serve as a basis for further discussions on an international regime on the protection of TK and thanked the WIPO Secretariat for producing such an elaborate document. He believed that some redrafting was necessary in order for the international regime to offer relevant protection for indigenous knowledge. He offered preliminary observations noting that a relevant discussion on an international regime could only be conducted when there was adequate indigenous representation in the Committee. As it appeared unlikely that there would be adequate indigenous participation at the eighth session, he did not believe that an adequate international regime could be adopted at the next WIPO General Assembly, as was suggested in WIPO/GRTKF/IC/7/5. He agreed with the Delegation of Brazil that WIPO/GRTKF/IC/7/5, while aspiring to strike a balance between TK holders and users, aimed too low when it came to protection against misappropriation of TK and seemed generally to address the concerns of TK users more than those of TK holders. In particular, he believed that the section entitled "protection against misappropriation" was too carefully worded when suggesting under what circumstances outsiders may not access or use TK. He underlined that the arguments made by indigenous representatives with regard to the so called public domain under the discussions on TCEs, applied also to TK. Therefore the current text of Principle B8 (on exceptions and limitations) and Principle B.10 (on application in time) were not acceptable to him. Indigenous representatives had stressed concerns with the principles of equity and ABS mechanisms applying to their TK. They had difficulty understanding how the principles of equity and ABS could be applied at the same time as the principle of free, prior and informed consent. In his opinion, these concepts were mutually exclusive. The Saami Council shared the concerns expressed by the African Group and the Delegations of India and Brazil with regard to the second paragraph of Principle A.6, that the

international regime should necessarily be consistent with international IP mechanisms. There was a need to reform existing IPR systems to prevent further misappropriations of TK, and the international regime should not prejudice this work. Furthermore, he objected to the first paragraph of Principle A.6, which stated that nothing in the Principles of the international regime should be interpreted to limit the sovereign rights of States over national resources. It was true that such a principle was expressed in the CBD. However, the CBD had been drafted years ago, and international law in this area had evolved since then. Even though States, in his view, were still entitled to claim sovereignty over natural resources, so were peoples – including indigenous peoples. These two principles had to be balanced against each other. He therefore objected to Principle A6 because it stressed the need to respect one of the principles, but completely fails to even mention the other. He expressed a wish for more emphasis on indigenous customary law in the document. In his view indigenous customary laws were obviously as relevant to the management of TK as to the management of TCEs and he thus reiterated that he did not think that the work on an international regime could proceed very far without a study on customary law. Finally, he supported the proposal made by the Permanent Forum on Indigenous Issues that a workshop be held to address TK in a holistic manner, and called on the WIPO Secretariat to work actively in order to make this workshop happen.

136. The representative of the Foundation for Aboriginal and Islander Research Action (FAIRA) stated that FAIRA was prepared to work with WIPO/GRTKF/IC/7/5 and to elaborate the policy objectives, general guiding principles and specific principles which should apply to TK protection. He supported the recommendation in paragraph 44. FAIRA would respond during the intersessional commenting period. On Principle A.6 of Annex 1 (principle of consistency with existing legal systems), FAIRA could not accept that nothing in the principles would be interpreted to limit the sovereign rights of States over their natural resources and the authority of governments to determine access to GR associated with TK. He referred to UN document E/CN.4/Sub.2/2004/30 ('Indigenous Peoples' Permanent Sovereignty Over Natural Resources'), paragraph 54 of which stated that as a general matter, in the absence of any prior, fair and lawful disposition of the resources, indigenous peoples were the owners of the natural resources on or under their lands and territories. In the case of shared lands and territories, a particularized inquiry was necessary to determine the extent and character of the indigenous ownership interests. On substantive principle B13 (administration and enforcement of protection) the 'appropriate national or regional authorities' to give effect to protection should be considered in the light of the Draft Declaration on the Right of Indigenous Peoples, specifically Articles 19 to 21. These articles set out the right of Indigenous peoples to determine, develop and/or administer their own structures, institutions and programs for decision-making and engage in traditional and economic activities. He added that the concern for safeguards for third party interests, and interests of the general public, should not be used as a means to impair the rights of Indigenous Peoples, and divert attention away from the exercise of the rights of Indigenous Peoples, including their right to reparation and just and fair compensation as set out in Articles 27 and 30 of the Draft Declaration. The representative raised the absence of clear reference in the principles to the responsibilities of States to Indigenous populations. He drew attention to ILO Convention 169 which, after establishing the right of Indigenous Peoples to the full realisation of the social, economic and cultural rights with respect for their social and cultural identity, customs and traditions made it clear in Article 6 that Governments should consult the peoples concerned; establish means to freely participate at all levels of decision-making; and establish means for the full development of their own institutions and initiatives.

137. The representative of FUNA expressed great satisfaction seeing in WIPO/GRTKF/IC/7/5 that principles and policy objectives which were conducive to dealing appropriately with TK. He suggested that, in light of the accumulation of information which had already been produced, the Committee could achieve a basic instrument which would contain these provisions and information. This information should be handed out to the different Committee participants, including governmental delegations, intergovernmental representatives and NGOs, as well as to any party that was interested in these topics. This would ensure that by the next meeting, all Committee participants had drawn up a report on the work within the respective countries and that all stakeholders would be involved. He was fully confident that there would be a good will on everyone's part and that would in itself achieve a very substantial objective which is to involve all concerned persons. He noted that it was not an economic problem but a cultural issue. As a cultural issue, it would take the Committee time to achieve evolution and progress. He questioned, how could the Committee do all this? How could it achieve such a demanding outcome? It would have to set up dialogues, exchange opinions and make indigenous and local communities see that here was a Committee which was really concerned with this topic of TK. Only in this way would it be possible to achieve the legal structure that the Committee had so strongly wanted to achieve, allowing it to be regulated in an institutional and organic way. He stated that he would like Annex I to become an instrument.

138. The representative of the Third World Network (TWN) recalled the main purpose of the Committee, namely to respond to the public outcry against the unethical phenomenon of biopiracy. He queried whether the Committee had succeeded in the past years to stop biopiracy and pondered that the results were meager because biopiracy continued unabated worldwide. He provided a list of examples of biopiracy cases. This was one reason why some delegations had expressed concern that somehow the Committee has not been addressing some problems. Key points included: whether TK and folklore needed to be protected through a binding international instrument; if so, what should be the nature of such an instrument; should WIPO be the forum for developing such an instrument. Instruments should be developed for the restrictions that needed to be imposed on the patenting of life forms, for disciplines on disclosure requirements in patent applications regarding the origin of utilized biological resources and TK, and for the provision of support to indigenous and local communities whose resources had been misappropriated.

139. The representative of the Kaska Dena Council thanked the Secretariat for the thoughtful preparation of the documents and appreciated the balancing act that was part of the documents. He believed that the document provided a foundation for the Committee's future. With that in mind, he supported paragraph 44 and considered it most unfortunate that there would not be a working level process, which would have given the Committee an opportunity to develop the draft provisions outside the restrictions of plenary procedures. Such a process would have provided a conduit for further constructive review and may have increased indigenous peoples' participatory rights. Without such a process there was a heavier burden to find other mechanisms to ensure that indigenous peoples' contributions would meet the prescribed deadlines. He noted that at the same time this would create an opportunity for voluntary donors to consider facilitating a consultative forum for the analysis and development of consensus comments by indigenous peoples. The Committee would benefit from the collective comments of indigenous peoples. He called upon Member States, intergovernmental organizations and non-governmental organizations to consider facilitating such a meeting. The Kaska Dena Council considered that greater emphasis was needed in the draft provisions on the recognition of indigenous peoples' customary laws. Any regime that seeks to protect and preserve TK must place equal emphasis on indigenous and

non-indigenous sources of law. With strong evidence of customary protocols, an indigenous group could argue that they should form an integral component of any national or international regime for TK protection. He noted the case study on customary law that the Secretariat had been instructed to conduct was still outstanding due to heavy resource constraints upon the Secretariat. This study was a priority. Its absence left the work on TK protection only half complete. The present document was half full. Its references to customary laws (A.1, A.8, B.5 and B.1) had qualifiers, such as “as appropriate”. He rejected this qualifying language. Such discretionary obligations were unsuitable for voluntary instruments. He also queried B.12 concerning consistency with the existing IP system. Referring back to the WIPO Fact-finding Missions on IP and TK, he recalled the findings that the IP system was failing to adequately protect TK. A study produced by Industry Canada had reached a similar conclusion.

140. The representative of the Call of the Earth (COE) advised that the COE was an independent initiative on IP and TK, integrating indigenous experts from different geographical regions around the world. He commented on the Committee, which was principally aiming to establish directives on IP for access to GR and equitable benefit-sharing and for the protection of TK in the form of policy options and legal elements. Certain items had particular relevance for the world’s indigenous people. TK could not be isolated from the GR, TCEs and the context in which they had been developed: this necessitated an integral view in the treatment at international law of TK connected with indigenous peoples, including the cultural identity and the indigenous spirituality, lands and territories. TK was part of the ‘cosmic vision’ and survival of indigenous peoples. Finding a unique “model” for the protection of TK was useless, and that, in accordance with the material prepared by WIPO, it was preferable to adopt an integral, comprehensive and flexible approach to which indigenous peoples felt most close. Such a comprehensive and flexible approach would have to recognize the own qualities of the TK, such as its intergenerational nature, collective property, permanent innovation and its constituted value for indigenous peoples. He requested the Committee to strive to identify best strategies for full and effective participation of the indigenous people and at call for the Voluntary Contribution Fund to be established for participation of indigenous people, in view of the future work of the Committee on its mandate in 2005.

141. The representative of the Inuit Circumpolar Conference (ICC) recorded thanks for support of her participation from the Government of Canada. She noted that Principle A.6 did not agree with the provision as currently worded. In Canada the authority of governments to determine access to GR was limited as a result of land claims agreements, and was vested directly in the land claims bodies. Principle B.4 on eligibility of protection should be extended to say: “Protection should be extended at least to that traditional knowledge which is (v) associated with and utilized by environmental processes.” In Principle B.13 should be extended to say: “(vii) ensuring that TK obtained by researchers and scientists is accurately interpreted”. The competent authority which was referred to under Principle B.13 should comprise a proportionate number of indigenous peoples.

142. The representative of the Tupaj Amaru said that the legal frameworks and fundamental principles in WIPO/GRTKF/IC/7/5 merited an objective and constructive analysis. It asked what was meant by value? What was the meaning of value? In the view of aboriginal communities, the category of value was not necessarily one generating commercial and monetary interest but TK incarnated spiritual value, the soul and the memory of historical communities. In terms of promoting respect, the market economy was driven by profitability and the most important gain from capital was not a moral one nor was the respect for human



dignity recognized. The use of moral and economic rights was therefore inappropriate. Undue use implied biopiracy at the national and international levels and it would be therefore more logical to use the concept of unlawful use or appropriation, of the unprotected heritage. The representative asked between whom exactly fairness existed. Brazil had said that bioexploration companies gained fabulous wealth from TK, while indigenous peoples were condemned to extreme poverty. In terms of duration, the IP rights in TK were inalienable, irrenounceable and not subject to prescription in time and space, because they were born, developed and died with historical communities, as provided in the document. As regards secrecy, a great deal of TK and indigenous wisdom were secret and confidential in nature. Many traffickers disguised as anthropologists had violated spiritual principles. As to prior consent, where that principle was not respected, the granting of patents should be prohibited. The only way to protect TK was via a binding international instrument in the form of a code of conduct to regulate effectively access to TK.

143. The Delegation of Brazil picked up on the African Group suggestion that, in addition to preparing revised drafts of the principles and objectives, the Secretariat should also prepare and disseminate a compilation of the drafting suggestions submitted by Committee members.

144. The Delegation of Bangladesh voiced its opinion that the process set out in the documents were welcome because they were practical and pragmatic. In Principles A.3 and B.5 there should be clear allowance for both individual or collective ownership or entitlement in TK. The beneficiaries of protection in Principles A.3 and B.5 should be defined in such a way that the entitlement for protection is vested both in individuals and communities. Options for the use of terms such as “TK holders” and “communities” should be elaborated to ensure that countries retain wide flexibility in interpreting them. In light of the wide diversity of circumstances and custodianship patterns, it suggested that in internationally agreed instruments an internationally agreed definition of terms such as “TK holder” or “community” would not be necessary. Instead the interpretation of those terms should be left to national laws. Regarding Principles A.5, B.1 B.3(iv) and B.6 it suggested that consideration needed to be given to where benefits would go under the Principles concerning equity and benefit-sharing. This might be an issue best left to national legislation but it should nevertheless be highlighted in the document as something that countries needed to address. The Delegation suggested adding specific substantive provisions for the protection of codified systems of traditional medicine. All the five knowledge systems, which had been recognized by the WHO as being distinct from other forms of traditional medicine because the constituted codified systems, were located in Asian countries. These were Chinese traditional medicine, the Goryo system and the Ayurveda, Siddha and Unani systems. Such codified systems had distinctive features and characteristics, which required a specific principle or principles of protection.

145. The Delegation of Zambia invited Committee members and other donors to consider providing financial support to the convening of expert-level consultative processes and requested information on the costs of convening such expert meetings.

146. The representative of UNCTAD informed that when budgeting for such expert meetings, UNCTAD normally planned for a budget of about \$50,000 to \$80,000.

147. The representative of ARIPO stressed the usefulness of WIPO/GRTKF/IC/7/5 and WIPO/GRTKF/IC/7/6 and welcomed the draft policy objectives and principles. Annex I was a useful document for further discussions and norm-setting. The representative recalled ARIPO’s statement at the sixth session of the Committee, favoring an approach which would

accelerate the process of developing international instruments in view of the increasing misappropriation and on-exploitation. During the ninth session of the Council of Ministers of ARIPO in August 2004, the Ministers had adopted an integrated policy framework for the protection of TK within ARIPO Member States. That framework provided a comprehensive approach, based on shared common objectives and principles that would enable ARIPO to develop an appropriate regional legislative framework with the view to enabling TK holders to benefit from their TK and ensure the promotion of traditional creativity and know-how as well as wider use and recognition of the knowledge. For this reason ARIPO concurred with the structure and approach set out in WIPO/GRTKF/IC/7/5, particularly with Annex I as a basis for the future outcome of the Committee's work. He expressed ARIPO's view that these objectives and principles should not be open-ended in determining the outcome of the Committee's work but should proceed towards international standards. Those international standards should not only enhance international protection, but also avoid free riding, misappropriation and reduce distortions and impediments to international trade of products and services incorporating TK. In order for the Committee to achieve this outcome, it would be essential for the next version of the overview of policy objectives and principles to clearly distinguish between objectives and principles that were crucial for TK protection from those that might help the debate but were not crucial. The representative suggested that the incorporation and elaboration of the principle of affordability in terms of cost of protection could be included in the document. This was necessary because many TK holders did not have the necessary means to pay fees for seeking protection of their knowledge. The PCT was cited as a case in point. In conclusion, ARIPO associated itself with the statement made by the African Group that the draft policy and objective should not be seen as an end in itself but should lead to the development of an international instrument

148. The representative of the World Bank shared some general observations related to traditional or indigenous knowledge and what the World Bank is doing in this area. The World Bank's experience in helping countries to alleviate poverty have had provided several important lessons. First, although local communities may be poor materially they are often very rich in the indigenous knowledge systems that helps sustain their livelihoods. Secondly, TK is an under-recognized and underutilized resource, yet it has the potential to make a significant contribution to achieving the millennium development goals. Thirdly, utilizing TK in development programs helps empower communities, promotes ownership and enables them to better manage the activities that impact their lives. In 1998 the World Bank started a program on indigenous knowledge for development to help improve the quality of development programs supported by the bank and by helping empowering local communities. Two weeks previously, Dar es Salaam, United Republic of Tanzania, the President of the United Republic of Tanzania had launched a new World Bank publication entitled 'Indigenous Knowledge: Local Pathways to Global Development', to commemorate five years of the Bank's work in this area. (Information on the program and the book in English, French and Swahili were available at the World Bank website.) The publication gave voice to over 60 development practitioners who presented powerful cases to demonstrate how local communities empower themselves to manage their own development process. For example, it showed how TK systems had helped health workers in Uganda reduce maternal mortality by about 50% within three years, and how traditional healers in the United Republic of Tanzania helped reduced pain and suffering for over 4000 HIV patients who lived longer as a result. The book envisaged that in the next five years, learning from indigenous knowledge systems and incorporating successful practices into development programs would become the standard rather than the exception it is at present. To help realize this vision, the publication proposed a six-point action agenda to build on the progress to date in promoting and using indigenous knowledge. The six action areas included scaling up of successful practices that could help

achieve the millennium development goals enhancing the capacity of local communities to develop, share and apply their indigenous knowledge systems by among other things developing national IK strategies incorporating them into country poverty reduction programs. Fostering south - south knowledge and learning exchanges facilitated community exchanges and building professional associations of indigenous practitioners. Another area was developing tools for the validation and protection of indigenous knowledge, which was the subject of this Committee. A results framework was designed for measuring the impact of exchanges on the development process. An innovation fund was established to promote successful indigenous knowledge practices, and a global indigenous knowledge conference was organized to galvanize the support of the development partners for the above agenda. The challenge posed by the protection of indigenous knowledge through the use of IP was cited in the book as “Ignorance, limited means, inadequate incentives and weakness of the underlying property rights as hindrances that prevented Africans from publicizing and sharing in their indigenous innovations”. The representative called for the global intellectual property rights regime to be reappraised to allow communities and countries to lay claims to their intrinsic knowledge systems. As indicated in the World Bank’s publication, more innovative and more binding approaches need to be developed to address the issues of IPR in the case of TK. The deliberation of the Committee was an important step in that direction. The World Bank was grateful to WIPO for leading this effort. The World Bank, for its part, had helped document and disseminate TK examples through its database of over 300 cases. Most of the information contained in this database had been in the public domain.

### *Conclusions*

149. The Committee took note of the detailed comments and drafting suggestions made on the draft objectives and core principles as set out in Annex I of document WIPO/GRTKF/IC/7/5; called for further comments on the draft objectives and core principles, including specific suggestions for wording, before February 25, 2005; and requested the Secretariat to produce, on the basis of that Annex and all subsequent inputs and comments from Committee participants, a further draft of objectives and principles for the protection of TK for consideration by the Committee at its eighth session.

150. The Committee noted that all comments on the objectives and principles received within the agreed timeframe would be posted on the WIPO website as received and would also be included in a compilation, to be distributed with the documents for the eighth session.

151. The Committee also noted the suggested outline of policy options and legal mechanisms for protection set out in Annex I of document WIPO/GRTKF/IC/7/6, and noted the comments made during its current session on that document. It agreed that this material should be updated as appropriate in the light of revisions to the draft objectives and core principles, and in the light of comments received.

152. The Committee took note of the update on technical standards and issues concerning recorded or registered traditional knowledge provided in document WIPO/GRTKF/IC/7/7.

*Recognition of traditional knowledge in the patent system*

153. The Secretariat introduced documents WIPO/GRTKF/IC/7/9, WIPO/GRTKF/IC/7/9 Add, and questionnaire WIPO/GRTKF/IC/Q.5, advising that compilations of the responses so far received to the questionnaire had been circulated to Committee participants.

154. The Delegation of Japan recommended that Member States which had not yet replied to the questionnaire submit their responses so as to deepen mutual recognition. It stated that, as for future work, the nature of the recommendation should be kept in mind. Namely, the recommendation was voluntary one, the content of which each Member may respond to consideration of present situation in their country. The Delegation stated that when considering the examination of applications related to TK in general, it was necessary for the patent office to have reliable database on TK. It gave the example of a case where there might be prior art in the field of TK at the time of examination of the application. From a practical point of view, it was burdensome as well as unrealistic for examiners, if the examiner was required to examine the application beyond the daily practice required by the examiner. It believed that the same and general examination practice should be applied to the examination in the field of TK. It was not clear what “special element” meant in paragraph 10. The examiner should examine the application in the same way, irrespective of the field of technique which it belonged to. It requested clarification of “analysis” in paragraph 10.

155. The Delegation of the Netherlands on behalf of the EU and its 25 Member States stated that the responses to the questionnaire should provide the Committee with more useful empirical evidence. It added that the analysis of the responses might also serve as a basis for the development of the draft recommendations on taking account of TK during prior art searches and examinations. It commented that such recommendations should in particular be useful for assisting patent authorities in their work. It should improve the understanding of the context of TK and the quality of the procedures, in particular with regard to novelty and obviousness. It finally supported the further development of the draft recommendations.

156. The Delegation of New Zealand supported the development of recommendations for patent authorities on how to take greater account of TK during patent search and examination. The development of guidelines with a focus on procedures, training and awareness, cooperation between patent offices and guidance for policy makers in the review of national patent systems could make a very practical difference. Cooperation between patent offices would be particularly useful for small patent offices such as those in New Zealand and suggested that the next draft could focus a little more on the special circumstances of these small offices. The Delegation was also very interested by the idea of training being provided by TK holders and stated that in the trademarks context, New Zealand’s Maori Trademark Advisory Committee was developing training resources for trademark examiners. This was working very well. The Delegation therefore supported the completion of another draft for consideration at the eighth session and the call for further responses to the questionnaire. The proposed annex for supplementary material for background training and awareness raising (paragraph 11) was a good idea. The Delegation had previously shared with the Committee the New Zealand guidelines for examination of patent applications that may be of significance to the Maori. It also noted that the proposed guidelines would complement New Zealand’s policy to amend its Patent Act 1953 and establish a Maori Consultative Committee, which would, among other things, provide assistance and determinations about Maori TK as prior art

and determining the novelty or inventiveness of a claimed invention. Depending on the respect of timing and guidelines and the Patents Bill, New Zealand would be happy to contribute in any policies or terms of reference developed concerning the operation of the Maori Consultative Committee.

157. The Delegation of Algeria stated that the implementation of this process with the traditional examination system probably needed further training for the examiners. In order to guarantee the effectiveness of such a measure, cooperation in all its forms should be encouraged, particularly by establishing a training program for examiners who would be dealing with TK. This should be brought out more clearly in the document. There should also be sufficient databases in this area so as to be able to establish reports on prior art. It concluded that WIPO and the competent bodies in this area should cooperate.

158. The Delegation of Romania approved the objectives and recommendations established in WIPO/GRTKF/IC/7/8. It supported the establishment of some clear principles, which would increase the probability that granted patents be valid from the perspective of TK and GR. The Delegation had answered in detail to the questionnaire annexed in the document. Romania had recently made important amendments to the Patent Law and completely changed its Implementing Regulations in order to bring them in line with the European Patent Convention to which it had in 2003. On this occasion, a provision was introduced in the Implementing Regulations stating that “when the prior art also includes TK, the description of the invention will compromise explicit indications concerning it, including its source, if known”. Having a patent office with a long tradition in substantive examination, Romania would welcome any progress made by the Committee in advising patent offices on how to approach the question of TK and GR.

159. The Delegation of the United States of America generally supported the outlines for draft recommendations for patent authorities as contained in WIPO/GRTKF/IC/7/8. It supported the proposal contained in the document to work towards the completion of a full draft for consideration at the Committee’s eighth session. With respect to paragraph 10(iv), it noted that a patent examiner is to apply the relevant level of skill in the art of the claimed invention. This level of skill was not necessarily the same level of skill that is reflected in relevant documents and publications that may disclose TK. The Delegation was concerned that the wrong standard was being suggested here. Like Japan, it did not understand what was meant in paragraph 10(v). If the objective of this paragraph were to create a new requirement for patentability, then it would not support it. It added that the novelty and inventiveness requirements were existing means of taking prior art, including TK, into account. It believed that patent law harmonization would be the best means to improve these standards to the extent that this was necessary. Regarding paragraph 10(vii), it pointed out that the PCT MIA was considering minimum documentation for international search authorities. As it had indicated in the MIA, they believed public domain sources of TK and information on GR, including journals notified to the Committee should be searched. It added that there should be access to databases such as those identified in the WIPO IPDL. It was regrettable that a large number of periodicals could not be effectively searched individually, even if they were in text searchable format. It supported the Delegation of Japan in its call for further responses to be submitted on the questionnaire on recognition of TK and GR in the patent system prior to January 31, 2005. This important questionnaire would help the Committee to better understand the legal and practical aspects to the recognition of prior art and may help to develop draft recommendations for taking TK into account during search and examination.

160. The Delegation of Switzerland supported the “Outline of Draft Recommendation for Patent Authorities” and the tasks proposed in paragraph 13. With regard to the “Outline of practical issues relating to searching for TK as prior art”, it referred to the proposals by Switzerland for the establishment of an international Internet portal for TK, which would link electronically existing local and national databases on TK and facilitate access by patent authorities to TK stored in such databases (details were provided in WTO document IP/C/W/400 Rev.1, paragraphs 30 to 32). In the context of recommendations for patent authorities with regard to the recognition of TK within the patent system, it added that a number of WIPO Member States did not examine the conditions of novelty and inventive step when examining patent applications. This should be expressly reflected in the draft recommendations.

161. The Delegation of Canada considered WIPO/GRTKF/IC/7/8 to be useful and supported the Secretariat continuing its work on the various elements of the document. It would seek to provide the Secretariat with the response to the questionnaire as soon as possible. The Delegation supported the Secretariat in developing further for the consideration of the Committee at the eighth session its current outline on draft recommendations for patent authorities. The applicability and utility of any future outcomes in this area would depend upon their practicality, reasonableness and consistency with the existing national IP frameworks. In Canada, for example, TK is already included or recognized as prior art within the patent regime. Any future revisions of the draft recommendations should reflect this relevant reality. The Delegation also encouraged the Secretariat to take into account the work of other WIPO committees where such work related to similar issues, was complementary and its consideration by the Committee could avoid duplication of resources.

162. The Delegation of China believed that WIPO/GRTKF/IC/7/8 raised important issues. The patent agencies of Member States should develop their own patent process to ensure TK to be taken into account in the patent process and to strengthen the relationship between TK and patent efficiency. At present, China was enhancing its studies and practice in this issue. This work included the further improvement of Chinese Medicine patent documentation search database and the strengthening of patent examiners and the related personnel aiming at raising awareness of TK protection and providing services to TK holders. It expressed interest in exchanging experiences and thoughts with other Committee members, and would respond to the questionnaire before January 31, 2005. At present, recognition of TK within the patent system not only related to the national patent system but also the international patent system. Part of the work of the Committee should be further linked to issues of ongoing discussions such as the PCT reform in order to link TK protection to existing patent system as well as to protect TK in a comprehensive and efficient manner.

163. The Delegation of Brazil stated that it was currently in the process of preparing its responses to the questionnaire which it intended to submit by the proposed deadline. The exercise being proposed to the Committee (the questionnaire and the elaboration of recommendations) would ultimately turn out to have a rather limited significance in addressing the concerns about misappropriation and biopiracy that had been raised by TK holders and custodians in diverse countries. The preparation of the suggested recommendations simply put would not seem to constitute a sufficiently ambitious and effective endeavor. As the document stated, this exercise would take place within the existing bounds of the applicable patent law in different jurisdictions. He took issue with the manner in which the introduction contained in paragraphs 4 to 6 framed the issue of defensive protection. He believed that these paragraphs employed the term defensive protection in a very narrow sense which seemed to suggest that defensive protection required public

disclosure of TK through, for example, its documentation or its inclusion in databases or inventories. The document seemed to suggest that the only alternative to this kind of narrowly defined defensive protection would be the active assertion of rights on TK through positive protection. The document therefore almost seemed to disregard the fact that the developing countries who had been supportive of the protection of TK had in fact been employing the term defensive protection in a broader sense so as to refer to other measures such as the inclusion in patent laws of the requirement for the disclosure of origin of GR and associated TK, that would not necessarily require or involve the public disclosure of TK. In this regard, it remained convinced that a mandatory disclosure of origin and prior informed consent requirement to be implemented by patent offices in all jurisdictions would constitute a measure of great importance in promoting international cooperation with a view to ensuring the quality of search and examination procedures and thus preventing the granting of bad patents. Defensive strategies should not pose too large a burden on the shoulders of TK holders many of whom were rather resource poor. If a fundamental concern was ensuring that the patent system operated in an equitable manner, then it was only appropriate that a reasonable burden to take proper account of TK in examination of patent applications be placed on the shoulders of patent applicants and patent offices in the developed countries. There were concerns in promoting international cooperation in this field to prevent the granting of patents for claimed inventions that did not fulfill the patentability criteria. With respect to the proposal of recommendations on coordination, consultation and cooperation, the Delegation expressed reservations in respect of the approach proposed in the document particularly as it related to the nature of the modalities for cooperation between patent offices. It did not believe that the purpose here was to centralize search and examination but merely to ensure the quality of the examination in different jurisdictions. It concluded that it would find it difficult to agree to a modality for cooperation between offices in this regard that would go beyond a purely consultative and non-binding framework.

164. The representative of ARIPO indicated that ARIPO would endeavor to complete and forward the questionnaire before the deadline. He considered that the context within which the outline of the draft recommendations for patent authorities had been proposed did not indicate the purpose for which the recommendations would be put to use or the intended beneficiaries. ARIPO's understanding was that the draft recommendations were aimed at measures that would enable patent offices to prevent the acquisition of IP rights over TK or GR by parties other than customary custodians of the knowledge or resources as stated in the document. He believed that the difficulties faced by patent offices, especially in developed countries, in respect of assessment of TK-based subject matter claimed in patent applications was well-structured, easily retrievable and reliable TK-based information that could form the technical basis for the assessment of patentability of patent applications. Any effort towards the determination of operational matters as they related to sufficiency of disclosure and prior art considerations should not be carried out in isolation but must take into account the revision and follow-up of the relevant discussions in other WIPO Committees, in particular those dealing with patent law. He queried whether the draft recommendations, to be developed for consideration by the Committee at its eighth session, would synthesize the responses received from patent offices, and would be a mere compilation that would not lead the Committee to prevent false claims in patent applications. He referred to recent developments in the Standing Committee on the Law of Patents and requested clarification to what extent the outcomes of this exercise would backstop the examination guidelines of patent offices. He suggested that the recommendations could be put together with the Toolkit on IP management when documenting TK and GRs. This, he suggested, would be to the benefit of patent examiners who had little exposure to TK systems. ARIPO and its Member States had taken proactive steps to develop customized TK Digital Libraries, which were

based on public domain TK in the first instance. In the view of ARIPO, the establishment of a database of public domain TK would ensure that ARIPO establishes a systematized and well-structured documentation as a searchable prior art tool for the substantive examination of industrial property titles, such as patents and utility models. Such a defensive measure did not seek to replace the need for an appropriate positive protection, but rather to serve as a tool to counter false claims to TK. He expressed ARIPO's gratitude to China and India for assisting with the development of TK databases. A prototype of a TK database had been developed. The Committee had made considerable progress and the Committee's substantive mandate had been broadened to include the development of an international instrument or instruments. ARIPO called on the Committee to put into place within the biennium an enabling legislative framework to stimulate further creativity, recognition and protection of all TK holders.

165. The Delegation of India stated that in the absence of an international agreement on prior informed consent (PIC) and disclosure, it did not believe that clarifying the parameters of the current void in the existing global regime could be a substitute for addressing the real issues. It observed that many of the concerns over TK were related to GR and a way to address this issue could only emerge from the issue of prior informed consent and mandatory disclosure requirements. While the Delegation had no difficulty with the contents of this document, it wished to point out that the main work was still to begin and would need to center around the questions of disclosure and PIC.

166. The Delegation of Turkey believed that, relating to WIPO/GRTKF/IC/7/8 (paragraph 4 (v)), search and examination reports should take account of TK and GR. A mechanism relating to TK and GR like the clearinghouse mechanism in the CBD should be established. The problem was whether patent examiners had ordinary skill in the art or not in TK associated with GR. The holder of TK may be accepted as the person having ordinary skill in the art. In this context, a pool of experts in TK and GR, including TK holders, may be requested to assist in the search and examination of the patent application.

167. The Delegation of the Russian Federation suggested that the work on drawing up recommendations should be pursued. It considered the existing criteria of patentability to be appropriate but the problem was that there was not enough information. It had worked on the issue of the list of TK and felt that TK should be part of the PCT Minimum Documentation on prior art. It considered it important to have a database of disclosed TK to examine patent applications.

168. The Delegation of Egypt recalled the statement of the African Group and stressed the fundamental importance of making the necessary changes in the patent system which would make it supportive of TK protection, in particular the prohibition of patents on life forms and the establishment of disclosure requirements in patent applications. The document was useful but fell short of addressing the issue of misappropriation of TK that was linked to GR. It therefore did not think that it was a substitute for the other measures of TK protection. It felt that there was not sufficient emphasis in the document that these recommendations were of particular importance for patent offices in developed countries. Since most of the patenting activity was occurring in developed countries, it would be necessary for these offices to assume their responsibility in this fight against misappropriation.

169. The Delegation of Trinidad and Tobago believed that the proposed recommendations would go a long way to improving the work of patent offices in general, particularly as that work involved patent applications that made use of ideas and concepts rooted in the



knowledge base of Indigenous and other cultural communities. It strongly supported these developments. It added that, with direct reference to issues which had been raised earlier in respect of recent developments with the granting of patents that had some relationship to its own national musical instrument, the steelpan, it particularly welcomed the recommendations contained in paragraph 10(v), WIPO/GRTKF/IC/7/8. This recommendation encouraged patent authorities and patent examiners to weigh fully the traditional context when considering the non-obviousness of subject inventions; and encouraged patent examiners to consider an approach to applying the test of the person skilled in the art with due reference to the context of specific elements of TK. Likewise, it applauded the recommendation at paragraph 9 on page 3 for assisting patent authorities to review and develop procedures that ensure relevant TK would be taken account of during patent procedures, thus potentially improving the likelihood of validity of granted patents; and providing a training and awareness tool for patent examiners, patent practitioners, researchers and innovative enterprises, community representatives, civil society representatives and other third parties concerned with the validity of granted patents. In this regard, it informed the Committee that Trinidad and Tobago had already offered to the United States Trademark and Patent Office to be available to co-operate with them in instances in which they may have to make determinations in respect of patent applications dealing with steelpan technology. It added that they were ready to co-operate in similar fashion with all other patent offices worldwide whenever the need for close consultation was necessary. It added that, between 1982 and 2004, four patents and one utility model had been granted by IP offices in the United States of America, Canada and Germany for various “improvements” to the steelpan: these titles included DE 20013648U entitled “Musical Instrument formed as steel drum has outer ring of tone fields representing octave from middle C to upper C and an inner so called center area containing five tone fields.” (Utility Model, Germany); CA 1209831 “Musical Drums” (Canada); US 5,973,247 “Portable Steel Drums and Carrier” (US); US 6,212,772 “Production of a Caribbean Steel Pan” (US); and US 6,750,386 “Cycle of Fifths Steel Pan” (US). The Delegation believed that if those Offices had been aware of the documentation and oral histories that existed in its local cultural communities about the origins of the steelpan and recent developments impacting state-of-the-art steelpan technologies, the above patents may not have been granted. In light of the foregoing, therefore, it welcomed these developments and supported the recommendations presented by the Secretariat. In particular, it welcomed the prospects of a completed full draft being presented for consideration at the Committee’s eighth Session.

170. The Delegation of Egypt considered the present document to be useful, although it did not deal with an essential item in making the patent system supportive of TK protection. Nevertheless, it was a useful step forward and therefore Egypt had provided its answers to the Questionnaire, based on the priority it gives to the topic of TK in the Egyptian legislation. In Article 13 it dealt with the importance that applications which dealt with biological material or TK contained information on the origin of the material and on how the patent applicant had obtained this information. It had also encouraged other countries to present their answers to Questionnaire WIPO/GRTKF/IC/Q.5.

171. The Delegation of Bolivia stated its understanding that the present exercise was to identify the gaps and deficiencies of the patent system as to the disclosure of origin, *inter alia*. It should therefore allow the Committee to reach its objective of developing an international legally binding *sui generis* system. As to paragraph 10(viii) the Delegation found it hard to accept that point since it did not see how it could share information on TK if there was no system to protect TK.

172. The representative of the Third World Network thought that it was a good objective for the document to deal with the recognition of TK in the patent system. Two of the important issues were to prohibit patents on life forms and naturally occurring GRs and international arrangements relating to PIC and disclosure. He recalled that there were many cases of misappropriation of TK, referring to specific examples. He considered it useful that the WIPO document also included how to address cases of misappropriation that had already occurred and where patents were already granted. The questions to be addressed were how this could be done within national patent systems and internationally. He noted that there were some NGOs that had specialized on finding such cases of misappropriation, often by going into WIPO patent databases, but it should not be left to NGOs alone because they did not have the systematic capacity to do this. He requested the Secretariat to include within the paper recommendations for correcting cases of misappropriation that had already occurred.

### *Conclusions*

173. The Committee considered the suggested outline for draft recommendations for patent authorities set out in document WIPO/GRTKF/IC/7/8 and agreed that a full draft should be developed for consideration at the Committee's eighth session. The Committee also called for further responses to be submitted to WIPO/GRTKF/IC/Q.5 prior to January 31, 2005.

## AGENDA ITEM 7: GENETIC RESOURCES

174. At the request of the Chair, the Secretariat introduced WIPO/GRTKF/IC/7/9, noting that it was a modest revision of a document from the sixth session, WIPO/GRTKF/IC/6/5, which in turn expressed the principles adopted by the Committee in earlier sessions. The Secretariat also subsequently introduced WIPO/GRTKF/IC/7/10, which provided an update to the Committee on the decisions of the WIPO General Assembly on the question that the Committee had earlier referred to it, namely the nature of a response to the invitation of the CBD COP for WIPO to examine and, where appropriate, address certain matters concerning GR and disclosure in applications for IP rights.

175. The Delegation of India noted that WIPO/GRTKF/IC/7/9 approached the question of access to GR and associated TK from a perspective that bore little relationship to the core responsibility of WIPO, namely international IP law. Instead of approaching the issue from the IP-law angle, it approached it from the perspective of contract law. The Delegation noted the high regard it held for the legal skills of the Secretariat, but explained that in a world increasingly dominated by specialists, WIPO's expertise lay elsewhere – in the area of international IP law, not national contract law. If, indeed, the solution to the problem before the Committee lay in establishing good contractual relationships it would have to be found elsewhere, perhaps in the CBD, where the issue originated, and where it is being considered more holistically. Instead of framing the issue in terms of what needs to be done to make IP laws supportive of a fair and equitable access and benefit sharing regime, WIPO/GRTKF/IC/7/9 approaches it from the opposite end. It appears to have turned the issue on its head, by asking instead, how we might ensure that access and benefit sharing concerns do not impact adversely on the global IP system. Acceptance and endorsement of this approach would have the Secretariat working on finding solutions based on private contractual agreements between the provider of the genetic resource and associated TK, and the prospective user of that resource and knowledge. Given the asymmetry of the power relationship between the two parties, there can be little doubt about what the inevitable

outcome would be. However carefully any model contract is drafted, however ardently such contracts try to correct the huge imbalance between the provider and the user, such an approach simply cannot lead to anything even remotely resembling a fair and equitable regime. Laws regulating private contractual relationships, combined with carefully crafted model contracts cannot, therefore be the solutions. The Delegation explained that a solution can only be found in a legally binding universal instrument which balances the rights of IP holders against a concomitant obligation on their part to submit to clearly defined, mandatory requirements relating to GR and associated TK. With its vast experience in the field of international IP law, the Secretariat, more than any other body, would surely appreciate the importance of an integrated approach to rights and obligations. The Delegation expressed surprise, therefore, that the Secretariat would propose a system where the obligations of IP holders in relation to GR flow entirely from national laws regulating private, voluntary contracts between giant corporations on the one side and miniscule traditional communities on the other, while the rights of the former flow from a binding public international IP regime. The Delegation urged the Committee to imagine what would happen if such an approach were adopted in the field of labor relations, where there were no labor laws, no national minimum wage, where trade unions were proscribed, where contracts were “freely” arrived at between a monolithic management and individual workers. That is, essentially, what private contractual rights would do for the owners of GR when they deal with the giant corporations. The Delegation expressed its view that work in WIPO must focus on the misappropriation of GR in the international IP system, particularly the patent system. The Delegation had earlier pointed out that disclosure was essential in patent applications for a full description of how an invention came about. Disclosure of GR should be required in clarifying prior art relevant to any inventive step. A number of cases have been documented where patents have been issued with respect to GR and known products and processes used by traditional and local communities for many years, indeed for centuries. The Delegation emphasized that biopiracy is a global problem. It involved not only the acquisition of genetic material in one country and seeking patents using such material and associated TK in another, but also use of such material for derivative inventions. Addressing this issue in national patent laws or through contractual approaches does not address the biopiracy problem at the international level. A positive and mandatory obligation in the international patent regime is necessary to address this problem and this should be the focus of this Committee’s. The Delegation also noted that in relation to GR, WIPO/GRTKF/IC/7/9 refers to a possible role for the WIPO Arbitration and Mediation Center, referring to the proposal tabled by the Asian Group in 2001. The Delegation pointed out, however, that that proposal did not refer to GR, only to TK and folklore. The Delegation expressed surprise that the Secretariat should mention this in the context of GR, while neglecting to point out that the same proposal of the Asian Group spoke of “negotiating a comprehensive international instrument on the protection of GR, traditional knowledge and folklore”. The Delegation further commented that the idea of a WIPO Arbitration and Mediation Center can only be considered in the framework of integrated solutions. It would be clearly premature to discuss this now, when this Committee is grappling with issues about how to proceed. The idea can be considered once there is a legal instrument in position that addresses disclosure, prior informed consent and benefit sharing in patent applications and the international patent system. The Delegation stated that it would be difficult to envisage how the Center would function without the benefit of a binding international instrument relating to misappropriation of GR. In connection with WIPO/GRTKF/IC/7/10, the Delegation noted that it had updated the Committee on the developments and decisions taken in the last Assemblies meeting. The Delegation indicated it would provide detailed comments on the Questionnaire and inputs for the proposal from the CBD within the required timeframe. The Delegation pointed out, however, that mere exchange of national experiences is not enough to address the problems of misappropriation

of GR. Finally, the Delegation agreed that any work undertaken in the Committee should be without prejudice to work in other international forums. It should also not detract from the core issues that led to the establishment of the Committee itself; i.e., to address the protection of TK and GR in the international IP system.

176. The Delegation of the Netherlands, on behalf of the European Community and its 25 Member States, thanked the Secretariat for WIPO/GRTKF/IC/7/9. Following the completion of the first stage based on the development of guidelines on the IP aspects of mutually-acceptable terms in agreements concerning access to GR and equitable benefit sharing, the EU invited the Committee to continue undertaking empirical surveys of experiences in this field. The European Community and its Member States welcomed WIPO/GRTKF/IC/7/9 which initiated the second stage of the process: the identification of principles to be applied for the development of guide practices based on existing practices and clauses. This should result in the drafting of a Guide Contractual Practices. The draft Guide should take into account the international policy context, but must be limited to IP-specific elements of contractual agreements for access and benefit sharing, respecting existing IP law. The European Community and its Member States expressed support for future work to develop a Guide Contractual Practices along the lines set out in paragraphs 40 to 42 of WIPO/GRTKF/IC/7/9. This should include the consideration of alternative dispute resolution procedures.

177. The Delegation of Romania thanked the Secretariat for the excellent WIPO/GRTKF/IC/7/9 and expressed support for this document. The Delegation expected that based on continued acquisition from the empirical surveys of experiences in the field, this Committee will identify clear principles to be taken into account in development and drafting Guide Contractual Practices based on existing practices and clauses. By taking into account the policy context, this Guide would naturally be based on requisite balance between fair access and equitable benefit sharing, and IP legislation.

178. The Delegation of Norway thanked the Secretariat for a very good document, which would prove helpful for various communities and peoples in carrying out the thorough analyses needed when entering into contractual arrangements with regard to GR in keeping with the principles in paragraph 11. The Delegation noted that the complexity and amount of issues involved would give challenges enough to all who grapple with the questions before this Committee. The Delegation expressed support for the general outline of principles for the Guide Contractual Practices. The proposal in paragraph 42 for a specific tribunal for issues surrounding contracts for access to GR and benefit sharing would need further scrutinizing. The Delegation signaled concern with regard to establishing such a new body. The decision with regard to arbitration and the appropriate forum should rest with the parties of the contract. Whether the WIPO Arbitration and Mediation Center should have a role, should hence rest with the parties of the contract. With regard to future work, the Committee was urged to bear in mind that the systems developed around the world answering to and implementing the CBD are indeed different. The recommendation to seek expert legal advice from a practitioner with experience in the relevant field was therefore very important.

179. The Delegation of Canada thanked the Secretariat for the document and the guide contractual practices and noted that this work reflects adequately the broad panoply of GR principles. Canada reaffirmed its support for model contractual clauses and described the approach in WIPO/GRTKF/IC/7/9 as appropriate. The Delegation encouraged the efforts aimed at developing principles and model clauses. As stressed in the decision of the COP, the principles should be flexible, simple, and of a non-binding nature. The scope and content of

the guidelines are essential to maintain flexibility for the model clauses. The Delegation supported the proposal for in-depth analysis of the guidelines based on comments put forth during this session of the Committee and any additional comments provided by February deadline. The Delegation considered it essential that the efforts of the Committee be focused on the identification of elements covered by the model clauses and their scope. Finally, the Delegation recognized the links between this work and the work being done in other forums such as the CBD and FAO. Cooperation was described as essential to coordinate the work of the different committees and organizations in the current international discussions. Canada urged the Committee to pursue its work to ensure broad dissemination and publication of the conclusions from this work and reaffirmed its support to the continuation of the excellent work done in this field.

180. The Delegation of Switzerland said that having studied WIPO/GRTKF/IC/7/9 with great interest, it considered that although the draft contractual guide was voluntary it appeared to be very complete and support could be expressed for it. It was very important for the guide to retain a certain amount of flexibility for ease of use. The Delegation regretted that the opinion had been expressed that it was not necessary to have definitions. On the contrary, that point was very important and, since the beginning of the Committee's work, the Delegation had insisted on the need to establish working definitions at least for the most important terms, in order to facilitate discussion and make the terms more specific. In order to avoid the duplication of work in various international fora, close cooperation with the CBD, which was already under way, the FAO and UPOV was essential. The Delegation had a positive view of the recommendation regarding the role of the WIPO Arbitration and Mediation Center. The Center was very active and functioned very well in relation to domain names among other things. Having such a body would strengthen the value and application of the contractual guide. Abuses would probably be less significant if a body were given responsibility for the correct implementation of the guide.

181. The Delegation of Peru thanked the Secretariat for WIPO/GRTKF/IC/7/9, describing it as an interesting document particularly from the theoretical point of view. The Delegation shared, however, some of the concerns expressed by India concerning access and equitable benefit sharing pertaining to GR. The Delegation clarified item 9 of the document on standards at different national and regional standards for these agreements. The Delegation explained that the reference made in the footnote about law 27811 of Peru was not accurate. Peru's law relates to a *sui generis* system of protection of TK of indigenous peoples linked to biological resources and not necessarily to GR in general. On the other hand, even when the possibility of establishing this type of agreement exists, there is an open ended Andean approach in Decision 391 of the Andean Community which is also referenced in a footnote. That decision was not implemented nationally, but this did not mean the legislation was undesirable. On the contrary, it could be considered model legislation. The Delegation noted that it is difficult for someone who wants to use a genetic resource to first form an agreement with the State or any national authority governing access and benefit sharing. Unfortunately, those who seek to misappropriate these resources never think about establishing a contract. It is easier to engage in biopiracy than to sit down and negotiate with the state. The Delegation joined statements of other delegations indicating that only a legally binding instrument and certificate of origin are needed to face up to biopiracy and ensure sovereignty of people over their resources. The Delegation also expressed concern regarding the possibility of the WIPO Arbitration and Mediation Center would interfere with these agreements.

182. The Delegation of the United States of America thanked the Secretariat for its work in updating WIPO/GRTKF/IC/7/9 regarding draft IP guidelines for access and equitable benefit

sharing. The Delegation described the document as comprehensive, well organized and containing a large amount of very useful information. The Committee's work in this area proved that the Committee is moving toward specific outcomes, such as Operational Principles, Guide Contractual Practices and Contractual Clauses in the area of access and benefit sharing agreements. The Delegation supported continued work on these matters by this Committee, including development of model clauses that can be utilized in such agreements. The Delegation also encouraged WIPO to continue to update its Contracts database so that it can serve as a practical and effective tool for providing information on existing practices in this area. The Delegation also emphasized its belief that contracts provide a great deal of flexibility in permitting the involved parties to ensure that benefits derived from GR are equitably shared between those who provide such resources and those who access, develop and utilize them. In connection with WIPO/GRTKF/IC/7/10, the Delegation noted that as the CBD's request did not address a particular WIPO body, it supported the General Assembly's decision to address this issue outside of the Committee. However, the Delegation continued to value and support the ongoing, productive work of the Committee on disclosure requirements, and believed that the process of responding to the CBD that was outlined by the Secretariat did not obviate the need for discussion. The Delegation particularly valued the continued exchange of national experience and case studies, as well as the development of additional background information by drawing more extensively on the responses received to the questionnaire (WIPO/GRTKF/IC/Q.3). It also supported continued, fruitful discussion of general disclosure requirements under patent law and contractual obligations for disclosure. The Delegation recommended that all of this fruitful work continue in the Committee and urged that all Members respond to the questionnaire (WIPO/GRTKF/IC/Q.3), so that the Committee may have a more complete picture of how disclosure requirements are implemented under national laws.

183. The Delegation of Brazil regarded the issue of access and benefit sharing related to GR with particular interest and noted that Brazil is engaged in reaching the most effective approach for realizing of the objectives of the CBD, including fair and equitable benefit sharing. The Delegation found it puzzling that so much time and so many sessions of this Committee had been spent on discussions on contractual guidelines while this body is yet to take any effective action on the real issues that supposedly led to creation of this Committee in the first place. Generally speaking, WIPO/GRTKF/IC/7/9 seemed to assume as a resolved matter an issue of paramount importance that in the Delegation's understanding is far from being settled. That issue is defining the reach of private arrangements with respect to access to GR as well as the sharing of benefits arising therefrom. Considering that pursuant to the CBD, States exercise sovereignty over their GR, it is only fair to question the validity and sufficiency of contractual guidelines in addressing this subject. The ideas underpinning the proposals contained in WIPO/GRTKF/IC/7/9 approach this issue as though it were confined to the realm of private interests. Such an approach to access to GR seems to run counter to the international dimension recognized as the necessary path towards a system aimed at curbing biopiracy. In other words instead of devising a system in which the States maintain the regulatory powers concerning this particular subject, the only means by which an international framework is possible, the rationale underlying these contractual guidelines would seem to lead in the opposite direction; that is to say, to a fragmented kaleidoscope of contractual provisions that provide no real response to biopiracy. By way of example, the Delegation called attention to some of the wording of the document on page 18. When referring to "some of the options that can be chosen by the two parties to the access and benefit sharing arrangement" the document lists the following as a contractual option: "imposing other conditions concerning patents such as obliging the user of the resource to mention the source of the genetic resource or condition of access in any patent application

concerning inventions resulting from access to the resource". What seems to be implied in this option is the assumption that disclosure of the origin of the genetic resource should be the result of a contractual arrangement between the parties which could be easily bypassed rather than duly set out by legal parameters. The Delegation underscored that while it strongly supported the need to disclose the origin of GR in patent applications, it does not favor this privatist approach recommended by WIPO/GRTKF/IC/7/9. The Delegation did not believe that a strictly contractual approach would provide an effective means of compliance with the CBD and adequate response to the problem of biopiracy. Because contracts are of a voluntary nature, it should be obvious to everyone that contracts could not be expected, in and of themselves, to contribute to the effective realization of the CBD's objectives including fair and equitable benefit sharing when the parties to the contract are of vastly unequal bargaining strength as is the case when commercial interests and indigenous or local communities, particularly in developing countries are involved. The CBD in effect has affirmed that the States have sovereign rights over their resources. The regulation of access to GR must remain in the hands of States. At the international level, enforcing compliance with the CBD and preventing biopiracy also requires the active involvement and compliance with States. This matter can not be approached as purely a matter for private regulation. Patent applicants should be required as a condition for acquiring patent rights to disclose the origin of GR and associated TK used in an invention and to provide evidence of compliance with the access and benefit sharing regimes of the country of origin of those resources. This measure should be applied universally on the basis of an international legally binding agreement negotiated by and among states and enforced accordingly. For these reasons, the Delegation expressed reservations with respect to the suggestions contained in paragraph 42 of WIPO/GRTKF/IC/7/9 particularly with respect to the proposal to use alternative dispute resolution by expanding in particular the services of WIPO's Arbitration and Mediation Center to handle disputes that may arise in respect of contracts relating to GR. This novel idea which would seem to approach the issue of access to GR exclusively from the law of contracts and private international law could have potentially serious implications and should be approached with considerable caution. The Delegation of Brazil recalled once again that the CBD is currently engaged in negotiation of an international regime on access and benefit sharing. This international regime, which the Delegation hoped would take the form of a legally binding instrument, is expected to set up its own dispute settlement mechanism. WIPO in its work should not prejudge the outcome of negotiations in other forums such as the CBD or otherwise intervene in other processes in a manner that would prejudice the positions of its member states on sensitive issues such as this one. In this regard, the Delegation pointed out that it does not find the recurring references to the Bonn Guidelines in WIPO/GRTKF/IC/7/9 to be entirely appropriate. The Bonn Guidelines are a strictly voluntary instrument. They do not reflect the consolidated consensus on the issue of access and benefit sharing. The Delegation stressed again that WIPO should not in its work, prejudge the outcome of negotiations in the CBD on the international regime. The Delegation further pointed out that in exercising its sovereign rights, as affirmed by the CBD, Brazil shall reserve its right to impose whatever conditions on access, benefit sharing it deems appropriate in respect of GR under its jurisdiction. The Delegation recalled, as on previous occasions, the reasons why this Committee is here, and that is to discuss possible ways to curb biopiracy. In the view of the Delegation of Brazil, this proposal for contractual guidelines does not address this issue effectively and could almost be seen as a diversion from the Committee's real work. With respect to WIPO/GRTKF/IC/7/10, the Delegation took note of the suggestion for future work contained in paragraph 14 and emphasized that any work undertaken on this issue should be without prejudice to the work of other international forums.

184. The Delegation of Japan supported the direction and flexible nature of the Draft Guidelines and noted that most of its prior comments were reflected in the current draft. The Delegation further indicated that it would refer this draft to industry again, and additional opinions would be submitted.

185. The Delegation of New Zealand repeated its support for completion of the guide. The Delegation noted that there is a stated need for assistance in this area, regardless of whether or not a contractual approach is believed to be the most appropriate. Completion of the guidelines would not preclude other work by the Committee in the GR area, for example, in relation to disclosure of origin of GR and associated TK in IP applications. The Delegation expressed caution about the idea of a dispute resolution tribunal. The guide, however, was described as useful for parties with limited awareness of the potential IP issues that may arise when access is granted to GR, or TK is shared. It would also provide a useful resource for policy makers preparing national guides. The Delegation further noted that the guide usefully places IP within the context of other, perhaps more immediate, likely or useful benefits that can arise from granting access to GR and associated TK. It is important that the Committee should not overstate the potential role of IP in benefit-sharing. The guide has appropriately noted this limitation. The Delegation noted its suggestion from the last session of the Committee that the approach used in the development of the WIPO toolkit might be applied to the further development of this guide, using different layers of complexity ranging from plain language and graphic representations at the beginning of each section with the option to progress to more complex text and additional information. The Delegation indicated it was generally comfortable with the principles as currently stated. It was thought that the guide appropriately excludes the possibility of a special tribunal to adjudicate ABS disputes, on the basis that it would entail a separate policy decision. The Delegation indicated that it would not want to stand in the way of consensus if there was a desire to undertake further work to flesh out the proposal regarding dispute resolution further. At this point, however, it reserved to a later date taking a position on whether the establishment of such a dispute resolution mechanism at WIPO would be appropriate or effective. In connection with the further elaboration of the principles as part of the ongoing development of the guide, referred to in paragraph 41 the Delegation indicated that, except for minor editorial changes, it considered this should be avoided, as there would seem to be a more immediate need for the guide to be completed and made available. The Delegation also expressed support the development of practical case studies and non-binding illustrative model IP clauses to accompany the guide.

186. The Delegation of China thanked the Secretariat for its work and achievements, and considers that these informative Guidelines contain detailed and valuable materials and information, which could be very useful in providing guidance. The Delegation noted that, as known to all, in practice, contractual arrangements have been used to protect GR, and have turned out to be a simple and efficient way of protection. Generally speaking, however, providers of GR are indigenous people or tribal groups living in remote areas, who have little knowledge and understanding of legal provisions and information due to their own limitations. To avoid establishment of inequitable and unreasonable clauses, the Delegation proposed that provisions concerning the “cancellation of contracts” or “invalidation of contracts” be included in the Guidelines, thus expressly providing for a possibility of requesting cancellation or invalidation of contacts which contain evidently inequitable clauses, such as in some contracts that contain only clauses on the right of use and the right to apply for patent in respect of GR, but nothing on the right of providers of those resources to a reasonable compensation or remuneration, or in some other contracts, where there might be no provisions concerning ownership of the right to apply for patent. The Delegation noted that with respect to the latter contracts, different countries have different provisions, resulting



in different interpretation and application of contracts. According to the laws of some countries, including China, this right may exclusively belong to the party that has completed the invention or creation. The Delegation explained that fortunately, in China, there exist complementary systems or legal provisions on examination and approval of contracts, so that invalidation of contracts or possible cancellation of contracts can occur to prevent these inequitable clauses from being included in contracts or invalidate such contracts after they have been concluded. The Delegation thus proposed that the Secretariat should identify the problems that might emerge and present recommended solutions. To this end, it might be necessary to collect and collate restrictive or mandatory provisions of all Member States on the contents and forms of contracts, for the reference of various stakeholders and policy makers.

187. The Delegation of Egypt, speaking on behalf of the Africa group, indicated that it had explained on many occasions in this and other forums that it believes that a contractual approach or contractual clauses have limited usefulness in dealing with misappropriation of GR and TK. The shortcomings of contractual clauses and a contractual approach are well known, have already been pointed to by several delegations. The representative saw much merit in what has been said by others in this regard, especially by the Delegations of India and Brazil. The Delegation emphasized that the most important shortcoming was the asymmetry of power between the users of GR and the original providers. It also recalled and emphasized the position of the African group that an international instrument is the most effective way to address this problem of misappropriation of GR and TK. This Committee is dealing with a global problem that necessitates global solutions in the form of legal standards or in changes to global patent standards as we have already pointed out. Furthermore, the Delegation highlighted that this is not the first time it has pointed this out. It was recalled that the limited usefulness of contractual agreements in isolation had been explained and its diversion from work specifically on other issues such as a legally binding international instrument have actually been pointed out since the first or second session of the Committee. Yet, the Delegation pointed out, paragraph 40 stated that work on contractual clauses had been a significant part of the work of the Committee despite the comments made by several delegations. The Delegation thus indicated that it is important to note and to reflect in the conclusions that many delegations find that this work is of limited usefulness in addressing the main problems that have led to the creation of this committee and to focus on the issues that are pressing in this regard.

188. The Delegation of the Islamic Republic of Iran emphasized in connection with principle 2 that the work of the Committee should be supportive and consistent with the work of CBD and FAO. It also expressed the opinion that the last paragraph of page 17 should be further clarified. With regard to principle 3, the Delegation noted that indigenous peoples, local communities or other forms of holders are one side of such contracts. The applicable conditions on the relation of the competent State authorities and local communities at the national level should be duly considered. Participation of relevant stakeholders should be compatible with the principle of national sovereignty of States over their resources. Genetic resources and TK are the national treasures of each nation. Utilization of such resources could have its own impact on national policies of States in different aspects. The Delegation expressed the opinion that the role of these principles should be highlighted in guide contractual practices. The existing WIPO arbitration and mediation mechanism was neither accountable nor sufficient for the purpose reflected in the document.

189. The Delegation of Ecuador referred to the Secretariat's statement that WIPO/GRTKF/IC/7/9 repeats some of the ways the issue of GR has been tackled by the this

Committee. The Delegation agreed with that description, noting that while this is how the problem of GR has been approached, unfortunately, as distinct from other areas, it had not found any creativity or progress in the way in which this issue has been dealt with. The rationale for establishing the Committee was the relationship between GR and intellectual property rights. The Delegation stressed the principle recognized by the CBD of the sovereignty of States over GR. That was an issue unrelated to access. The representative emphasized that the way in which the document approaches the relationship with GR, from an exclusively contractual viewpoint, is quite inappropriate, as has been explained on many occasions. This is not the way one should link or describe the relationship between GR and IP. This relationship exists above all in the way patents are used. This is really what should be dealt with. It was emphasized that the contractual approach cannot solve the problems of biopiracy, misappropriation, or the problem of disclosure of source or distribution of benefits. Contract law is important but it is absolutely insufficient. It is something voluntary and private and in no way can it solve the problems in exploitation and use of GR. The Delegation repeated the importance of dealing with this issue from the viewpoint of patents taking into account all the progress that has been made on this problem by the CBD and FAO. The Delegation also associated itself with the detailed statements of India and Brazil on this subject.

190. The Delegation of Bolivia thanked the Secretariat for WIPO/GRTKF/IC/7/9, noting that it added little towards achieving the objective of a legally binding instrument. The Delegation noted that during the General Assembly the financial difficulties of this organization were discussed. The Delegation explained that it did not see the use of continuing to spend scarce resources if the only achievements are private contractual guides relating to GR. That was not the reason why the Committee was set up, nor the spirit of the renewed terms of reference of the Committee. Bolivia had a common system on GR where topics such as legal procedures and granting of prior informed consent already existed. Once again the Delegation pointed out that it did not see any added value in discussions under this topic. The Delegation shared the concerns expressed by India and Brazil.

191. The Delegation of Kenya thanked the Secretariat for WIPO/GRTKF/IC/7/9. It was noted that the draft is based on national experiences which have no bearing to the international legally binding instrument as proposed in the earlier Committee meetings. Contractual arrangements had been of limited effect in terms of enforcing utilization of GR and benefit sharing. The Delegation requested the Secretariat to focus drafting an international legal instrument as mandated by the Committee. The Delegation also associated itself with comments made by Egypt on behalf of African Group.

192. The Delegation of Brazil noted the remarks made by the delegation of the Netherlands on behalf of the European Union and its member states. The Delegation agreed entirely with the European Union that a mandatory disclosure requirement should be established for patent applicants in all jurisdictions. This is a measure that would be of great relevance to efforts to fight the very great problem of bio-piracy. The Delegation thus encouraged the European Union to further flesh out its ideas with regards to this issue in all relevant international forums, including the Committee, so that we might be in a position to engage constructively in discussions on this very important issue. It was quite clear to everyone that the proposal for mandatory disclosure of the source of origin of GR enjoys wide spread support in the international community. With respect to paragraphs 13 and 14 of the document, referring to the work of the Committee on this issue, the Delegation indicated that it was not entirely convinced that the suggestions made there would be appropriate. Paragraph 13 contained a reference to the preparation to the guidelines and recommendation on this issue. The

Delegation stated that members of the Committee did not need guidelines and recommendations. A number of developing countries already had a disclosure requirement and these countries did not have to be told by WIPO what they should be doing in respect of this issue and how those requirements should be implemented. The Committee should be looking at what the developed countries could be doing in respect of this very great contemporary problem. The Delegation indicated that the only way forward was to negotiate an international legally binding instrument on disclosure that would be applied by all countries. With regard to paragraph 14, the Delegation shared the skepticism expressed by the Delegation of India on the value of the suggestions contained in this paragraph. The Delegation failed to understand how exchanges on national experiences and case studies would add any value to the discussion. The Delegation did not see how such exchanges could actually take place, given the fact that the developed countries do not have this requirements in their national laws. The Committee should first discuss the negotiation of an international agreement on this issue. The Delegation emphasized that it failed to see what value added by the suggestion contained in paragraph 14. There is a reference to developing additional background information which might be of some marginal relevance to a discussion but in general paragraph 13 and 14 really are just beating around the bush on an issue of fundamental importance to the Delegation and in fact to the international community as a whole.

193. The Delegation of the Islamic Republic of Iran referred to paragraph 42 of the subject document and noted that it shared the view of India that the Asian Group proposal in 2001 was related to TK and not to genetic resources.

194. The Delegation of the Russian Federation thanked the Secretariat for WIPO/GRTKF/IC/7/9 and WIPO/GRTKF/IC/7/10. The Delegation supported the recommendations in paragraphs 40 to 43 of WIPO/GRTKF/IC/7/9. The Delegation further expressed agreement with statements of other delegations concerning the importance of prior informed consent, and supported consideration of situations where no patent applications are filed. Agreements also need to take in to account TK as well as GR when access is at issue.

195. The representative of UNESCO referred to some of its documents that may be relevant in terms of further developing principles and refining definitions or distinctions between biological and GR in the field of non human genetic materials as well. The most specific though legally not binding instrument that UNESCO adopted in the field of GR is the International Declaration on Human Genetic Data, adopted in 2003. But since the beginning of the preparation of this document it was evident that it is an extension of another document of the Universal Declaration of Human Genome and Human Rights from 1997. The Universal Declaration of Human Genome and Human Rights gained a worldwide reputation as subsequent to adoption of this declaration, a number of countries enacted legislation in the field of genetics and in the field of protecting genetic data which we will also try to follow. The International Declaration of Human Genetic Data and Article 4 provided new elements to underline the specificity of genetic data. While the Universal Declaration provided special status of the human genome, the second declaration of UNESCO further elaborated a special status of genetic data. The following specific elements were stated: genetic data can be predictive; it has a transgenerational effect; it can contain information but its significance is not necessarily known at the time of the collection which think is also relevant of other sorts of genetic data and they may have cultural significance for persons and groups. Furthermore, in Article 19 the International Declaration of Genetic Data states that benefits resolving from the use of human genetic data, or biological samples collected for medical and scientific research should be shared with the society as a whole and the international community.

While within UNESCO there is no specific legal instrument on the IP of GR, in 2001 an international symposium was organized on IP in the field of human genome. Although the proceedings were not yet published during the symposium, participants mentioned a potential conflict that had been recognized in the implementation of TRIPS Agreement and the realization of economic, social and cultural rights, *inter alia*, the transfer of technology to developing countries. Subsequent to this international symposium, the International Bioethics Committee prepared an advice on the patentability on the human genome.

196. The representative of UPOV noted that the Consultative Committee of UPOV, at its sixty-eighth session held in Geneva on October 20, 2004, discussed certain issues involving biodiversity, plant GR and plant variety protection. In support of its view that the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the UPOV Convention should be mutually supportive, the Consultative Committee agreed: that the FAO should be invited to make a presentation to the Council of UPOV at its thirty-ninth ordinary session to be held in October 2005, on the development of the ITPGRFA; that a UPOV briefing session should be offered for FAO to inform relevant FAO experts, including, in particular, officers of the FAO Legal Office, of the adopted UPOV position on the access to GR and benefit-sharing; and to consider other means of appropriate cooperation with FAO. The representative explained that UPOV considered that plant breeding is a fundamental aspect of the sustainable use and development of GR and that access to GR is a key requirement for sustainable and substantial progress in plant breeding. The concept of the “breeder’s exemption” in the UPOV Convention, whereby acts done for the purpose of breeding other varieties are not subject to any restriction, reflects the view of UPOV that the worldwide community of breeders needs access to all forms of breeding material to sustain greater progress in plant breeding and, thereby, to maximize the use of GR for the benefit of society. In addition, it was recalled that the UPOV Convention has inherent benefit-sharing principles in the form of the breeder’s exemption and other exceptions to the breeder’s right.

197. The representative of the Food and Agriculture Organization (FAO) commented that WIPO/GRTKF/IC/7/9 was extremely excellent, but drew attention to a technical problem that the Committee may need to address. He noted that the document used a definition of ‘genetic resources’ that is taken from the CBD and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture. However, this would restrict the scope of the guidelines only to biological material containing functional genetic material, and the guidelines should be broadened to cover biological materials in general. A genetic resource is alive and can reproduce itself. Many of the biological materials to which TK is applied are not alive. Traditional healers use a wide variety of resins and ligneous products of biological origin that do not contain genetic material. The representative also distinguished between the nature of the product resulting from GR which may itself be a genetic resource (and contain functional units of heredity), such as seeds and planting materials, or may be a mere chemical. Bioprospecting is most obviously applicable to the unauthorized development of such inert chemicals. For example, an indigenous or local community is aware of the medicinal use of a biological product. Someone without authorization, armed with this misappropriated knowledge, synthesizes the active principle and brings it under a patent, without benefit sharing. It is important to recognize that the agricultural sector dealt with GR proper, breeding generation after generation, and crossing materials from around the world, which are themselves the product of many generations of crossing. This shows why the specificity of agriculture needs to be recognized. The CBD COP recognized the need for specific solutions in the agricultural sector. For these reasons, the International Treaty was negotiated, and a sui generis system was established under UPOV to recognize the specificity of products which are themselves GR. A variety is a protected product, but the genetic material is, by the

breeder's exemption, left open for anyone to use, without permission or payment, to breed further varieties. He reported that UPOV had recently written to the Director General of the FAO offering to develop cooperation regarding the treaty, since both instruments addressed the same sectorial needs.

198. The representative of the Biotechnology Industry Organization (BIO) commended the effort of the Committee to engage in a constructive discussion of measures that will improve the transparency and accountability in the collection and use of GR. The representative explained that BIO was an international association representing more than 1000 companies, academic institutions and biotechnology centers in over 33 countries. Its members conduct a diverse range of research and development in the fields of agriculture, healthcare, industrial engineering and environmental remediation. Innovations from the biotechnology industry are producing dramatic new improvements in agriculture, industrial processes, and most importantly, human health. The representative further explained that the vast majority of biotechnology companies are small and medium sized businesses. More than 90% of these companies had no products, and no revenue. What they had were innovations and hope. They had to attract funding from private investors to exist and continue their operations. They did this by demonstrating that they had made a significant technological innovation that had a promising commercial application. But they also had to demonstrate that they can deliver a strong return on an investment because of the very high risk of failure. Effective and certain patent exclusivity for their inventions was essential for these ventures. There was also intense competition for research and development investments. A technology with a high degree of uncertainty, such as a possible loss of patent exclusivity, simply would not be funded. On the issue use of the patent system to provide greater transparency in the collection and use of GR, and to enforce obligations under the CBD, the representative pointed out that BIO had consistently supported the CBD principles. These included, in particular, that before any genetic resource is collected, prior informed consent must be obtained from the country providing access, and that mutually agreed terms are reached concerning, *inter alia*, the sharing of benefits arising from use of that resource. Although its members did not engage in bioprospecting, BIO nonetheless recognized the importance of these principles. BIO had supported the effort to include access and benefit sharing provisions in the FAO International Treaty. The CBD was the motivation and justification for a patent disclosure requirement. The Convention embraces and incorporates several key concepts. It recognized the importance of providers and users of GR working together in a cooperative and mutually beneficial manner. Cooperation was essential to create the envisaged commercial and non-commercial benefits. If the private sector did not invest in the research and development of GR, the resources would not yield any of the benefits that the Convention envisions. This is why the CBD repeatedly emphasized that mutual agreement between the provider of a genetic resource and the user of that resource must be reached. The Convention protected the right of a country of origin to condition access to its GR on obtaining prior informed consent and agreement regarding use and exploitation of those resources. The CBD also made it clear that obligations cannot be imposed unilaterally or retroactively on users of GR. Instead, obligations to share benefits arise when a user makes a decision to obtain access and when it agrees to conditions for being providing that access. Second, the CBD plainly applied to non-human GR, as COP Decision II/11 expressly provided that it did not apply to human GR. BIO had questioned whether use of the patent system is the most viable or effective way of promoting the goal of greater transparency and accountability under the CBD. In addition to supporting the principles of the CBD, BIO supported an effective mechanism for improving transparency in bioprospecting activities and in ensuring that commitments undertaken by users of GR can be enforced. This can be done most effectively by a system that directly regulates bioprospecting activities. The Secretariat was encouraged to solicit comments on

other measures for monitoring access to and use of GR that are not incorporated into the patent system. By doing so, the relative merits of the various approaches could be compared and the most effective system identified. Concern was expressed that many of the proposals being made regarding patent disclosure requirements did not reflect the essential features and conditions of the CBD, and did not take into account the practical impact of these measures. For example, many of these proposals would require disclosures to be made for uses of human GR, and for materials that were not collected or which were not governed by the CBD. Indeed, many of these proposals would impose obligations entirely unrelated to situations that are actually governed by the CBD. The representative found this troubling and unacceptable, observing that a special patent disclosure requirement would not improve transparency and accountability in bioprospecting activities governed by the CBD. A patent disclosure requirement would only provide information when the use of a genetic resource had led to a potentially patentable invention, and would exclude all other situations where access to a genetic resource has been provided or used. A patent-based monitoring system would thus ignore the vast majority of collection activities that occur today - namely, those done for non-commercially motivated research by academic researchers. The disclosure requirement proposals also ran counter to a central goal of the CBD, encouraging uses of GR that resulted in benefits that can be shared. Biotechnology companies had to be able to count on patent exclusivity to justify taking risks and spending money to discover and develop inventions. A disclosure requirement that could block the grant of a patent for an otherwise eligible invention, or could be used to invalidate that patent, would create unacceptable risks. Companies facing these risks would simply choose to avoid engaging in bioprospecting activities or using GR that are governed by the CBD. This would plainly frustrate one of the goals of the Convention to promote these uses and the sharing of benefits derived from such uses. In this regard, the representative encouraged the Committee to assess as part of its continuing work the likely impact of disclosure requirements on the interest and use of GR by the private sector. With respect to WIPO/GRTKF/IC/7/9, the representative expressed support for the effort to develop model guidelines. Including experiences not only in the form of provisions suitable for these contracts, but also the experiences of collaborators in activities conducted under such contracts was also encouraged. Obtaining information on how frequently success is realized in developing new products out of research on GR was also said to be helpful. Such information might inform parties about the relative merits of the various types of economic and non-economic benefits that might be covered by an agreement. It would also be useful to get a better understanding of the non-economic priorities of stakeholders and how those may be effectively protected through these types of agreements. The representative also stressed the importance of understanding and appreciating the value of contributions of the private sector through their research and development activities. For example, an important form of benefit-sharing identified in the CBD is the transfer of research results and other information, along with technology know how. This comes about through dissemination of information, training, joint research and joint technology development efforts. Cooperation between the public and private sector is essential to realize these benefits. Indeed, the biotechnology industry exists as a result of its strong tradition of collaboration and publication. The industry was therefore been troubled by the suggestions that the industry cannot be trusted to live up to its obligations or that it is not a reliable partner. In conclusion, the representative expressed conviction that the most appropriate path is one that does not seek to use the patent system to police the provisions of the CBD. The importance that the global community places on devising an effective regime to govern bioprospecting activities was recognized by the representative, and the valuable insights and expressions of concern of the various delegations that have spoken eloquently on this issue were acknowledged. These discussions would lead to productive outcomes, and BIO

remained committed to working with this community to devise an effective system for improving transparency and enforceability of the CBD's provisions.

199. The representative of *Tupaj Amaru* stated that the conditions for access to GR and benefit-sharing should incorporate effective protection for GR on the decline and not simply make be a compilation of technical and legal concepts and moral principles. In order to understand the extremely complex problem more clearly, it was necessary to recall the definition of GR. For the purposes of the CBD, GR were considered to be genetic material with real or potential value. Genetic material was defined as any material of plant, animal and microbe which contained functional hereditary units allowing the characteristics of an ancestor to be passed on to a descendant by means of reproduction. The diversity of GR constituted the source of survival for humanity, although in the modern area humanity continued to destroy the basis of life on earth. The preamble to the CBD, ratified by 160 States excluding the United States of America, recognized "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of TK, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components". In the materialistic conception of the history of indigenous peoples, the biological and GR contained in an infinite number of living organisms and other forms of life in a state of continuous transformation, over a period of more than four million years, constituted the collective heritage of the aboriginal nations and the common heritage of humanity. Consequently, the Committee should examine not only in market terms the gains, profitability and investments between suppliers and those receiving such intrinsic values. Although the aim of the contractual guidelines consisted in helping the parties to draw up legislative or administrative measures or model clauses on the access and participation of beneficiaries and the drafting of contracts, in no way did it resolve the issue of biopiracy that was being practiced with impunity. All those who were free to use GR unlawfully would never be subject to the rules and laws of the receiving countries in order to sign up to mutually agreed contracts. The formulation of the four principles defined in WIPO/GRTKF/IC/7/9, relating to the production of contractual guidelines and benefit sharing, actually appeared to be a very simple technical and legal methodology. By contrast, for the originating communities and indigenous peoples that had neither telephones nor electricity, and many of whom did not have Internet access, the legal and technical mechanisms and terms were excessively complex in their interpretation and application, and were inaccessible to indigenous communities. As in the correlation of forces between the market and the protection of life, indigenous and local communities would be able to negotiate contracts or arrangements with pharmaceutical, bioexploration, agricultural, industrial and cosmetics companies. In reality, it would be both impossible and improbable for a contract to be drawn up between a wolf and a lamb. By their legal nature, such contracts, agreements and licences would, by action or omission, be one-sided. The CBD affirmed sovereign control over biological and GR and the need to regulate the access to such resources and the rights to the distribution of the benefits derived from their use. On the other hand, the meeting of the Special CBD Working Group on Access to and Distribution of Benefits, which had taken place in Bonn in 2001, recommended the production of standard-setting frameworks for access to GR. The question was to know to what extent governments had met their contractual obligations. WIPO/GRTKF/IC/7/9 simply proposed options relating to the establishment of non-binding contractual practices, guidelines and model clauses relating to IP. The guidelines were simply for information and had no legal value. They did not refer to what was and what was not patentable, and patent applicants should disclose the origin of genetic material. The representative believed that during its sixth session the Committee had received a mandate to produce and present an outline international

legal framework. The representative also asked why was a binding instrument a matter of urgency? In the globalized world where multinational companies constituted super States within States, in a world where wars crushed humanity in terms of the appropriation of natural resources in violation of the principle of national sovereignty, a global response was required to the plundering, use and unlawful appropriation of GR. Since they were voluntary, the guidelines were not effective. Only an international framework would be able to harmonize laws, regulations and legal systems in the protection of GR. In relation to the contracting parties, the representative urged the Committee to include originating communities and indigenous peoples as legal subjects with full powers for the negotiation or rejection of contracts concerning access to the genetic and biological resources which they owned. The procedures for applying for IP rights should require a patent applicant to present proof of prior consent from the owners of GR and TK. Finally, WIPO should organise workshops, round tables and seminars for indigenous peoples in order to explain to them the techniques, mechanisms and scope of the basic structure of data compiled on the WIPO website.

200. The representative of the International Seed Federation (ISF) thanked the Chairman for the opportunity to speak on WIPO/GRTKF/IC/7/9. The ISF supported both the spirit and letter of the document which provided the basis for flexible and effective mechanisms designed to manage access to GR and equitable benefit sharing. The guidelines for the establishment of contractual links appeared to be particularly well suited to the situation which, almost uniquely, existed between private law partners and those in public law acting in good faith. A restrictive and probably unsuitable framework, taking into account the numerous contexts and relations existing in that area, was not relevant. In that regard, it was necessary to strike a balance, as had been achieved by the Food and Agricultural Organization (FAO) in the International Treaty between a multilateral framework and bilateral relations. It should be recalled that in relation to matters clearly identified, such as disclosure of origin, international treatment allowing harmonized implementation appeared to be essential. The representative supported comments made by the Delegation of New Zealand and supported WIPO's efforts in that area to provide satisfactory responses, in particular in terms of the proposals made by Switzerland. The representative reaffirmed the unanimous position taken by the ISF more than a year previously. The ISF was in favor of a disclosure of origin defined according to three principles. The disclosure should not be made as a new criterion for the validity of an application for protection or for the invention to be protected. The elements of the disclosure should be objective and be based on the information available, in good faith, to the applicant. For that reason, reference should be made to a disclosure of the source of access by designating the person or organization allowing such access. The disclosure should be based on internationally recognized principles such as those established in the Patent Law Treaty, in particular Article 10.1.

*Conclusions : document WIPO/GRTKF/IC/7/9*

201. The Chair noted that:

(i) a number of comments were made on the contents of document WIPO/GRTKF/IC/7/9, which were all duly noted by the Secretariat and will be included in the Report.

(ii) A number of Delegations expressed support for the future work as proposed in paragraph 43 of the document.



(iii) A number of Delegations expressed strong opposition to the future work proposed in paragraph 43 of the document and to the contractual approach detailed in the document, and stated that this activity would inevitably detract from other work of the Committee, particularly considering the difficult financial situation of the organization.

202. The Chair concluded that there was no consensus on the future work of the Committee in this area and suggested that no decision should be taken at this session but that it should be kept on the agenda for the eighth session of the Committee.

203. The Committee decided in accordance with the suggestion by the Chair.

*Conclusions: document WIPO/GRTKF/IC/7/10*

204. The Committee took note of the contents of document WIPO/GRTKF/IC/7/10.

205. The Chairman noted that there was no consensus on the future work as indicated in paragraphs 13 and 14 of the document and suggested that no decision should be taken at this session but that the issue should be kept on the agenda for the eighth session of the Committee.

206. The Committee decided in accordance with the suggestion of the Chair.

#### ITEM 8: ADOPTION OF THE REPORT

207. The Committee adopted its decisions on agenda items 3, 4, 5, 6 and 7 on November 5, 2004. 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 to Committee participants, so that participants could submit any written corrections to their interventions as included in the draft report. This draft report was circulated as document WIPO/GRTKF/IC/7/15 Prov. A further draft report, including all corrections submitted to the Secretariat up to March 11, 2005, was then prepared as document WIPO/GRTKF/IC/7/15 Prov. 2. In accordance with the agreed procedure, that document was circulated to Committee participants for adoption at the eighth session of the Committee, which was held from June 6 to 10, 2005. At its eighth session, the Committee adopted the report of its seventh session, "noting that the Delegation of the Islamic Republic of Iran would submit amendments to its reported interventions for incorporation in the final report". The present document (WIPO/GRTKF/IC/7/15) is the adopted final report, incorporating the amendments that were noted by the Committee.

#### ITEM 9: CLOSING OF THE SESSION

208. The Chair closed the Seventh Session of the Committee on November 5, 2004.

[Annex follows]

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VIET NAM

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ZAMBIE/ZAMBIA

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Edward CHISANGA, First Secretary, Permanent Mission, Geneva

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Barbara NORCROSS-AMILHAT (Mrs.), Copyright and Related Rights Unit, Internal Market Directorate-General, Brussels

Harrie TEMMINK, Administrator Industrial Property, Internal Market Directorate-General, Brussels

Alfonso CALLES SANCHEZ, Brussels

## III. ORGANISATIONS INTERNATIONALES INTERGOUVERNEMENTALES/ INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

### CONFÉRENCE DES NATIONS UNIES SUR LE COMMERCE ET LE DÉVELOPPEMENT (CNUCED)/UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

Edna DOS SANTOS-DUISENBERG (Ms.), Chief, Secretary's General Office, Geneva

Sophia TWAROG (Ms.), Economic Affairs Officer, Division on International Trade in Goods and Services, Geneva

### ORGANISATION INTERNATIONALE DU TRAVAIL (OIT)/INTERNATIONAL LABOUR OFFICE (ILO)

Finn ANDERSEN, Cooperatives Branch, Geneva

Birgitte FEIRING (Ms.), Equality and Employment Branch, Geneva

Francesca THORNBERRY (Ms.), Equality and Employment Branch, Geneva

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

Françoise GIRARD (Mme), spécialiste adjointe du programme, Division du patrimoine culturel, Secteur de la culture, Paris

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

Wolf MEIER–EWERT, Legal Affairs Officer, Intellectual Property Division, Geneva

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Jayashree WATAL (Mrs.), Counsellor, Intellectual Property Division, Geneva

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HAUT COMMISSARIAT DES NATIONS UNIES AUX DROITS DE L'HOMME (OHCDH)/OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR)

Maliin ABELSEN, Geneva

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

Clive STANNARD, Senior Liaison Officer, Commission on Genetic Resources for Food and Agriculture, Agriculture Department, Rome

PROGRAMME DES NATIONS UNIES POUR L'ENVIRONNEMENT (PNUE)/UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP)

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

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UNITED NATIONS UNIVERSITY-INSTITUTE OF ADVANCED STUDIES (UNU-IAS)

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BUREAU BENELUX DES MARQUES (BBM)/BENELUX DESIGNS OFFICE (BBDM)

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

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OFFICE INTERNATIONAL DE LA VIGNE ET DU VIN (OIV)/INTERNATIONAL VINE  
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ORGANISATION AFRICAINE DE LA PROPRIÉTÉ INTELLECTUELLE (OAPI)/AFRICAN  
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American Folklore Society (AFS):  
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Assembly of First Nations:  
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Conférence circumpolaire inuit (ICC)/Inuit Circumpolar Conference (ICC):  
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