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

**Eighth Session  
Geneva, June 6 to 10, 2005**

SECOND DRAFT REPORT

*prepared by the Secretariat*

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## INTRODUCTION

1. Convened by the Director General of WIPO in accordance with the decision of the WIPO General Assembly at its 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 eighth session in Geneva, from June 6 to 10, 2005.

2. The following States were represented: Albania, Algeria, Argentina, Armenia, Australia, Austria, Bahrain, Bangladesh, Belgium, Benin, Bhutan, Bolivia, Brazil, Burkina Faso, Cambodia, Canada, Chile, China, Colombia, Congo, Costa Rica, Croatia, Democratic Republic of the Congo, Czech Republic, Denmark, Dominica, Dominican Republic, Egypt, Ethiopia, Finland, France, Germany, Ghana, Greece, Haiti, Holy See, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Lebanon, Lesotho, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malaysia, Malta, Mauritius, Mexico, Mongolia, Morocco, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Senegal, Singapore, South Africa, Spain, Sweden, Syrian Arab Republic, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Kingdom, United States of America, Ukraine, Uzbekistan, Venezuela and Zambia (97). 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, Caribbean and Pacific Group (ACP), African Regional Industrial Property Organization (ARIPO), African Intellectual Property Organization (OAPI), Arab League Educational Cultural and Scientific Organization (ALECSO), Benelux Trademark Office (BBM), European Patent Organization (EPO), Food and Agriculture Organization of the United Nations (FAO), International Union for the Protection of New Varieties of Plants (UPOV), Office of the United Nations High Commissioner for Human Rights (OHCHR), 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), and the World Trade Organization (WTO) (19).

4. Representatives of the following non-governmental organizations (‘NGOs’) took part as observers: Ainu Association; American Intellectual Property Law Association (AIPLA); Associação Paulista da Propriedade Intelectual (ASPI); Berne Declaration; Biotechnology Industry Organization (BIO); Call of the Earth (COE); Center for International Environmental Law (CIEL); Centre d’échanges et coopération pour l’Amérique latine (CECAL); Centre for International Industrial Property Studies (CEIPI), Consumer Project on Technology (CPTech); Copyright Research and Information Center (CRIC); Creators’ Rights Alliance (CRA); Foundation for Aboriginal and Islander Research Action (FAIRA); Foundation for Research and Support of Indigenous Peoples of Crimea; Friends World Committee for Consultation (FWCC); *Fundación Nuestro Ambiente (FuNA)*; Ibero-Latin-American Federation of Performers (FILAIIE); Indian Movement *Tupaj Amaru*; Indigenous People’s Biodiversity (IPBN); Indonesian Traditional Wisdom Network; Institut du développement durable et des relations internationales (IDDRI); International Centre for

Trade and Sustainable Development (ICTSD); International Chamber of Commerce (ICC); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Institute for Environment and Development; International Literary and Artistic Association (ALAI); International Plant Genetic Resources Institute (IPGRI); International Publishers Association (IPA); International Seed Federation (ISF); International Society for Ethnology and Folklore Studies (SIEF); Kaska Dena Council (KDC); Maasai Education Discovery (MED); National Aboriginal Health Organization (NAHO); Panktuuit Inuit Womens Association; SAAMI Council; South Centre; Third World Network (TWN); Tulalip Tribes; UN Permanent Forum on Indigenous Issues; World Conservation Union (IUCN); World Trade Institute, World Trade Institute and the World Wide Fund (WWF) (50).

5. A list of participants was circulated as WIPO/GRTKF/IC/8/INF/1, and is annexed to this report.

6. Discussions were based on the following documents and information papers:

- “Draft Agenda for the eighth session” (WIPO/GRTKF/IC/8/1 Prov. 2);
- “Accreditation of certain Non-Governmental Organizations” (WIPO/GRTKF/IC/8/2 and WIPO/GRTKF/IC/8/2 Add.);
- “Participation of Indigenous and Local Communities: Proposed Recommendation to the General Assembly for the Establishment of a Voluntary Contribution Fund” (WIPO/GRTKF/IC/8/3);
- “Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Policy Objectives and Principles” (WIPO/GRTKF/IC/8/4);
- “Protection of Traditional Knowledge: Revised Policy Objectives and Principles” (WIPO/GRTKF/IC/8/5);
- “Practical Means of Giving Effect to the International Dimension of the Committee’s Work” (WIPO/GRTKF/IC/8/6);
- “Update on Technical Standards and Issues Concerning Recorded or Registered Traditional Knowledge” (WIPO/GRTKF/IC/8/7);
- “Recognition of Traditional Knowledge in the Examination of Patent Applications” (WIPO/GRTKF/IC/8/8);
- “Overview of the Committee’s Work on Genetic Resources”; (WIPO/GRTKF/IC/8/9);
- “Update on Legal-Technical Assistance and Capacity Building Activities” (WIPO/GRTKF/IC/8/10);
- “Disclosure of Origin or Source of Genetic Resources and Associated Traditional Knowledge in Patent Applications” (WIPO/GRTKF/IC/8/11);
- “The Patent System and the Fight Against Biopiracy - The Peruvian Experience” (WIPO/GRTKF/IC/8/12);
- “Submission by Portugal: Ministry of Agriculture, Rural Development and Fisheries, Decree-Law No. 118/2002” (WIPO/GRTKF/IC/8/13);
- “List of Documents Posted on Accredited Observers Web Page” (WIPO/GRTKF/IC/8/INF/2);
- “Brief Summary of working documents” (WIPO/GRTKF/IC/8/INF/3);
- “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.

#### AGENDA ITEM 2: ELECTION OF OFFICERS

9. Following a proposal by the Delegation of Singapore on behalf of the Asian Group, supported by the Delegation of Morocco, on behalf of the Asian Group, and the Delegation of the United States of America, the Committee elected Ambassador Eddi Hariyadhi of Indonesia, and as Vice-Chair, Ms. Song Jianhua of China, in each case for one year and by acclamation. Mr. Antony Taubman (WIPO) acted as Secretary to the eighth session of the Committee.

#### AGENDA ITEM 3: ADOPTION OF THE AGENDA

10. A revised draft agenda (WIPO/GRTKF/IC/8/1 Prov. 2) was submitted for consideration by the Chair, and was adopted by the Committee.

#### AGENDA ITEM 4: ADOPTION OF THE REPORT OF THE SEVENTH SESSION

11. The Chair submitted, and the Committee adopted, the report of its Seventh Session (WIPO/GRTKF/IC/7/15 Prov 2.), noting that the Delegation of the Islamic Republic of Iran would submit amendments to its reported interventions for incorporation in the final report.

*Décision en ce qui concerne le point 4 de l'ordre du jour : Adoption du rapport de la septième session*

11. Le président a soumis, et le comité a adopté, le rapport de la septième session du comité (document WIPO/GRTKF/IC/7/5 Prov.2), après avoir noté que la délégation de la République islamique d'Iran communiquera des modifications à apporter au texte de ses interventions en vue de les intégrer dans le rapport final.

*Decisión sobre el punto 4 del orden del día: Aprobación del informe de la séptima sesión*

11. El Presidente presentó el informe de la séptima sesión (documento WIPO/GRTKF/IC/7/15 Prov.2), que el Comité aprobó, tomando nota de que la Delegación de la República Islámica del Irán presentará modificaciones de las actas de sus intervenciones, para su introducción en el informe final.

## AGENDA ITEM 5: ACCREDITATION OF CERTAIN ORGANIZATIONS

12. 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 twelve additional non-governmental organizations (NGOs) that had requested *ad hoc* observer status for the sessions of the Committee since its seventh session. The Committee unanimously approved accreditation of all the following organizations as *ad hoc* observers: Centre for the Management of IP in Health R&D (MIHR), Consumers International (CI), Fridtjof Nansen Institute (NFI), Indigenous Knowledge Systems of South Africa Trust (iKSSA Trust), Graduate Institute for Development Studies (GREG), Indigenous Peoples Council on Biocolonialism (IPCB), International Committee for Museums of Ethnography (ICME), Maasai Education Discovery (M.E.D), National Council of Otomi/Consejo de la Nación Otomi, Ogiek Peoples Development Program (OPDP) and the Peruvian Society for Environmental Law (SPDA).

*Decision on Agenda Item 5: Accreditation of Certain Non-Governmental Organizations*

13. The Committee unanimously approved accreditation of all the organizations listed in the Annexes to documents WIPO/GRTKF/IC/8/2 and WIPO/GRTKF/IC/8/2 Add. as *ad hoc* observers.

*Décision en ce qui concerne le point 5 de l'ordre du jour : Accréditation de certaines organisations non gouvernementales*

13. Le comité a approuvé à l'unanimité l'accréditation de toutes les organisations mentionnées dans les annexes des documents WIPO/GRTKF/IC/8/2 et WIPO/GRTKF/IC/8/2 Add. en qualité d'observatrices ad hoc.

*Decisión sobre el punto 5 del orden del día: Acreditación de determinadas organizaciones no gubernamentales*

13. El Comité aprobó por unanimidad la acreditación con carácter de observadores *ad hoc* de todas las organizaciones enumeradas en los Anexos de los documentos WIPO/GRTKF/IC/8/2 y WIPO/GRTKF/IC/8/2 Add.

## AGENDA ITEM 6: OPENING STATEMENTS

14. The Delegation of Morocco, on behalf of the African Group, recorded its appreciation for the quality of the documentation prepared for the meeting and its support for the vision of WIPO concerning the current process. The African Group had noted with interest the notable and positive development in the work of the Committee since the renewal of its mandate, one of the fundamental aspects of which was the international dimension, which did not exclude the elaboration of one or several international instruments. This work of the Committee had certainly contributed to the emergence of a greater awareness of the importance and urgency of protection of traditional knowledge (TK) and expressions of folklore (EoF). In fact, it concerned a key concern expressed, on repeated occasions, by the African Group, which continued to believe, more than ever, that effective and efficient protection of this material necessitated putting into place a legally binding international instrument. The alarming degree of illicit appropriation of TK and EoF impelled the Committee to work without pause so as to realize this ambition. The African Group favorably welcomed the documents forming the revised draft provisions on general policy objectives and core principles concerning the

protection of TK and EoF. These documents, to which the African countries had contributed to help the process evolve towards the final stage, are certainly of such a nature as to give a new spirit, in the right direction, to the Committee's future discussions on these matters so crucial to the African countries. The African Group also hoped to be able to count on an inclusive and participative approach in the process of consultation on these documents, so as to draw on the richness and diversity of commentary from all concerned. The African Group wished to underscore that the Committee's work, of a principal importance in the Committee itself, should not impede other similar work in other contexts. It welcomed the draft recommendation concerning the creation of a voluntary fund for the participation of indigenous and local communities in the work of the Committee, after dialogue with the Member States concerned. The consideration of the general policy objectives and core principles did not constitute an end in itself, but was a precursor to the elaboration of a legally binding international instrument.

15. The Delegation of the Philippines, on behalf of the Association of Southeast Asian Nations (ASEAN), expressed pleasure at seeing Indonesia, an ASEAN country and an active developing country delegation in the Committee, presiding over the discussions of this very important WIPO body. It thanked the International Bureau for the excellent preparations for the meeting and the high quality of the documents. ASEAN had always lent strong support the Committee's work. ASEAN countries were rich in genetic resources (GR) and possessed a unique cultural heritage which they wished to protect. As such, they believed that the Committee could play a useful role in developing appropriate international legal instruments to arrest biopiracy and the misappropriation of TK and folklore, while safeguarding the well-being of indigenous communities and other right holders of these newly-acquired IP assets. ASEAN was pleased with the extensive discussions thus far in the Committee. Notwithstanding the remaining differences, there had been a rich exchange of views and national experiences. However, such deliberations could not be ends in themselves, and it was essential for the Committee to accelerate its work and strive towards concrete results. The Committee served as a valuable forum in analyzing case studies and formulating an international consensus in developing IP systems that can effectively protect GR, TK and folklore. The contributions of various stakeholders were as important as those of delegations and IGOs, ASEAN therefore welcomed the establishment of a voluntary fund to finance the participation of indigenous and local communities in the Committee. Beyond the Committee, ASEAN believed that WIPO had an important role to play in helping Member States develop appropriate policies and build the requisite national capacity to protect GR, TK and folklore. ASEAN therefore wished to engage WIPO in organizing more activities, either collectively or individually, and in collaboration with other relevant IGOs, to provide legal advice, information and training to raise awareness in and build national capacities of ASEAN countries.

16. The Delegation of Benin, on behalf of the least-developed countries (LDCs), appealed to WIPO to establish a database on GR, TK and folklore, for the benefit of the LDCs. This would permit this group of countries to familiarize themselves with complex ideas such as these already mentioned. The Delegation also voiced approval for the statement by the Delegation of Morocco in the name of the African Group.

17. The Delegation of Indonesia indicated that, like other developing countries whose various traditional communities are rich in their cultural diversity, Indonesia very much appreciated the sterling work accomplished by the Committee in its effort to address the issues of the protection and recognition of GR, TK and traditional cultural expressions (TCEs), which were of great importance and concern to all participants. The current results

had been achieved thanks to the spirit of compromise which had characterised the participation of various delegations. The Delegation appealed for this spirit to continue to guide the Committee's discussions and future work. The Delegation recalled that at the previous session of the Committee, it had emphasized the need for the Committee to accelerate its work in order to achieve concrete results, including, in particular, the establishment of an internationally binding instrument for the protection of GR, TK and folklore. The alarming level of bio-piracy and misappropriation of TK and folklore required the Committee to undertake immediate steps to address these problems. The Delegation noted that over the years the Committee had strengthened understanding on the legal and practical aspects of addressing concerns about inadequate protection and recognition of TK and TCEs. The Delegation welcomed the development of policy objective and core principles for the protection of TK and folklore as stated in the WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5. The Delegation reported that Indonesia was drafting a regulation on the utilization of GR, which covers important issues such as equitable benefit sharing in using GR; sustainable conservation of GR and prior information consent (PIC) in using GR. In the process, there were interdepartmental meetings as well as sanctioning sessions with stake holders, the NGOs. Indonesia was also issuing a Governmental Regulation concerning TK and EoF. Indonesia considered that important documents concerning the disclosure of source and country of origin of the biological resources and of the TK used, evidence of prior informed consent under the relevant national regime, and evidence of benefit sharing under relevant national regimes, should be submitted when applying for patent rights. It was necessary to have those documents included, in order to avoid misappropriation or misuse of GR, TK and folklore and as an acknowledgement of the moral right of the concerned states and to ensure equitable benefit sharing for the respective countries. As a member and given that Indonesia abided by the agreements signed with other international governmental organizations which deal with the issues related to the rights of local and indigenous communities such as the CBD, FAO and UNESCO, Indonesia looked forward to the continuation of effective consultations and collaborations between WIPO and those organizations. The Delegation reiterated its support for any reasonable initiatives taken at this meeting in order to facilitate the consideration of the relevant issues at a latter date within subsidiary bodies.

18. The Delegation of Peru recalled that Indonesia, like Peru, was a megadiverse country with a huge cultural wealth and suggested that this added to the personal qualities of the Chair. It expressed thanks for the high quality of documents prepared for the meeting. Peru was concerned about cases of bio piracy which were preventing it from benefiting from its GR in a fair way. This was linked to the protection of the TK of Peruvian communities, which was in many cases associated with GR. In March, the countries of the Andean Community had received a mandate from their trade ministers to address the issue of disclosure of origin within the Doha negotiations. Likewise, in the Caracas declaration of April 1, 2005, the environmental authorities of Andean countries decided to establish the Andean Genetic Resources Committee with a mandate to define a strategy for the Andean region concerning an international regime for dealing with GR and equitable benefit sharing. This would aim to work together with other countries in Latin America and the Caribbean and with other similar countries in as far as possible. It was also decided to promote action to support *sui generis* protection of TK in compliance with Andean Community Decision 396 and Direction 36 of the 2004 Presidential Act of Quito. These efforts that Peru was effecting at the level of the Andean Community, and at a national level, should not mean that it should suffer further cases of biopiracy which it was again discovering outside of Peru and its sub region, in developed countries which didn't have mechanisms of protection like those which were presently being developed in the Andean subregion. The Delegation believed that this



posed a serious threat to the entire international community. For this reason it was necessary to find effective measures to confront this phenomenon sufficiently. The Committee is one of many fora where this issue is being considered, including other WIPO committees such as the Standing Committee on the Law of Patents, and other negotiating committees which are also very important, such as the WTO and the CBD. It was important to consider the mandate that the WIPO General Assembly gave to the Committee in particular the mandate to consider, in particular, the international dimension of these issues, without prejudice to work of other fora, and that it should not preclude any outcome, including a possible international instrument or instruments. In this context, the Delegation stress the necessity for the requirement for the disclosure of origins and of source in the patent system, as well as recognition of a system which would provide protection for TK as well and also deal with misappropriation. This was the final session of the Committee in its current mandate and it had to decide on its future. The Delegation believed that positive progress in the area of TK and folklore had been made over the years, so that there were specific texts which could be worked on so as to lead to international instruments. However, in the issue of disclosure of origin and GR in particular there had not been concrete progress, raising the question of the utility of maintaining the discussions in the Committee. Dealing with that issue in the SCP would be appropriate because there is a very close link to the patent system. This would allow the Committee to focus on the areas where it had made progress and it could not then be used as a pretext, as some delegations had done, to delay negotiations without wanting to actually find real solutions to the Delegation's concerns. The Committee was at an important cross roads where the decisions and recommendations that were to be adopted must be carefully weighed up by all stakeholders in the Committee: this included Indigenous brothers and sisters from all over the planet, who on a daily basis were faced with these problems mentioned by the Delegation, and who were the real victims of biopiracy and misappropriation of TK. They were the face and the voice of the Delegation's concerns, but they also represented hope. The Delegation hoped that the Committee would address the concerns it have raised which particularly affect developing countries and their communities, in a spirit of dialogue and mutual understanding, so that more than mere words would be created.

19. The Delegation of South Africa stressed the great importance of protecting GR, TK and folklore. South Africa commended the work of the Committee and confirmed that its work had been a guiding force in formulating an indigenous knowledge systems policy. This policy had been adopted by the Cabinet of South Africa in November 2004 and launched by the Department of Science and Technology in March 2005. The main drivers of the indigenous knowledge systems policy had been: the affirmation of African cultural values in the face of globalization; practical measures for the development of services provided by IK holders and practitioners including traditional healers; the contribution of indigenous knowledge to the economy; and interfacing indigenous with other knowledge systems. In addition to this policy, further policies and legislation had been or were being developed, including: the policy framework being developed by the Department of Trade and Industry; the Traditional Health Practitioners Bill, the Traditional Leadership and Governance Framework Act, and the Biodiversity Act. The Delegation supported the statements by Peru and by Morocco on behalf of the African Group. Mandatory disclosure requirements should apply to all national regional and international patent applications, as a basis for combating biopiracy and misappropriation of indigenous knowledge. The Delegation was concerned up the pace at which agreements and common points had moved in the Committee and hoped for significant progress at the conclusion of the current session.

20. The Delegation of Brazil considered that the documents that were available as the basis for the Committee's work had improved, and noted that further comments could be made on

them in the course of the Committee's work. The Delegation emphasized the importance of the issues that fell within the scope of the Committee's work; various sectors of the Brazilian population followed these issues very closely, and the Brazilian Government gave particular priority to these issues. It voiced concern about the levels of biopiracy that were being observed within Brazil, a very large megadiverse country. Many sectors of the population felt that they had much to lose from the misappropriation of their TK, TCEs and EoF; this was a concern that involved not merely one or two governmental agencies – there was a concerted effort across various agencies, due to the cross-cutting nature of the issues. The Committee's work was progressing more on the front of TK and TCEs/folklore as was evidenced by the documents before the Committee, while the documents showed that work on disclosure of origin of GR had not progressed as much. The Delegation considered disclosure of origin as a key issue which is directly associated with substantive patent law. It should be integral with the requirements for patent applications, so that it was important to see progress on this issue multilaterally in forums that have a substantive and concrete negotiating mandate, in particular in the context of the Doha Development Round of the WTO, where the issue of the relationship between the TRIPS Agreement and the CBD is included as an implementation issue of the round, and is being dealt with in the context of a development-oriented mandate that the Delegation would like to see progressing and producing concrete results. The Committee's work had been useful work; it had helped improve understanding of certain issues, but the Delegation was concerned that the fact that the Committee was working on certain issues was used as an excuse for not dealing with them in other bodies that have a concrete and substantial negotiating mandate. The Delegation understood that this was the last session of the Committee under its current mandate and that further renewal of its mandate would require an understanding concerning its terms of reference, particularly with a view to making the future work of the Committee more focussed and productive.

21. The Delegation of Canada underscored its longstanding commitment to the Committee's existing mandate to provide technical expert input on IP issues related to genetic GR, TK and TCEs. The Committee had long played a significant role in WIPO as well as in the broader multilateral framework, to further international understanding of these complex issues. It had also helped inform ongoing national discussions on these matters. In Canada, in particular, the work of the Committee had assisted in scoping out some of the many legal and policy layers involved in GR, TK and TCE issues. In addition, present in the room were a number of representatives from Canadian Aboriginal organizations, many of whom have participated in the Committee on other occasions. Canada's discussions on GR, TK and TCEs had benefited greatly from their participation in the Committee. The Committee had also provided these Canadian organizations a useful venue for expanded knowledge-sharing and knowledge development at the international level, thereby supporting greater capacity building. For the present session and the Committee's future work, Canada looked forward to the Committee providing substantive and focussed input, as required, on these issues. To this end, the Delegation looked forward to discussions on productive and possible ways of moving the Committee's work ahead, while respecting the specific and diverse nature of Member States' interests. For Canada this last point was important, since there was a range of national experiences among Member States on the matters before the Committee. Canada supported efforts to ensure that the Committee's future work maintained sufficient flexibility to accommodate and reflect Member States' national priorities and concerns. There was concern in Canada that the documents for the current session on TK and TCEs, in particular, were not sufficiently inclusive of this diversity, and did not reflect Canada's understanding of what Member States agreed to at the seventh session. This could detract from possible progress in these areas. The Delegation encouraged Member States to consider additional ways in which indigenous and local communities could contribute effectively to the Committee's future

work. The relevant and useful contribution of accredited observers, particularly those representing indigenous and local communities, was well known to Member States. Canada recognized the WIPO-mandated intergovernmental structure of the Committee had to be respected by all, but encouraged continued consideration of ways in which the participation of indigenous and local communities could be enhanced, in addition to the possible creation of a voluntary fund.

22. The Delegation of Senegal commented on the quality of the synthesized documents before the Committee, and especially those dealing with policy objectives and general principles for the protection of GR, TK and folklore. The most valuable state of progress and the level of understanding, achieved by different sessions of the Committee building upon its three pillars, notably the themes such as the disclosure of source, the sharing of benefits and the like, leading to legal protection of the factors in question, allowed one to think that the procedures undertaken for several years could, at present, be brought to a conclusion: to be precise, towards the elaboration of a legal instrument for the international protection of GR, TK and folklore, to reinforce the development of national systems put in place by Member States. In this context, the Delegation welcomed the statement made by Morocco on behalf of the African Group.

23. The Delegation of Burkina Faso noted that its presence indicated the importance that its country attached to question of the protection of GR, TK and folklore. Its national copyright law already protected TCEs. If the work of the Committee could attain an improvement and a reinforcement of this protection, this could only be welcomed. Burkina Faso was perhaps a materially poor country but it was culturally rich. The Delegation warmly welcomed the progress which the Committee had attained in dealing with these new questions, notably concerning the direction which the work had taken towards formal protection of TK and TCEs/EoF. The Delegation took the view, in common with the statement of the African Group, that the Committee's work would not be achieved until it produced a legally binding international instrument. The Committee would not fulfill its objectives if it only produced texts to guide Member States in their policies on TK and TCEs.

24. The Delegation of the United States of America recalled that it had been a long standing supporter of the Committee and recognized the important role that it played in lending its expertise to the important topics of IP in GR, TK and folklore. The Committee had facilitated a deeper understanding of these matters through its detailed discussions in ensuring of national experiences. However, the United States shared the concerns that were expressed by the Delegation of Canada on the Committee's documents related to TCEs and TK. It appeared that these documents were not sufficiently related to national experiences and did not express or reflect many of the objectives and principles that were discussed in previous meetings. The Delegation looked forward to continued fruitful Member-driven discussions under the current mandate that build upon the work of the Committee. As the Delegation had learned in this process, building upon successful national experience was the best way to achieve meaningful results.

25. The Delegation of Australia noted that the preparation of the papers for this meeting would provide a very useful resource for the deliberation of the Committee, as well as for the consideration of these issues at the national level. Australia commended the work of the Committee and highlighted some of its achievements, particularly its practical outcomes, such as the revision of the latest version of the International Patent Classification to include categories for TK and the inclusion, as minimum documentation within the Patent Cooperation Treaty, a selection of TK-related journals. These practical outcomes can only

serve to enhance and strengthen the patent system by facilitating better patent searching. The Delegation welcomed the opportunity of the current session to further discuss the important and complex issues surrounding IP and GR, TK and folklore, and to learn from the experiences of other countries. While the debate over these issues had been ongoing for some time, it was important to note that while some members of the Committee had voiced their support for an international legally binding regime or instrument, to date no consensus had been reached within the Committee on substantive outcomes, including the form of any such outcomes. Although much useful work had been undertaken, much more needed to be done before the Committee would be in a position to make recommendations on what steps might need to be taken regarding the IP aspects surrounding the issues of GR, TK and folklore. As noted for instance at paragraph 13 of WIPO/GRTKF/IC/8/5, an international legally binding instrument was only one of a number of possible outcomes of the work being undertaken by this Committee. Consideration of such an outcome was not warranted at the present stage in the Committee's consideration of the issues. At its seventh session, the Committee had asked the Secretariat to draft, following further contributions by interested parties in February this year, further drafts of the Policy Objectives and Core Principles papers for the protection of TCEs/EoF and TK. These further drafts had been presented in WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 respectively. Part III of the Annexes to these documents the concepts formerly presented as substantive principles had been developed into substantive provisions and presented in the form of draft treaty language or negotiating text. The international dimension of its work was part of the Committee's extended mandate, but it was premature to formulate the material before the Committee in such a manner given that as yet no consensus within the Committee on the objectives and principles nor on any vehicle by which these matters could be taken forward. Rather, the Delegation strongly urged as a priority the further discussion of the policy objectives and general guiding principles in these documents, particularly as there had been some significant changes to these sections of the papers, including amendments to the objectives and principles, the inclusion of new elements and the deletion of others. These changes had altered the character of some of the objectives and principles quite substantially from the draft provided to previous session. It was very important that the basic elements underpinning any form of proposed protection, encapsulated in the policy objectives and general guiding principles, should be fully discussed before the Committee turned to a detailed consideration of the substantive principles to be developed from these underlying policy objectives and general guiding principles. The Delegation therefore looked forward to the opportunity for further discussion, particularly of the objectives and principles in WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 at the current session. The Delegation understood that this was the last meeting of the Committee's current mandate, but the Committee's work was far from completed. The Delegation was very supportive of the excellent work the Committee had been responsible for. This work had greatly informed the debate, at the international and national levels and in civil society generally, around issues of the protection of TCEs/EoF and TK. Aside from bringing practical improvements to the existing IP system, the Committee's work had provided much food for thought and was beginning to bring clarity to these very complex issues. The Delegation wished to see this extremely valuable work continue under the auspices of this excellent Committee.

26. The Delegation of Morocco thanked the Secretariat for the important well-prepared documents, which, in its view, would undoubtedly facilitate the continuation of the efforts furnished to enrich such documentation and achieve the desired objective of the Committee to adopt a legally binding instrument for the protection and safeguarding of TK and TCEs, i.e., folklore, in such a manner as to provide the appropriate environment for their development. The Delegation supported the statement made on behalf of the African Group, and noted with

satisfaction the progress of the work carried out by the Committee, following the renewal of its mandate by the General Assembly in September 2003. The positive and constructive spirit in which work had been achieved by the Committee should be maintained and future work oriented towards consensus and mutual understanding. The Delegation said that Morocco attached particular importance to the protection of TK and TCEs, and had provided for effective legal and practical protection against all forms of abuse or piracy. The Delegation expressed the hope that efficient protection would be provided at the international level to ensure safeguarding and development of such assets, and codification of the use of that intellectual property and derivative works. In that context, the Delegation emphasized the need that the necessary field studies be prepared to enable evaluation of the global situation in the countries concerned, and a WIPO database be created to allow such countries to monitor progress of those studies and evaluations. The Delegation hoped that work would continue on various experiences of Member States with the necessary diligence and flexibility. The project to establish a Voluntary Contribution Fund to finance participation of indigenous communities, to be submitted by the Secretariat to the General Assembly, was welcomed. The Delegation reserved its right to make observations on the contents of the much-appreciated WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5, underlining that those contents constituted a sound basis for the adoption of an international instrument that would provide for the desired protection.

27. The Delegation of Norway noted that there were tensions related to the interface between IP and GRTK. These tensions were not good incentives for the conservation and a sustainable use of GR. The Delegation recalled that the international dimension formed part of the mandate approved in 2003 by the General Assembly. In contrast to some others, Norway generally supported the approach taken in the documents prepared for this meeting. On the other hand it was in favor of a balanced approach based on a clear analysis of real gaps in international and national frameworks. The Delegation did not favor constructing overly complex structures covering everything under the sun in detail. One could not have one single instrument providing detailed rules for diverse elements like musical heritage and plant genetic resources for food and agriculture. One could clearly foresee some kind of international principles or framework. Sufficient flexibility would have to be left to accommodate national needs as well as the characteristics of different sectors with different needs.

28. The Delegation of Nigeria expressed the hope that the Committee process would make significant progress as it had done in the past, and appreciation for the excellent work and the rich documents made available at the current session. The Delegation was pleased that the Committee had made progress. Although the three major streams of the work of the Committee were not proceeding at the same speed and depth, the progress that had been made, particularly in the areas of TK and folklore, was is very significant, and this should inform the future work of the Committee. The Committee's work had made particular windows of opportunities for various local communities and holders of TK and EoF. More and more local communities and traditional asset holders realised the cultural and economic value of these assets and naturally all saw a greater need to protect them from external exploitation and desecration as well as the need for them to pay greater attention to these areas for their own development strategies. It did appear that many delegations rose from the seventh session of the Committee on a rather optimistic note, and this was due to the apparent convergence of opinions on the core and policy objectives. The Delegation felt that this could in fact form the basis for a legally binding international instrument. For Nigeria, the work of the Committee had been of tremendous benefit as it has begun to influence its policy and the formulation of new instruments in the area of intellectual property. The Delegation was

convinced that a great deal of research and studies had been carried out and that more local communities and interest groups and concerned developing countries had taken active part in this process, probably more than any other IP related process. As the Delegation had noted at the sixth session, this was probably the only IP related process in which the greater majority of developing countries and local communities had had their voices so well registered. This was not only a confirmation of the importance of the subject being discussed, but it also reflected the wide platform that WIPO had provided for an all inclusive and informed participation. The Delegation expressed the gratitude of Nigeria to WIPO and its leadership for facilitating the participation of more developing countries and local communities in this process. The Delegation fully supported the statement of the Delegation of Morocco made on behalf of the African Group. It was particularly pleased to note the work that has been done on the continent either at regional level or by individual states and noted with particular interest that the African Group in fact had been able to indicate some direction for the future work of the Committee. The Delegation acknowledged the enormous task before the Committee, realised the difficult issues that confronted the Committee, and the sensitive nature of some of the solutions that had been proposed. It also realised that the African Group had pointed the way forward, showing that what is being asked for is more than just a theoretical solution, but a practical measure to arrest the desecration and the undue exploitation of the cultural assets of a great majority of people. The Delegation reiterated its belief that the Committee would be able to bring to conclusion what it had started so well and that was to have a legally binding international instrument in this area. Nevertheless it saw the need to work on and examine other suggestions and to work to improve what the African Group had so well proposed.

29. The Delegation of Egypt supported the intervention made by the Delegation of Morocco on behalf of the African Group. Egypt gave great importance to the questions before the Committee and considered that it should carry out its work with greater effectiveness and in a positive manner so that its work became an international mechanism that is effective for the defense of TK, GR and folklore. Egypt had been amongst the pioneers in protecting these topics through the Law for the Protection of Intellectual Property Law No. 82 for 2002 which stipulated that the patent applicant must divulge the legal origin of the matter that he wants to register. Dealing with these three topics through the Committee should not impede work on these topics in other international fora. In order to reach the objective the Delegation aspired to, namely to have a *sui generis* international code or mechanism that would stipulate the validation of the origin of these resources. This international mechanism would be the most effective way for the protection of these three topics under discussion.

30. The Delegation of India recalled its view that discussions on the protection of TK, TCEs and GR had to take care to address all aspects of the related IP dimensions holistically. Unlike conventional forms of IP which grant monopoly rights to individual right holders and were almost stand-alone in their application, the forms of TK, folklore and GR had wide interfaces with each other as well as with some of the conventional forms of IP, and in fact could not be dissociated from each other. The Committee had long been seized of this issue since its inception. It was therefore necessary to holistically address the issues relating to the protection of TK, TCEs and GR. The Committee was already seven sessions old and one more session was in progress. It was at the end of its current mandate. Over this period, a large amount of detailed research had been undertaken, but it had not been possible to achieve substantially what the Committee had set out to do, namely to create a set of internationally binding instruments to provide protection to these forms of IP. For this purpose, there would always be a need to create a set of internationally acceptable norms and standards as the first step. The Delegation would also be asking the Committee to focus on definitions which

would form the basis for creating an international instrument. The principles linking benefit sharing and equity with access must form part of the deliberations. Absent any form of prior informed consent from the holders of TK, TCEs or GR, no form of IP would be equitable. The Delegation was aware of the complex and cross-cutting nature of issues involved and that the quantum of research conducted in this sphere had perhaps been needed. However, the Committee should not become a forum for endless discussion. India would be interested in looking for concrete results emerging from the Committee. The Delegation appreciated the work done by the Secretariat in this regard in the creation of revised provisions for protection of TK and TCEs contained in WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5. The Delegation was keen that the work forward in this regard should be in the direction of creating an internationally binding instrument to provide such protection. Protection against misappropriation was but one dimension of the overall context of TK, TCEs and GR. India was one of the countries of the world which had an historical and civilisational continuity. Over the millennia, many forms of TK had evolved which were codified and in the public domain. This disclosed TK was also being subject to misappropriation, even though there did not exist a single community or a collection of communities which held the right to this knowledge. The Delegation was keen to give recognition as positive rights to codified forms of TK. So far, the efforts of the Committee had focussed almost exclusively on non-codified community-held TK. This excluded a wide range of knowledge systems which were formal, non-patentable or copyrightable and non-community based. In the absence of any protection for these forms of knowledge internationally, piracy and misappropriation were only likely to increase. India had to struggle to get the patents on the wound-healing properties of turmeric plant and the fungicidal properties of the neem plant, to name a few, revoked in various patent offices, even though these properties had been known to Indians for ages and had also been codified in various ancient texts of Indian systems of medicines. The system of Yoga was an ancient Indian system of living in which the physical postures were but a small part of the overall concept of being. But today India was also watching with consternation the efforts to copyright some yogic postures and also attach a trademark to Yoga. It had to be realised that it was essential to have norms and standards at the earliest, to prevent such usurping of TK. The reality of post-grant opposition to patents and other forms of IPRs was that they were not only cumbersome but also expensive to follow across international borders. The large scale on which misappropriation and piracy of TK, TCEs and GR took place made it that much more difficult for a country such as India to fight each and every such misappropriation. The Delegation recalled its statement at the seventh session that the extent of the problem can be gauged from the result of a study conducted by a task force of Indian experts on the data bank of the USPTO, UKPO and EPO in the year 2000. The study had found 4896 references to medicinal plants and assessed that 80% of these plants were of Indian origin. This number had increased substantially to more than 15,000 in a similar study in 2003. Similarly, within a sample study of 762 randomly selected US granted patents with direct relationship to medicinal plants in terms of their full text, 374 or 49% were found to be based on TK. These figures more than underscored the need for an internationally binding instrument. An adequate role might be prescribed for a national authority to handle such cases where no single community held rights to a particular kind of TK or folklore. It was essential to recognise that national authorities do need to be created to ensure the evolution and stabilisation a system of benefit sharing. It would also be able to create some form of equality of power in the process of negotiation between the holders of TK and the potential users. The Delegation gave an example of the immediacy of the problem. The biotech industry was one of the fastest growing sectors of the world economy. A large part of the R&D in this industry was based on existing GR and related TK. In this context, it became incumbent on the world community to focus on the need to prevent any misappropriation of the TK and piracy of GR. The Committee would do well to recognise that the obligation that this industry had towards

the holders of the rights to the GR and the related TK. India's laws on the conventional forms of IP like the patent law and the plant variety law, as well as the biodiversity law and the initiative on TK Digital Library, had all been developed with due regard to the issue of disclosure not only of source and geographical origin of biological material but also of any non-codified, even oral, form of TK with any community in the country. The Delegation was keen to ensure that the work of the Committee should not prejudice the progress in any other forum, and in this context would welcome any attempt that the Committee might make to progress its work according to a specific time schedule.

31. The representative of ARIPO commended the excellent quality of documents prepared for the meeting. He advised that ARIPO had officially changed its name to the 'African Regional Intellectual Property Organization' with effect from November 13, 2004. The Council of Ministers of ARIPO had recognized the significant contribution that ARIPO had made since its establishment in 1976 towards the development of industrial property, an aspect of IP, and decided to broaden the mandate of the Organization to cover all aspects of IP including emerging issues such as the protection of TK and folklore. ARIPO was now a fully-fledged intellectual property organization. The representative asserted that Africa was perhaps economically the least developed continent in the world yet was probably the most endowed with natural resources together with living heritage of TK and folklore which was considered an important cultural and economic asset and a potential source of wealth creation and future prosperity of the African people. For this reason, the Secretariat of ARIPO on behalf of its 16 member States had actively participated in the Committee processes and joined the global search for developing an appropriate mechanism for the protection of TK and folklore. During the early stages of the Committee's work, a number of delegations had expressed the concern that in order for the Committee to understand the underlying issues involved in developing comprehensive international normative framework on the protection of these resources, a number of national and regional experiences would be required. Today, ARIPO noted with satisfaction the number of national and regional systems that had been developed and are being enforced in the various jurisdictions. Furthermore, extensive revisions had also been carried out with respect to the policy objectives and core principles contained in WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5. It was therefore the view of ARIPO that the time was ripe for the Committee to move beyond the synthesis of national systems in the form of policy objectives and core principles which the Delegation of India during the seventh session had described as merely an "international layer" and to take a bold step towards elaborating an international instrument, which was one of the expected key outcomes of the Committee. The representative recalled that over the past two years the Committee had redoubled its efforts in establishing mechanisms aimed at charting the way forward for Member States. In 2004, ARIPO prepared an integrated policy framework for the protection of Genetic Resources, Traditional Knowledge and Folklore. The policy framework was put in place to provide direction and the basis for the design of legal mechanisms, assist in the assessment of capacity building needs as well as the structuring of regional strategies for elaborating an international instrument or instruments. ARIPO recorded thanks for WIPO for the assistance provided in preparing this framework. Subsequent to this development, ARIPO had also drafted two legislative instruments for the protection of TK and folklore. These draft instruments took into account the policy objectives and core principles of the Committee process and were reviewed by an expert group that took place from April 19 to 22, 2005, thanks to the sponsorship of WIPO. It was the opinion of ARIPO that the outcome of this expert review meeting served as a useful input in the revisions of the policy objectives and core principles. In view of the fact that in most parts of Africa, the TK, GR and folklore were multicultural in nature and cut across national boundaries, ARIPO intended putting in place mechanisms to address problems that may arise from the so-called regional TK and folklore. ARIPO would share its views on these



issues when the Committee considered WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5. ARIPO was in the process of developing a database on TK. As an industrial property office, ARIPO believed that defensive protection measures such as the development of databases were particularly useful as a searchable prior art tool for the substantive examination of patent applications, which claim the use of TK and associated GR. Efforts were being made to collaborate with other international and national institutions such as the WIPO, European Patent Office (EPO), the State Intellectual Property Office of the People's Republic of China and the National Institute of Science Communication and Information Resources (NISCAIR) of CSIR in India. The representative paid tribute to the Chinese and Indian delegations for opening their doors to ARIPO officials to familiarize and learn from their experiences in the development of TK databases. ARIPO associated itself with the statement made by the Delegation of Morocco on behalf of the African Group, and was increasingly becoming mindful of the alarming rate of bio-piracy and the adverse impact the lack of a comprehensive international normative framework is having on biodiversity, TK and folklore. As a result of this prevailing situation, communities were losing control over their own bio-resources and were being increasingly exploited for their knowledge. It was the hope of ARIPO that this meeting would accelerate the process towards developing the much-awaited internationally-agreed instruments to protect GR, TK and folklore.

32. The representative of OAPI recalled that the Committee had, at its last session, invited its members to make comments on WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5. To fulfill this, OAPI had convened a meeting of experts in Dakar in February. Following that meeting, OAPI had provided the Secretariat with the collection of observations and proposals for amendment. The representative was pleased to note that the essence of these observations had been taken into account. OAPI congratulated WIPO for the excellence of the current documents. The moment seemed opportune to go to the following step, which was to direct the Committee's work towards the elaboration of an international legally binding instrument. In fact, guidelines for national laws or even regional laws would be inadequate for effective protection. Following the recommendations of its Member States, OAPI was undertaking the elaboration of draft frameworks for regional instruments for the protection of TK and EoF, as well as GR. The representative renewed its appreciation for the excellence of the documents, which added to various studies and surveys constituted a basis for work towards the elaboration of an international legally binding instrument for the protection of TK, GR and EoF.

33. The representative of the UNU-IAS recognized that the importance of the Committee's work to develop measures for the protection of TK and folklore. He commended the Secretariat for its work in preparing the background documents for the meeting, and recalled that the UNU-IAS had provided detailed comments on WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 and in particular on the concept of misappropriation as an organizing framework for the development of guiding principles for the protection of TK and folklore. There were clear parallels between the work of the Committee and the process to develop effective international governance of ABS issues under the CBD, which included the development at first instance of set of guidelines in the form of the Bonn Guidelines followed by the commencement of a process for the negotiation to of an international regime on ABS. The proposals under consideration for a misappropriation regime may be likened to the Bonn Guidelines. On that basis, the Committee can step towards an international regime. The discussion of principles and objectives underlying WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 would need to keep a number of key issues in mind. Any regime should reflect the true aspirations, needs, interests and rights of the indigenous and local communities. This required the development, funding and implementation of an extensive

participatory process to enable full involvement of indigenous peoples and local communities in the formulation of any regime. This must go beyond the invitation of a small number of indigenous peoples to the meetings of the Committee, and must include funding of a dissemination, capacity-building, consultation and regional, national and local dialogue, managed and directed in close collaboration with indigenous peoples and local communities. As was clearly heard from indigenous presenters at the opening panel session, any regime must be based upon customary law and practice. To this end, the meeting should address the issue of funding for research on customary legal regimes and their interface with national and international legal regimes. Protection of TK required an holistic approach. The representative also supported the call by the UN Permanent Forum on Indigenous Issues for UN bodies working on TK issues to come together and identify synergies and opportunities for ensuring a more collaborative for the protection of TK and folklore. The UNU-IAS had been working to help to move forward debate and research on the issues before the Committee. This work included subregional workshops, capacity building in the Pacific on customary law and protection of TK, and research on databases and TK. The Institute was working closely with WIPO on a number of issues relevant to the Committee's work and a joint workshop on TK and IP issues for Central Asia and Mongolia. This was part of a wider program of capacity-building on ABS and TK.

34. The representative of the SCBD recalled that the seventh meeting of the CBD Conference of Parties (COP) provided a mandate to the working group on access to GR and benefit sharing to negotiate an international regime on access to GR and benefit sharing, with the aim of adopting an instrument or instruments to effectively implement the provisions of CBD Article 15 on access to GR and benefit sharing and Article 8(j) on the protection of TK. The COP also agreed on the terms of reference for these negotiations and the Working Group was mandated to meet twice before the eighth COP, due to take place in Brazil in March 2006. The Working Group had held its meeting in Bangkok in February 2005 and initiated these negotiations. The Working Group considered the nature, scope, potential objectives and possible elements for inclusion in such an international regime. As could be expected at an early stage of negotiations, no agreement was reached on the nature and scope of the regime; however, parties to the CBD did put forward options for consideration in future negotiations. The parties identified what were termed potential objectives of such a regime. In this respect, two proposals were of interest to the Committee. One of the proposed objectives was to prevent the unauthorized access and use of GR to ensure that fair and equitable sharing of benefits through to the providers of GR and to reinforce national legislations. A second objective was to ensure compliance with prior informed consent of providers of GR and of indigenous and local communities where TK is accessed. Possible elements of an international regime including the disclosure of origin, source or legal provenance of GR, and associated TK in applications for IP rights were clustered by subject matter and additional elements were also put forward by parties for future consideration. The Working Group would next meet in January 2006 in Granada, Spain. Among the issues addressed by the Working Group, the one most relevant to this committee was the issue of disclosure of country of origin, and also of GR and associated TK. Recommendations by parties in this regard included that parties and governments should consider the introduction of disclosure of origin, source or legal provenance of GR and associated TK in applications for IP rights in their national IP legislation. As one of the measures to ensure compliance with the prior informed consent and mutually agreed terms upon which access was granted, parties had also been invited to identify issues related to disclosure of origin, the source or legal provenance of GR and associated TK in applications for IPRs, and submit this information for examination by the Working Group, and also with a view to transmitting the results of this examination to WIPO among other international organizations. Finally with

respect to the invitation by the COP to WIPO to carry out further work on the interrelation of access to GR and disclosure requirements in IP applications, the representative was pleased to note that the WIPO General Assembly responded positively to this invitation and that progress was being achieved as is evidenced by the Ad Hoc Intergovernmental Meeting on Genetic Resources and Disclosure Requirements held the previous week. He looked forward to the finalization of the report in time for the fourth meeting of the Working Group in January 2006 and the Working Group on Article 8(j). The clarification of concepts and the examination of technical issues by WIPO was a vital input into the negotiating process being undertaken within the CBD. As regards TK, the next meeting of the Working Group on Article 8(j) would also be held in January, back to back with the Working Group on Access and Benefit-sharing. This would provide the Working Group on 8(j) the opportunity to formulate recommendations regarding the negotiation of the international regime to be considered by the Working Group. The issues to be addressed at that meeting would include the development of *sui generis* systems for the protection of TK, and in this regard it should be noted that the group had identified what were termed potential elements of *sui generis* systems and requested the Working Group to develop these further. It was hoped that the upcoming meeting would develop these issues further. The Working Group had also been requested to look at particular mechanisms both at national and international levels and also to finalize the preparation of the composite report on the status and trends of TK. In this last regard, the SCBD had in May held three regional workshops on the status and trends of TK and the outcome of these workshops would be a vital input in the finalization process for the composite report. He looked forward to containing collaboration with WIPO on these issues.

35. The representative of the IUCN recalled that her organization had participated in the discussions of the Committee from its first meeting. She viewed with interest the development of technical information and proposals which had served as basis for the development of provisions for access to GR and the protection of TK, and had guided debates in other international forums like the CBD. The IUCN had organized forums for discussion with different actors and from different perspectives, during meetings of the Committee and at the regional, national and local levels. It had produced analytical and information documents to contribute to the Committee's discussions, including recently a preparatory electronic forum for the current session with almost 90 participants from Latin America, Europe and Africa to promote discussion of the objectives and principles that were currently being analyzed. On the basis of the outcome of that forum, she made general comments on the document concerning policy objectives of principles. The first concerned the necessity of an integral approach that uses instruments within and beyond the IP system, including existing options (marks, patents, breeders' rights, collective marks, copyright, trade secrets, etc.), together with compensatory funds, registries of TK of indigenous peoples, under the control and custody of the holders of this knowledge, defensive mechanisms (such as requirements of disclosure of origin), and *sui generis* mechanisms. The second concerned agreements on the objectives and the scope of the protection of TK. To this end, an approach based on the rights of the indigenous peoples and not purely contractual could be very useful. The third concerned a program of holistic valuation of TK that recognizes its contributions to the conservation of biodiversity, environmental goods and services and sustainable development. This was key at the time of establishing terms of equity and justice in the distribution of benefits. Fourth, a work program of harmonization and synergy between different forums and processes that are dealing with this subject, with special emphasis on the CBD's work on an international regime for access to GR and the revision of the WTO TRIPS Agreement. It was clear an effective protection of TK could not be achieved with a single instrument since it requires integral solutions through different mechanisms that combine international normative bodies, regional and national norms, and instruments for implementation at the local level.

Fifth, was to clarify the scope and competencies of the different legal and political measures for protection at the national, regional and international levels. This last aspect has been criticized concerning the deliberations of the Committee and clearly suggested the necessity to rethink its function, role and mandate. The pending work would not be possible without the full and informed participation of the indigenous peoples and local communities in this process. The creation of a voluntary fund should therefore become a reality. She was convinced that the normative alternatives that the Committee was producing must contribute substantively way to the conservation and sustainable use of the biodiversity as well as respecting the rights of the indigenous peoples and the strengthening and revitalization of their TK and their cultures. The UICN was, like always, prepared to continue supporting the work of the Committee in establishing spaces for dialogue, and offering pertinent information and analyses for its work.

36. The representative of the Kaska Dena Council delivered a consensus statement developed by the Indigenous Peoples ad-hoc observers that attended the informal consultative forum, that had preceded the session. He noted the Secretariat's exemplary development of the documents. Their continuing efforts to brief and consult indigenous peoples' representatives in their preparations was truly committed. The Secretariat's impartial facilitation of the informal consultative forum which occurred on June 5, 2005, was particularly appreciated. The representative was delivering a consensus statement deliberated upon at our forum, but clarified that his intervention did not presume to speak on behalf of all indigenous peoples' organizations attending the session. This submission was without prejudice to the submissions of his indigenous brothers and sisters. The statement congratulated and offered thanks to WIPO Member States for supporting the informal panel session in the morning preceding the session. Such developments in the Committee were truly progressive and respectful of the imperative role that indigenous peoples play in the development of the Committees' work. It was however important to state that the panel was not a substitute for more enhanced participation in the Sessions themselves within or prior to the discussions under each agenda item. The statement strongly supported the establishment of a Voluntary Fund by adoption of an appropriate decision by the WIPO General Assembly. Since the European Union's proposal at the First Session of the Committee there had been an unanimous agreement-in-principle to establish such a Fund. The representative respectfully submitted that the time had come. He strongly encouraged Member States to support the adoption of the establishment of the Fund, and foreshadowed some specific nuanced language suggestions with respect to the selection criteria. With regard to the revised provisions for the protection of TCEs and TK to be discussed under agenda items 8 and 9, respectively, the informal consultative forum participants wished to strongly encourage the further development of both sets of these provisions by the Committee or other appropriate forums, such as open-ended working groups or open-ended experts groups with the participation of indigenous peoples. Although these revised provisions were works in progress, the forum participants acknowledged the considerable efforts that indigenous peoples and Member States had invested in these valuable work products, and supported the evolutionary nature of these documents, looking forward to making detailed submissions under these agenda items. The forum participants also made a substantive call for a prioritization of Committee's work on the role of indigenous customary law in protecting, preserving and maintaining Indigenous TCEs and TK. A study on the role of indigenous customary law within the IP system had been approved by the Committee at its third session but no progress had yet been seen in this area. This work on indigenous customary law was absolutely integral to the further developments of both the TCE and TK provisions.

37. The representative of FILAIE paid tribute to the Secretariat for the preparation of extraordinary document, and described his organization as an international Federation, with a membership of 23 management entities and found in South America and Central America, and some in Europe, in Italy and in Spain. These management entities were in permanent contact with daily events in the corresponding countries. The representative considered TCEs/EoF. The representative recalled the three step theory that arose in copyright discussions, and mentioned a rule of four 'R's. His federation believed one should start by analyzing recognition and active respect (that is to say the need for protection), then move towards regulations and finally a possible remuneration. The first 'R' was recognition: it was necessary to make progress to see who are the holders of this possible protection of TCEs. There were two right holders, the community and the artists. Both keep the cultural expression alive because without the artist's participation the TCE would disappear. The artist must not only learn his mother tongue, but he also needs to learn to play on traditional instruments which are rather difficult without the appropriate technique. The TCE would otherwise become part of prehistory. The future of TCEs resided in communities and in artists who kept these traditions alive, so recognition was stage one. Recognition involved an obligation of preservation and respect. The second 'R' was respect and protection. One could envisage a system of authorizations or a system of positions which would enable truly effective protection. The third 'R' was legal regulations: these were still in the fledgling stage, should be flexible and reasonable, and should not impair other rights in the field of intellectual property. And finally, in order to resolve this question, it was necessary to set up a remuneration system in favor of these communities: the fourth 'R'. The system would provide remuneration through the application of compulsory licenses, not exclusive rights, so that the cultural expression should not remain an exclusive right of a single entity but would belong to the international community as a whole. It was necessary to envisage a practical distribution mechanism because cultural expressions have nothing to do with GR. One concerned intellectual property, and the other concerned industrial property; so there were different applications depending on the countries concerned. The representative said the fight concerned piracy not only of genetic resources but also cultural expression, and proposed that WIPO consider the definition of the artist with reference to expressions of folklore. Artists should all be remunerated, whether they perform a literary work, play music or dance.

38. The representative of Tupaj Amaru expressed thanks for the particular attention given to indigenous peoples, particularly for allowing them to participate in the Committee. The Tupaj Amaru people had followed these discussions and the process of the Committee from the start, and based on this participation had seen that in this forum there were a lot of economic, financial and strategic interests rather than interests aiming to really want to legally provide protection for GR, TK and folklore, the authors of which are indigenous people and local communities. The representative thought that the Committee's mandate was to draft a legally binding instrument, but thus far this has not been the case. The Committee had compiled reports but had made little progress, even though indigenous peoples had made contributions and everybody was aware of their position on these issues. Why was there a need to draft a legally binding mandatory instrument for States and multilateral organizations and transnational corporations? This was due to the globalized unipolar world where there was just one superpower with its economic, financial and trade policies. The Committee had heard several times of the need to draft this instrument in order to harmonize national legislations and to take into consideration WIPO proposals on these issues concerning EoF and TK, including proposals dating back to the 1980s. Apparently Member States had not borne all of this in mind in deciding on their national legislation dealing with GR, TK and EoF. Despite the existing *sui generis* systems, and national legislation, the Committee should now draft an international legally binding instrument. There were many reasons for this.

Many delegations, such as Peru, had said they were suffering from biopiracy, and bio-prospection. And who were the victims? They were indigenous peoples, because they were the holders of these traditions, these cultures, these values, this wealth. Indigenous peoples had been victims going back to the *Conquista* and the whole colonization process, a period of more than 500 years during which indigenous peoples had been victims of cultural genocide. They had seen their wealth and culture stripped from them. So how could the international community and how could States find a solution to this very tricky problem? And it would only be possible with political will. This political will was not evident to find a solution to these such delicate problems facing indigenous peoples- not just indigenous peoples, but all peoples of the third world. The present development model in the new international economic framework went back to 1974 was incompatible with the development of the human person given their rights to live in peace with their natural resources. This was completely incompatible. Because this development model which governments are defending, particularly the ultra-liberal governments, who today were issuing licenses and patents to transnational corporations, had destroyed the cultural heritage of humanity because GR and TK don't just belong to indigenous peoples. This concerned the common wealth and heritage of humanity. This spiritual heritage, important for the survival of mankind, had been destroyed. It was necessary to think about who was going to benefit from all of this, and beyond that to think about the whole human race which is actually in danger of extinction today. Many indigenous communities in the North and in the South had already disappeared. There are communities that had already lost their memory, and there are problems because the holders of some of their TK had already disappeared. Historic communities were disappearing and being sucked up in the spiral of globalization. For five or six years now, the representative had been waiting for effective participation from indigenous peoples, not only in the WIPO but in other UN fora and elsewhere. Unfortunately he had come up against egoism, an egotistical approach from other countries who do not want to provide sufficient means for indigenous peoples to be able to participate in WIPO fora and in other UN fora. Therefore it was now up to the States, particularly up to rich States to ensure that this is possible.

39. The IIED advised that the International Institute for Environment and Development was working with a group of researchers from China, India, Panama, Peru and Kenya, examining the TK systems of indigenous and local communities and the role of customary law in the protection of TK. A good understanding of local concepts, norms and strategies was critical for the development of sound policy on the protection of TK, GR and folklore. Concerning the revised policy, objectives and principles for the protection of TK, the representative felt that a number of positive elements have been included in the revised policy objectives and principles and yet there were still some critical issues that need to be addressed. Most notably the principles did not adequately reflect the distinct and holistic character of TK which is common to many TK systems. They address TK in isolation from the cultural, biological and spacial components, which form an integral and inseparable part of many knowledge systems and which are vital for the preservation and creation of TK, both for local livelihoods and for the benefit of mankind as a whole. Unless approaches for TK protection are founded on a good understanding of the distinct cultural, biological and ecological character of TK systems, they risk doing little to safeguard TK and may accelerate its already rapid loss. Just as IP rights facilitate and encourage industrial innovation and creativity through market incentives, mechanisms to protect TK should be designed to facilitate and encourage traditional innovations.

40. The International Federation of Pharmaceutical Manufacturers Associations supported the Delegations of Australia, Canada and the United States of America concerning the need to

fully analyze measures before commencing on language for an international legally binding regime. A regime for the protection of GR had been discussed for some time, not only in the Committee, but also in the CBD *Ad Hoc* Open-Ended Working Group on Access and Benefit-Sharing. There had been a clear recognition that the most successful International Regime will be based on evaluation of national experiences, and an understanding of any gaps existing in such national regimes. This was all the more true for the protection of TK and TCEs.

#### AGENDA ITEM 7: PARTICIPATION OF LOCAL AND INDIGENOUS COMMUNITIES

41. In accordance with the decision of the Committee at its seventh session (WIPO/GRTKF/IC/7/15, paragraph 63), the eighth session was immediately preceded by a half-day panel presentations, chaired by a representative from a local or indigenous community: the panel presentations were chaired by Mr. Stanley Jones, Chairman and Elder of the Tulalip Tribes, and presentations were made according to the program (WIPO/GRTKF/IC/8/INF/6).

##### *Proposal for a Voluntary Funding Mechanism*

42. The Chair referred to previous sessions when ways to enhance the participation of indigenous and local communities were discussed at length. Some practical measures have been already adopted, including the panel for indigenous and local communities that was organized on Monday June 6, 2005, the Committee's decision to prepare a formal proposal (WIPO/GRTKF/IC/8/3) aiming at the establishment of a voluntary fund, and the WIPO web page open to observers' contributions and comments. The most recent contributions and comments were compiled in WIPO/GRTKF/IC/8/INF/2. The Committee took note of this information document.

43. The Secretariat introduced WIPO/GRTKF/IC/8/3, drawing attention to the fact that its drafting had been mandated by the Committee at its seventh session, with the aim of developing a formal proposal for the establishment of a voluntary fund by the General Assembly to support the participation of indigenous and local communities. As stated in WIPO/GRTKF/IC/8/3, this proposal was based directly on a series of previous documents discussing various approaches to a voluntary fund and on the extensive past debate in the Committee about the appropriate parameters of funding indigenous and local communities. Certain key elements were drawn from past documents. Firstly, funding would only be made available to representatives of observers that are already accredited to the Committee. Decisions on funding would not preempt the accreditation process foreseen by the rules of procedure established by the Member States. This would mean that funding would only be available to those representatives who already had the entitlement to take part in the Committee. Secondly, the Fund should have no impact on the budget of WIPO itself but would be only a supplementary and voluntary resource for funding participation. Thirdly, the proposal addressed the concern that available funds should be focused exclusively on the direct support of participation of representatives rather than being diverted to administration. And finally the Secretariat itself would be limited to a backup or administrative role, carrying out the recommendations of a proposed Advisory Board which would determine the beneficiaries of any financial support. The Secretariat added that the original text of WIPO/GRTKF/IC/8/3 was in French. Some inaccuracies had emerged in the initial English version, and WIPO/GRTKF/8/3 Corr. 1 provided corrections to the text.

44. The Delegation of Luxembourg, on behalf of the European Community and its Member States, wished to thank the Secretariat for WIPO/GRTKF/IC/8/3. It had consistently held that the involvement and participation of the indigenous and local communities in the sessions of the Committee and in all other WIPO work on GR, TK and folklore was of great importance. It considered the discussions of the panel held on Monday June 6, 2005 to be of considerable importance. This panel underlined the importance of participation of indigenous and local communities in the work of WIPO on GR, TK and folklore. On the funding issues, it had already stated in the past that, in the longer term, participation of indigenous and local communities should be ensured through a voluntary fund modeled to the extent appropriate on the UN Voluntary Fund for Indigenous Populations. It welcomed and supported therefore the proposed recommendation to the General Assembly for the establishment of a voluntary contribution fund as set in WIPO/GRTKF/IC/8/3. It reiterated the view that it was important to have a voluntary contribution fund which would operate under objective, transparent and low cost selection mechanisms. It believed that the present proposal met these conditions. In particular, it was important that the criteria for eligibility took into account previous accreditation to the Committee, the availability of financial resources of the accredited indigenous and local communities, the proven expertise and experience of the beneficiaries, and the balance between male and female beneficiaries. At the same time, it noted that the proposal contained the necessary control mechanisms in order to ensure that the available voluntary funds would be distributed in a fair and efficient manner. It welcomed the creation of an Advisory Board, which would assist the WIPO Director General in his management task. Final decisions on the modalities and operation of the voluntary fund would have to be related to the future work on IP and GR, TK and folklore after the conclusion of the current Committee mandate.

45. The Delegation of Norway underlined the accelerating emergence of a globalized, knowledge based economy that rapidly increased the political, economic, social relevance and impact of WIPO and added that the work of WIPO, and in particular of the Committee, more and more directly affected people, specially indigenous and local people, beyond the scope of intergovernmental decision-making. It was therefore of the utmost importance, both for the quality and the legitimacy of the work of the Committee, that indigenous people enjoyed real opportunities to participate in the proceedings. It noted that each Member State should ensure an appropriate participation of indigenous and local people in its own delegation at intergovernmental fora, including WIPO. It added that the Committee needed the direct implication of indigenous peoples and local communities. Recognizing that many developing countries and indigenous organizations might not have the necessary financial resources to be present at the Committee, it expressed support for the idea of a fund dedicated to ensuring the participation of indigenous people in the meetings of the Committee. However, it was of the view that such an important issue, which should be prioritized, should not be left to voluntary contributions, given the economic situation of WIPO. It was therefore of the view that WIPO, as a matter of the highest priority, should allocate appropriate funds – as assessed contributions – in the regular budget in order to facilitate indigenous participation in the Committee.

46. The Delegation of Japan stated that it generally supported WIPO/GRTKF/IC/8/3 aiming at the strengthening of the involvement of indigenous people and local communities. As widely recognized, input from indigenous people and local communities was essential for the work of the Committee. It hoped the proposed mechanism would become truly operational. In order to put it into work meaningfully, the Delegation of Japan underlined that transparency was one of the most important points to look at. In this regard, Articles 5 and 6 of the proposal were necessary. It noted that paragraph 5 of the Preamble seemed to refer



implicitly to the adoption of a new mandate for the Committee or the creation of a new body. It was of the view that there should be no relationship between the establishment of a voluntary contribution fund and a new mandate or the creation of a new body and asked the view of the Secretariat on that point.

47. The Secretariat clarified that the current wording in the proposal was intended to stipulate that the fund would only operate if the General Assembly decided to renew the Committee's mandate, and was not intended to pre-empt the decision concerning renewal of the mandate.

48. The Delegation of Turkey stated that it had studied WIPO/GRTKF/IC/8/3 very carefully. It was pleased by the establishment of that WIPO voluntary contribution fund for accredited indigenous and local communities, considering that contribution from those communities to the Committee was essential. This being said, study of WIPO/GRTKF/IC/8/3 led it to reflect further on the various principles which should guide the modalities of funding. It noted that those guiding principles had to be found in WIPO/GRTKF/IC/5/11 and WIPO/GRTKF/IC/7/12. Among them, there was one which was not to be found in the proposal. At the Committee's fourth session, Member States had considered that the choice of beneficiaries should be done in close consultation with Member States from where the interested NGO or local communities came. In other words, the government of that country was supposed to intervene in one way or another in the selection process. After reading Article 5 which deals with the criteria for financial interventions or other paragraphs, the Delegation did not find any reference to consultation with Member States in that case. It would not welcome the fact that the Committee would be changed in a political area according to the wish of some representatives of local and indigenous communities. It reiterated that it would particularly appreciate a reference in the proposal to state intervention in the selection of funded representatives. Furthermore, it noted that subparagraph (f) of Article 6 related to the mechanism of the Fund stated that 'the WIPO Director General will communicate for the information of participants an information note setting out the level of the voluntary contributions paid into the Fund on the date on which the document was drafted, the identity of the contributors, apart from those contributors expressly wishing to remain anonymous (...)' It was surprised by that subparagraph because it did not see the reason why a private contributor would wish to remain anonymous while supporting the participation of an indigenous community in an international organization such WIPO. It asked the Secretariat to comment on those two questions which were particularly important in its view.

49. The Secretariat acknowledged that the question of the state consultation was important. Its approach was to make a clear distinction between two matters: first, the accreditation process, which was the process by which this Committee and the Member States would decide whether or not an observer is appropriate for accreditation to the Committee. In its view, this was the stage at which the Committee should be considering eligibility in full consideration of all aspects involved. Once it had been decided by this Committee that a particular group or organization should be given the status of accredited observer to the Committee, only then could the question arise whether there should be financial support of participation for that already accredited observergroup. The proposal that the Secretariat submitted for consideration by the Committee was to maintain a clear two-stage process. Member States would continue to make the decision concerning accreditation, and the entitlement of any observer to take part in the work of the Committee; and only then should a community be potentially eligible for whatever funding might be available, subject to a selection process implemented by the Advisory Board. The Advisory Board would not have

the capacity to accredit an observer but would only consider funding of already accredited observers.

50. The Delegation of Morocco, on behalf of the African Group, stated that it was convinced that indigenous and local communities contributed constructively to the discussions of the Committee and firmly supported this contribution. That contribution should take place together with the one from Member States and should take into account the technical nature of the work of the Committee without modifying its intergovernmental nature. The Delegation of Morocco, on behalf of the African Group, welcomed WIPO/GRTKF/IC/8/3. The voluntary fund should derive from Member States and other stakeholders' views expressed in previous sessions as substantial point of reference. It welcomed this noble effort to give a new visibility to the work of the Committee.

51. The Delegation of the United States of America said that the proposal for a voluntary fund that was set forth in the annex of WIPO/GRTKF/IC/8/3 was generally acceptable, as it would facilitate appropriate participation of indigenous groups while minimizing costs to WIPO. Furthermore, the selection mechanism appeared to be generally fair and transparent. However, it expressed several concerns. Article 5(d) of the Annex, in setting forth the criteria for voluntary support, stated that 'Fund support will be directed as a priority toward members of indigenous and local communities in developing countries, countries in economic transition, and of small island developing countries'. The Delegation of the United States of America supported a selection process that would maintain geographical balance and diversity, and that would not be skewed toward any particular group of countries. Article 6(b) of the Annex stated that '(t)he administrative costs associated with the operation of the Fund will be kept to a strict minimum and may not entail the drawing of specific funds in credit from the WIPO ordinary budget'. The Delegation expressed its concern that the permissive nature of this operating mechanism would allow associated administrative costs to be paid through the regular budget. To address this concern, it proposed that the word 'may' in Article 6(b) should be replaced with the word 'shall'. It had no objection to Article 6(c) which allowed the voluntary fund to be managed by the Director General and an Advisory Board, provided that it could support the composition of the Advisory Board. The inclusion of NGOs on the Advisory Board would appear to create a potential conflict of interest. Finally, it stressed the fact that the proposal should seek to ensure geographical balance for Member State participation on the Advisory Board.

52. The Delegation of Indonesia stated that it fully supported the Committee's decision to establish a voluntary funding support mechanism for enhancing the participation of so-called indigenous and local communities. It was of the view that indigenous and local communities should be given access to the Committee meetings and most importantly that they had to be provided with the means to come and participate effectively in the Committee's debates. However, the Delegation referred to the term 'indigenous communities' in the proposal and to its implication. The term 'indigenous people' as a category was actually not firmly defined, since this definition depended on the historical background involved. The tendency of the present use of the term originated in a colonial context, in which the ruling majority of colonists had to be differentiated from the so-called original people living on the land before the colonists came. However, there were a lot of countries in the world where the majority, and even in some case the whole population, was indigenous. Therefore, the Delegation was of the view that it should be more advisable to use 'traditional community' or 'traditional society' or even 'society or community bound by customary law' rather than 'indigenous people' in WIPO/GRTKF/IC/8/3. But noting that the Committee used already that term in other documents, it proposed that the term 'indigenous community' be understood in a broad

sense. Finally, it expressed support for what the Delegation of the United States of America said about the geographical balance that had to prevail in the selection of the so-called indigenous people.

53. The Delegation of the Islamic Republic of Iran was of the view that participation of indigenous people and local communities had helped to enrich the discussions with the aim of moving towards the adoption of international instruments. To set up a mechanism to fund indigenous and local communities meant a step forward in this regard, provided that various kinds of communities would have the chance to use that facility. Regarding the proposal, it referred to the fifth paragraph of the preamble of the annex of WIPO/GRTKF/IC/8/3. Since it should be part of the future work of the Committee, it asked that paragraph be deleted from this document. Regarding Article 2 of the proposal related to the objectives, it said that a broad and open approach should be followed. The fund should be open to all indigenous people and local communities without any discrimination. It also stated in that context that the continuation of the work of the fund and the participation of the indigenous people had a direct relation with the continuation of the work of the Committee. It said that Article 4 seemed to be more a condition than an objective. In addition, this kind of fund could not be assumed to be *sui generis*. Therefore, the determination of the Member States should not be restricted in that regard. As far as the operating mechanism was concerned, the Delegation stated that in Article 5(c), (d) and (e), many restrictive conditions had been put forward which conveyed a restrictive message regarding the presence of indigenous and local communities. Since the Member States may be among the major contributors, their involvement in the composition of the Advisory Board should be taken into account. Therefore, it was of the opinion that a new approach concerning the eligibility of indigenous people for receiving financial support needed to be introduced. It already supported the establishment of a voluntary contribution fund. In order to enrich and make its mechanism more effective, it should be preferable that the Member States could also have the opportunity to present any input in this regard and that Member States should be engaged in the operational mechanism of the fund in order to make it more effective. WIPO/GRTKF/IC/8/3 should therefore be open for further comments.

54. The Delegation of Switzerland stated that it had studied WIPO/GRTKF/IC/8/3 with great interest. It said that active participation of indigenous and local communities was very important in its view. At previous sessions, it expressed support for the direct financing by WIPO of participation of representatives of those communities. It recognized however that this funding mechanism was unfortunately not the object of a consensus in the Committee. It could instead support the proposal of recommendation put forward by the Secretariat to create a voluntary contribution fund. This fund should facilitate the participation of indigenous and local communities. The procedure as proposed was simple and kept administrative costs to a minimum. The balance on the Advisory Board of two members of indigenous and local communities and two members from the Member States was a good balance in its view. It took due note of the fact that nothing would be decided by the Secretariat. The Delegation expressed the hope that the recommendation could be implemented as soon as it was agreed upon.

55. The Delegation of New Zealand said that it supported the formal proposal for the creation of a voluntary contribution fund to the General Assembly, as set in the Annex of WIPO/GRTKF/IC/8/3 and added that the objective, criteria and operating mechanism seemed to duly reflect the comments and suggestions made by participants at previous sessions of the Committee. However, Article 5(d), highlighted by the Delegation of the United States of America, providing that 'fund support will be directed as a priority toward members of

indigenous and local communities in developing countries, countries in economic transition, and of small island developing countries' merited refinement. The Delegation supported the participation of members of indigenous and local communities from these countries but noted that the issues that the Committee was considering were equally important to indigenous peoples and local communities in developed countries, and that the pertinent question of whether applicants had alternative financial resources was already addressed in Article 5(c) (v). It would therefore support an amendment of the document that would make sure that the criteria also reflected a broad geographical distribution and reflection of cultures. It recalled that at previous sessions of the Committee it referred to the seven geo-cultural regions used by the Permanent Forum and proposed that this reference be taken into account in a revised proposal.

56. The Delegation of Canada considered that the creation of a voluntary contribution fund for the Committee could be a most useful tool for enhancing indigenous and local communities' participation in its work. In other multilateral fora, like the WTO and UNESCO, similar voluntary contribution funds had successfully assisted participants from developing countries, economies in transition and small island developing countries to attend international meetings and workshops. The Delegation said that it was encouraged that the same would occur in the Committee, provided that a similar fund is established under the auspices of WIPO. It expressed the view that the Secretariat's proposal was very well drafted. It had only two amendments to suggest for the purposes of making the existing funding criteria more complete and comprehensive. It suggested that a mechanism be included in the text limiting the funding provided to voluntary funded participants to a reasonable period of time before, during and after each Committee session. This addition proposed was not meant to be restrictive, but to take account with the fact that, as for any fund, there would be only a limited amount of money available. Consequently, the Delegation suggested this addition as one means of extending that pool of available resources to supporting as many participants as possible. Furthermore, it suggested that some sort of capacity building mechanism be included in the funding criteria. The purpose of this mechanism would be to encourage successful participants to make best efforts to share their Committee information and experiences with members of their respective organizations, as well as with their broader communities and with civil society in general. But it recognized that any such addition would need to take into consideration that some participants could be limited in their resources and abilities to do so. It stressed the fact that while supporting the creation of a voluntary fund and realizing its value, it was uncertain at the moment whether Canada could contribute any monetary resources to this particular effort. But this did not detract it from its continued support for enhanced participation of accredited non-governmental organizations and local communities in the work of the Committee. The Delegation encouraged Member States to continue to consider other ways in which this engagement could be improved.

57. The Delegation of Bolivia reiterated its position that this funding mechanism should be financed by the regular budget of WIPO and not by voluntary funding to guarantee continuity and predictability of funding. Regardless of its final version, it stated that this fund should prioritize indigenous and local communities in developing countries.

58. The Delegation of Colombia supported a mechanism enhancing greater participation and exchange of views with indigenous communities during Committee's meetings. It added that the Secretariat's proposal setting forth the mechanism and criteria that would govern this fund and the additional proposals made by other Delegations touched on all the elements needed by an effective fund. Since the fund was intended to meet the needs of indigenous and local communities in developing countries, it should rely on guaranteed funding. Since the

Advisory Board would be the body which would decide on the recipients, the Delegation thought its composition should be broader, aiming at better participation of Member States, so that true assistance for the representatives of the indigenous and local communities could be given to those who would effectively contribute to the work of the Committee. It was therefore of the view that the Committee needed to review the criteria for eligibility. It recalled that there were many important representatives in Colombia of local communities who are not necessarily NGOs and that there were different types of organizations that bring together representatives of indigenous communities holders of great TK and that those, and not only the NGOs, had a lot to contribute. The Delegation expressed its fear that the fund could exclude these types of indigenous tribes. It went further saying that beside accreditation, the Committee needed a system to allow those communities who are not necessarily officially recognized NGOs to participate also. They could obtain a green light from their governments and have access to the funds and participate. It expressed support for a proposal made by the Delegation of Canada which proposed to set up an exchange mechanism intended to make sure that the funded representatives would return to their homes and disseminate knowledge and information that they acquired at Committee's meetings. It was in its view an extremely important initiative, recognizing at the same time that the Committee had to find the appropriate way to set up this mechanism. It was of vital importance for those representatives to benefit from additional assistance which would enable them to hold workshops where they live, disseminate the knowledge acquired during Committee's meetings. The Delegation said its comments were only initial thoughts.

59. The Delegation of Congo welcomed the creation of a voluntary contribution fund, because indigenous and local communities were holders of great cultural heritage. Their participation in the various meetings of the Committee would make it possible for these communities to benefit from everything that was to be decided at the international level. It added that the fund should enable the communities to disseminate knowledge to the rest of the population who would not have the chance to participate in the various meetings that may be organized. The proposal could also be a way to ensure that diversity of cultural heritage would be reflected equitably internationally. The Delegation stressed the important role that NGOs did play in the civil society in terms of management, especially in the African context. It expressed support for the intervention of the Delegation of Morocco who spoke on behalf of the African Group.

60. The Delegation of Mexico expressed its agreement with WIPO/GRTKF/IC/8/3 presented by the Secretariat and considered that the participation of indigenous and local communities was vital for the issues the Committee was discussing. It expressed its satisfaction that many of the suggestions that it made in previous sessions had been taken up, particularly as far as selection and eligibility criteria for beneficiaries are concerned. It stressed how important it was to ensure a geographical balance in the work of the fund.

61. The Delegation of Jamaica supported the view expressed by the Delegation of Bolivia regarding the need for predictability in the funding mechanism to facilitate the participation of representatives from indigenous and local communities in the work of the Committee. However it had taken full account of the Secretariat's official proposal for the creation of a voluntary fund and said it had no difficulty supporting such a voluntary fund. It believed that this fund could help to ensure and guarantee a full and effective participation of representatives from the indigenous and local communities in the work of the Committee, recalling that the sharing of experiences by these representatives had enriched the debate, bringing in tangible experience and example of best practices. Focusing on article 5 (d) of the annex of WIPO/GRTKF/IC/8/3 with regard to the priority be given to various categories of

groups of countries, including small island developing countries, it emphasized the operative word 'priority' in that context. Such a word did not preclude in any way funding for other categories, but would only state that priority would be given to these categories. As a delegation of a small island developing country, the Delegation welcomed this focus. It expressed the hope that the Committee would take the necessary steps to adopt the recommendation.

62. The Delegation of Morocco stated that it studied WIPO/GRTKF/IC/8/3 with great care and considered that it was a good document on a whole. However it made a few comments related to the participation of indigenous communities. Previous sessions of the Committee made clear that the criteria contained in this paper should reflect quite clearly the need to ensure coordination between the various parties concerned and the countries to which these communities belong. Therefore, it endorsed what had been said by the Delegation of Turkey and the African Group. It would propose to revise Article 5(b) and Article 6(f) in order to make them more transparent.

63. The Delegation of India expressed the view that the participation of those who had a relevant role in the work of the Committee should be facilitated, even though they were not members of an official delegation. Echoing what had been said by the Delegation of Indonesia, it pointed out that the terms 'indigenous and local communities' were terms that had a connotation derived from the colonial era when an attempt was made to distinct between colonists and the original people inhabiting a particular country. It added that this model was not relevant in Asia and would even not be applicable at all in some large parts of that continent. Therefore, it would be inappropriate to exclude the members of non community-based organizations, merely because they would not fit perfectly into the model of indigenous and local communities. The Delegation underlined that it was therefore important to suitably amend Article 5(d) in the Annex of GRTKF/WIPO/IC/8/3, by introducing the words 'relevant non-government organization' after 'members of', in order to make clear that the fund was not specifically targeting mainly community based organizations, whether they were indigenous or local and that funding should be available to any NGO that would be relevant to the work of the Committee, based on the TK that organization might possess. The Delegation raised the question of whether such a fund should be voluntary, or should be funded instead from the regular budget. It recognized that a voluntary contribution based fund always ran the risk of being biased in favor of particular groups that might be supported by donors. Also, it was important that it should not become a practice for the fund to support participation from developed countries in a disproportionate way. Participation of communities from developed countries should be funded directly by entities belonging to the developed countries rather than through the voluntary fund, leaving the voluntary fund to support participation from developing countries, countries in economic transition and small island developing countries as mentioned in Article 5(d).

64. The Delegation of Brazil supported the participation of representatives from indigenous and local communities in all the activities of the organization that had a relationship to issues that were of direct concern to them. In that context, it highlighted that the Committee was not the only body that dealt with issues of relevance to such indigenous and local communities, mentioning the issue of disclosure of GR which was associated with patent applications and the SCP, issues related to norm setting in the field of copyrights which had also a bearing on several questions that were of concerns to indigenous and local communities of several member states, and the registering of indigenous name as trademarks by multinational companies abroad which was a practice that had been affecting local communities and indigenous people in Brazil. Additionally, the Delegation recalled that the continuation of

work of this particular Committee was still up for decision as to whether it would be renewed and in what terms. Therefore the establishment of this voluntary fund should not prejudice those terms. In that context the Delegation supported the principle that fund should be available for financing the participation of indigenous and local representatives from Member States in all activities of WIPO that might have a bearing on issues that were of direct concern to them, and not only in the activities of that particular Committee. It supported what the Delegation of the Islamic Republic of Iran had said, that there should be no pre-established concept of the fund being *sui generis*. It also endorsed the comment made by the Delegation of India that there should be no relationship between voluntary donors and recipients and that such relationship be avoided at all costs. It added that transparency should be exercised to the fullest in the work of the fund, in particular when decisions were made regarding the recipients of financial support. The criteria for eligibility for financial support could be looked in more detail and that there was room for improvement. Article 5(c) (iv) of the Annex of WIPO/GRTKF/IC/8/3 was an example: reference was made to the eligibility criteria of proven expertise or experience in subject matter of the Committee. It was of the view that subject matters of the Committee might be quite technical and therefore that it might not be advisable to hold a representative of an indigenous or local community of member country to such a high standard of requirement of expertise. On Article 5(d), it endorsed the views expressed by other delegations that understood that the fund was intended to support those countries which would face difficulties in financing representatives of their indigenous communities and not intended to fund communities from the all membership. It considered that there was a need to correct an asymmetry in term of financing capacity and that the developed countries had the resources to finance their indigenous and local communities and were precisely expected to be the donors. It was therefore of the view that the wording for Article 5(d) should remain as it stood, to the effect that support would be directed to the members of indigenous and local communities in developing countries, countries in economic transition and small island developing countries. It did not have an issue with the voluntary fund drawing on the ordinary budget, as it was proposed by the Delegation of Bolivia. In fact, if it did so, it would understand that the fund would be actually more in line with the neutrality that should be sought in all activities of WIPO and it would be more Member-driven if the fund would come from the regular budget. It expressed a major concern regarding the decision making for financing. Reading Article 6(d), it could see that the final decision would be taken by the WIPO Director General for formal purposes only, in accordance with a binding recommendation from the Advisory Board which could not be appealed against. It was therefore concerned with the composition of the Advisory Board which was in its view too narrow. In addition to the *ex officio* participation of the Chair of the Committee and of two other representatives of Member States, there would be two representatives from NGOs in the Advisory Board. It wondered how they would be selected. Echoing a comment made by the Delegation of the United States of America, it considered that this formula might lead to some conflict of interest and would also reduce the member-driven character of the Advisory Board. It would therefore support a more representative and integrative Advisory Board made of representatives of Member States, coupled with some sort of geographical balance. It expressed further concerns about the decisions within the Advisory Board that might not be unanimous and that might not be made known to Member States. It would not support Article 6(i) as it stood because it stated in its view that the only decisions that would be transmitted to Member States would be those taken unanimously. It was also concerned by Article 10. It seemed that any particular member of the Advisory Board would have a veto power regarding any decision that is taken. The Delegation expressed strong interest in knowing who and for what reasons a particular country would not agree with the participation of a particular representative of indigenous or

local community. Therefore it understood that all decisions whether unanimous or not should be informed to member countries.

65. The Delegation of Pakistan acknowledged that a consensus was building up at least on the issue of setting up a voluntary contribution fund for the purpose of seeking effective participation of local and indigenous communities. It believed that this agreement in the making was encouraging for this Committee and others Committees in WIPO. It proved that there were issues which could be agreed upon once there had been discussed and touched upon in all aspects and once all the competing views and different interests had been accommodated. It endorsed the comments made by the Delegation of Brazil that the support of the voluntary fund should not be limited to this Committee. Therefore the discussion on that issue should have a broader spectrum covering all the areas that have been dealt with in WIPO, like SCP and others, as mentioned by the Delegation of Brazil. It was of the view that participation of all stake holders, peoples, communities and organizations alike who could contribute positively to the work of one of the other committees or proceedings of WIPO should be guaranteed. That funding mechanism should ensure a positive outcome on all those issues. Furthermore it was of the view, as other Delegations, that the funding should be more predictable and expressed willingness to study how that could be ensured, with the view to have the broadest possible spectrum of debate incorporating all views. It would be ready to look into which proportion of the funding could be financed from the regular budget, not just for the Committee but also for other meetings of WIPO. It added that transparency was also important in that regard and endorsed the comments made by the Delegation of Brazil on Article 6(i) of the annex of WIPO/GRTKF/IC/8/3. As a matter of principle, all decisions, whatever would happen in the Advisory Board, should be brought to the notice of the entire membership, and not only the decisions which would be taken unanimously. The Delegation of Pakistan recalled that in previous meetings, it had stressed the importance of transparency as an important principle in the work of WIPO, beside inclusiveness. That second principle meant that all those who could potentially contribute positively and constructively to the various work and progress in WIPO be included, so that they could be given the opportunity to voice their concerns and contribute significantly as much as they could. In this regard, it endorsed the comment made by the Delegation of Brazil that the criteria of expertise to be applied to indigenous communities did not carry that much of value in practical terms, because the Committee was in any way a highly technical issue. In that sense the basic idea should be to have a more inclusive spectrum debate as such, and all those who could contribute potentially to the discussion in that sense should be given an opportunity to voice their views. It took note of the fact that some Delegations had asked for a wider dispersion of fund in order to include people from developed countries as well as potential recipients. It was of the view that such a voluntary fund should aim at providing opportunity to support deficient groups or organizations to come in Geneva and participate actively in WIPO activities. That should require instead that funding should be strictly given to those who effectively can not afford such participation. Finally the Delegation of Pakistan asked to place on record that the approval mechanism was in its view inextricably linked with the decision which would be ultimately taken on the renewal of the Committee mandate and should strictly be seen in that context.

66. The Delegation of India asked whether the decision to set up such a fund was entirely within the scope of the Committee, or whether it required approval of the General Assembly. In line with the view that some delegations had expressed, the Delegation considered that the scope of support for participation of non-government entities, whether traditional, local communities or NGOs, which are relevant to the activities of WIPO, should be expanded to include not only the Committee but also several other Committees and working groups where



issues relevant for them were involved. The Delegation therefore asked whether it would not be appropriate for the Committee to consider this question from an holistic point of view rather than in a fragmented manner and in the narrow confines of the Committee. A decision of that nature might best be taken up in the General Assembly which could decide to set up a single voluntary fund which would be available for funding participation not only for the Committee but also for other relevant committees of WIPO.

67. The Secretariat clarified that the first paragraph of WIPO/GRTKF/IC/8/3, in its two last sentences, proposed that the recommendation to be adopted by that Committee would be than submitted to the General Assembly for final decision, as this was the approach that the Committee itself had decided upon at its last session. In line with the Committee's earlier decision, the Secretariat had assumed this was the appropriate way to deal with that issue. On the second matter raised by the Delegation of India, the Secretariat was of the view that this question was one of the questions of principle that needed to be addressed by Member States, and it was a question that would affect the whole organization. In that sense, it might be more appropriate for that question to be addressed by the General Assembly, since the suggestion related to committees other than this one alone. The Secretariat took also note of the fact that there were numerous other observations which had been raised in the course of discussion. The Secretariat was of the view that number of those could be dealt with by way of drafting suggestions from the Secretariat, given that there was a large measure of support for the concept presiding over the fund. But it also took note of the fact that there were certain questions of principle still pending. One of those was the one just referred to. Another question of principle concerned the differences of views about geographical balance or whether this fund should be limited to relevant NGOs indigenous and local communities from developing countries, countries in transition and small island developing countries, or more widely available. Another question of principle was the one raised by the Delegation of India which asked whether the Committee would go forward with the term 'indigenous and local communities' or include, as well or instead, the term 'relevant NGOs'. That question needed also to be addressed. There was another question of principle raised by the Delegation of Turkey, supported by the Delegation of Morocco, concerning the extent of participation or consultation of governments in the selection process of the Fund. As the Secretariat mentioned before, it understood that funding would be available only to NGOs that had already received accreditation and that the Advisory Board itself would constitute a means of consultation with governments at large. Comments on composition of Advisory Board had been made, but none that could not be dealt with by revised drafting.

68. The Delegation of Peru endorsed the principle of creating a voluntary fund of the type proposed. At the same time, it shared some of the concerns that had been expressed by other Delegations. Echoing the intervention of the Delegation of Brazil, it said that any decision at this stage should not prejudge the decision on the future of the Committee. It referred also to the concerns raised by the Delegation of Colombia related to the participation of accredited NGOs. It felt unsure on that point. If effective participation of indigenous representatives is the goal, it wanted that real efforts be made to ensure that those could be heard here in Geneva. A Peruvian representative had told the Delegation of Peru that a problem arose for the participation of one indigenous representative coming from Peru. It wanted to make sure that all efforts would be made so that representatives could participate and be heard in this Committee. In conclusion the Delegation supported the initiative aimed at establishing a voluntary fund. It hoped that once the fund adopted Member States would bear in mind the importance of predictability and transparency and that the concerns which had been expressed would be listened to.

69. The Delegation of Bolivia supported statements made following its own, like those of the Delegation of India and the Delegation of Colombia, referring to the need to extend the concept of indigenous and local communities with examples provided by those Delegations. Likewise, it could associate itself with the proposal that support for participation of representatives of indigenous and local communities be expanded beyond this Committee to include other WIPO committees so that indigenous communities could play the role they have in a cross-cutting way in all issues relevant to them.

70. The Delegation of Norway said that the best could be the enemy of the good. It was worried about the way the debate had developed. It reminded its first intervention saying that it was in its view preferable for funding to come from the regular budget. However, in order to set up a funding arrangement operational as soon as possible enhancing participation of local and indigenous communities, it recognized that it was advisable to seek for a compromise on this issue. But in the meantime it noticed that new questions had been brought up by Delegations in that session which had not been raised before, like the funding of NGOs in general or the funding intended to include participation in other WIPO bodies. In its view it would be extremely difficult to reach an agreement on the selection criteria for such an expanded funding mechanism and added that the Committee would be clearly blamed in that case. To discuss these ideas could take time, be complicated and lead to an impasse. It suggested therefore that the Committee focused again on the core challenge of this agenda item, namely to support participation of indigenous and local communities in this Committee. At a later stage, funding could be expanded. But it said that the main issue and challenge at present was to get the funding mechanism created.

71. The Delegation of Thailand concurred with the other Member States which pointed out the limitations of the current phrasing of Article 5(c) in the Annex of WIPO/GRTKF/IC/8/3. It encouraged Members to consider the merit of participation from a wider circle of participants who truly represent local communities, whose concerns the Committee was trying to address. It said that by limiting the scope of participation only to members of NGOs, the Committee might unduly prevent the participation from communities outside such scope. Extending the coverage by considering the inclusion of participants from a wider circle of community and local representatives would enhance in its view the excellent work the Committee was trying to achieve. It referred to the example of community leaders who do not belong to NGOs but whose the input could be relevant for the work of the Committee.

72. The Delegation of Nigeria supported the proposal attached to WIPO/GRTKF/IC/8/3 and the statement made by the Delegation of Morocco on behalf of the African Group. It shared the concerns of many other delegates; particularly those expressed by the Delegation of Brazil on the threshold formulated by Article 5(c)(iv). While it agreed that there was a need to ensure that beneficiaries of funding would be those who would add value to the work of the Committee, the determination of eligibility based on proven expertise and experience might be unduly restrictive, bearing in mind the very high technical nature of the work of the Committee. It also shared the concerns already expressed by the Delegation of Colombia that put emphasis on paragraph 5(c)(ii) which might also be unduly restrictive by focusing on NGOs. Because of the weakness of some of the communities the Committee was looking at, many were unable to form NGOs in the same way as some other organizations already accredited by the Committee. It added that the near absence of such NGOs and representations from Africa probably underscored this point. Associating itself with the Delegations of Brazil and of India, the Delegation supported the need to ensure that appropriate mechanism be put in place to guarantee transparency and integrity of the fund and to avoid any undue influence from donors on recipients or potential recipients. Finally, it

shared the concern expressed by the Delegation of United States of America that the participation of members of previously accredited NGOs on the Advisory Board might bring about a conflict of interest. It was of the view that it should be reconsidered in the light of such risk. It expressed support of what had been said by the Delegation of Morocco on behalf of the African Group, namely that the window should not be closed against those NGOs or those communities that might not have been already accredited in the Committee process.

73. The representative of the Foundation for Aboriginal and Islander Research Action (FAIRA) supported the proposal put forward by the Secretariat. He had pushed for it since the second session of the Committee. He said that the Committee was generally aware that the indigenous and local communities did not have the resources to participate in the meetings of the Committee. He was very pleased that the proposal had got to the stage where a resolution could move up to the next General Assembly. He welcomed the proposals and improvements presented by the Member States. However he wished to stress that it was more important to establish this fund at the next session of the Assembly and that the draft that had been put forward was acceptable in his view. This draft could be improved, but he did not want to see this proposal not be supported by the Committee just because of a lack of agreement on some specific provisions. For example, the comments that have been made in relation to criteria set out by article 5 of the annex of WIPO/GRTKF/IC/8/3, in particular the critical paragraph 5(c)(ii) which the Delegation of Nigeria had just pointed out, which stated that any NGO representative to be assisted needed to be previously accredited to the Committee, raising concerns about accreditation and participation. But he was of the view that it was the accreditation process that had to be blamed for and not the voluntary fund as such. The representative of FAIRA would have proposals aiming at improving his proposal. However, he did not think that putting forward further suggestions other than to encourage all members to agree in this process would not contribute to the establishment the fund. He believed that it might be possible to review another draft which would try to incorporate the comments made before the end of the week.

74. The representative of the Saami Council asked the Chair to follow the precedent set by his predecessor, and allow indigenous peoples' representatives to participate in the debate in the Committee to the largest and most efficient extent possible. Turning to WIPO/GRTKF/IC/8/3 and its annex, he reminded the Committee that a decision in principle to support indigenous peoples' participation in the Committee had been taken already at its first session. This promise had then been repeated at every Committee session. But in practical terms, nothing had happened so far. He said that this issue alone had taken up the discussion time of one entire Committee session. In monetary terms, the costs for this debate probably exceeded the sum that would ever be contributed to this fund, should it be established. He therefore welcomed WIPO/GRTKF/IC/8/3 that contained a concrete draft decision to establish a voluntary fund. Even though he had some concerns with Article 5(c)(v) with regard to who would be eligible for funding and Articles 7 and 8 with regard to the composition of the Advisory Board, he supported the proposal contained in the Annex of WIPO/GRTKF/IC/8/3 in its current wording, so that the Voluntary Fund could finally be established. He called on the Member States, who, according to him, had not demonstrated any major problems with the document, to show the same flexibility. He was of the opinion that this issue had turned into somewhat of a travesty. The principal decision was made at the first session of the Committee; still a concrete decision had been blocked for seven consecutive sessions by what he believed to be details. The representative of the Saami Council put forward the idea of a drafting committee to sort out the outstanding wording issues, so that a decision on this crucial issue could be made before the end of this session. He took note that the Committee was now entering a stage when concrete decisions on

substantive issues could be made. As WIPO has previously noted, 80 % of what is commonly referred to as TK is actually indigenous knowledge. Therefore most of the decisions that this body might potentially make have to be implemented in indigenous territories, reminding that without adequate indigenous participation, the decisions of this body will have no credibility or support in the areas where they were supposed to be implemented. He underlined that any amendment to WIPO/GRTKF/IC/8/3 that would suggest that the selection criteria should be based on knowledge rather than indigenousness was unacceptable. Indigenous peoples believe that they have valuable knowledge of those issues that could enrich the work of the Committee. But their request for participation in this Committee was not predominantly based on knowledge, but on the fact that they were the owners, holders, custodians, etc. of most of the material of the Committee discussions. He added that this was something no NGO as such could claim and underlined that the proposed voluntary fund could not be opened to organizations other than indigenous peoples' representatives. Directing his remarks to the Delegation of India and the Delegation of Indonesia, with regard to the meaning of the term 'indigenous peoples', the representative of the Saami Council invited solemnly the Delegations of Member States to study the existing UN working definitions of the term 'indigenous peoples', as well as the definition used by the World Bank. He further invited them to compare that definition of the indigenous peoples with the working definition of 'peoples', which was also an undefined term under international law, a state of play which was sometimes forgotten. In particular, he recommended a comparison with the so-called Kirby-definition of 'peoples', which he understood as being the most commonly used in the UN-system, as it has been endorsed by UNESCO for example.

75. The representative of the Kaska Dena Council supported WIPO/GRTKF/IC/8/3. He said that the design of the prospective voluntary fund had accommodated many of the concerns of indigenous peoples. He started by making some general observations about indigenous participation in the Committee. As stated in the opening statement of the informal consultative forum organized on Monday June 6, 2005, he was greatly encouraged with the progressive involvement of an informal panel preceding the session. Assuming that the Committee's work continued, he suggested that other topical discussions for inclusion and interest included indigenous TK protocols as instruments of protection, case studies related to the WIPO toolkit for the protection of TK and case studies related to practical integration of indigenous customary law. It was his understanding that topics particularly relevant to the work of the Committee might be of assistance to further deliberations. He supported the representative of the Saami Council in his submission with respect to the continued call for more appropriate speaking order under agenda items. Finally, as a final general statement, he noted and encouraged the Member States to include indigenous peoples representatives in their Delegations. He added that the proposed voluntary fund would be able to maximize their participation in the Committee if Member States would make better efforts to include indigenous peoples on their own Delegations. Referring to the voluntary fund, the representative of the Kaska Dena Council fully supported the adoption of a decision to establish a voluntary fund. His comments were made without prejudice to the adoption of such document. He made a reference to the comment made by the Delegation of the United States of America and the Delegation of New Zealand with respect to Article 5(d) regarding the priority given to indigenous peoples from developing countries. He strongly supported the inclusion of his indigenous brothers and sisters from developing countries. Too often, their voice had been silent in this Committee and in silence lies powerlessness. This said, he supported the amendment proposed by the Delegation of New Zealand with respect to Article 5(d) in order to place greater emphasis on the seven indigenous regions used by the Permanent Forum on Indigenous Issues. He invited the Committee to keep in mind that many

indigenous peoples in developed countries lived in developing country conditions. He was particularly supportive of Article 7 regarding the equal representation of indigenous peoples and member states representatives on the Advisory Board. With respect to the Delegation of the United States of America comments regarding potential conflicts of interest that might arise in a situation where a indigenous peoples representative is both an applicant for funding and on the Advisory Board, he certainly saw that as an important issue. He suggested text such as “Advisory Board that are representatives of indigenous peoples organization shall abstain in deliberations regarding the NGO that they are directly or indirectly associated with” to assist the Secretariat in dealing with this matter. With regard to the comments made by the Delegation of Brazil with respect the highlighting of a “proven expertise or experience” as an eligibility criteria, he noted that one of the accreditation conditions was similar. Therefore he did not believe that this language was prejudicial or inconsistent with the process in which the some 120 *ad hoc* observers had been accredited so far. Finally, with respect to the comments of the representative of the Saami Council regarding his expressed dissatisfaction with the excessive delay of the establishment of the fund, he expressed equal frustration. He noted that the Committee had failed in its efforts to establish a Fund by allowing itself to be stuck in details. This was very disappointing in his view. He believed that Member States had never so obviously using indigenous peoples as pawns in the Committee. Therefore, he strongly encouraged the Parties to put substance behind support for their participation and ensure that the fund would be adopted by an appropriate decision at the General Assembly.

76. The representative of the United Nations Permanent Forum on Indigenous Issues said that it was encouraged by the discussion, as a few years ago, he recommended that WIPO seriously consider financial support for direct and meaningful participation of indigenous people. It was important in his view to consider adoption of WIPO/GRTKF/IC/8/3 at least in its current form at this session and not to postpone the decision for another year, notwithstanding the comments that had been made. He stated that the United Nations Permanent Forum on Indigenous Issues wanted to maintain an important collaborative partnership with WIPO, but that the Permanent Forum continued to need financial support to do so.

77. The representative of the Ibero-Latin-American Federation of Performers (FILAIE) commented on article 7 of the annex of WIPO/GRTKF/IC/8/3. He had a proposal to make on the membership of the Advisory Board, namely on the two members coming from non governmental organizations. He stated that the main problem with this membership could be that a discrepancy could arise between some representatives capable to attend and some others unable to attend for financial reasons, those being excluded from the Advisory Board for the same reason. He suggested therefore that the Committee reflected on the need to provide equal opportunities to all organizations that it would like to be members of that Advisory Board. He expressed support for what had been said by the Delegation of Brazil regarding the need to make all the decisions of the Advisory Board transparent in order to help indigenous and local communities to realize that there were opportunities to participate in these discussions. He added that folklore was important for every region. He asked therefore that geographically balanced representation be guaranteed.

78. The representative of Indian Movement *Tupaj Amaru* underlined the fact that the question of participation of indigenous communities was treated in many fora and sessions of the Committee. He recalled that Member States had reached a consensus on the participation of indigenous and local communities in the Committee. In his view it was time for Member States to take their responsibilities. He strongly invited them to decide on a funding mechanism to ensure the participation of indigenous communities in this and other fora

related to the rights and interests of indigenous communities. On the other hand, he was pleased to hear from the Delegation of Norway, the Delegation of Bolivia and other Delegations that they were in favor of funding from the regular budget of WIPO. He recalled that the Committee seemed to have reached a consensus to finance the participation of indigenous communities with the regular budget of WIPO and said that unfortunately what he described as rich and selfish countries of the North had rejected the proposal. He invited the Committee to reflect this in this forum as it was done in other fora. In addition, he noticed the precedent set by the United Nations Voluntary Fund and other mechanisms related to treaties relevant for indigenous peoples, explaining that The Voluntary Contribution Fund for Indigenous Peoples aimed at supporting the participation of indigenous representatives in the UN Working Group on Indigenous People which takes place every year in July before the sub Commission. Since it has been working for more than twenty years, he understood that it was an example worth studying. He said that the conclusion to draw was that the UN Voluntary Contribution Fund for Indigenous Peoples did not have any money to cope with the increasing need for participation of indigenous peoples in the human rights area, because there was no contribution coming from member states nor from multilateral organizations, and still less from non governmental organizations. He stated therefore that this initiative had been a failure. He also mentioned the International Decade for Indigenous People Fund that has been working for 10 years. Its objective was to solve the crucial problems faced by indigenous peoples in the area of education, environment, health and extreme poverty. He stated that the fund had not solved any problem in 10 years due to the absence of political will on the part of Member States to contribute to the Fund. He added that participation suffered from other defects and that it had become some sort of *modus vivendi*. He stated that the same people participating were always the same and that much more people were excluded. Referring to his own organization, the representative of Indian Movement Tupaj Amaru recalled that it participated in preparing a draft declaration twenty years ago. But he said that it never received financial support from Bolivia nor Peru nor the local authorities, notwithstanding the fact people with tremendous experience were members of the Indian Movement. He was of the view that the selection criteria had created discrimination from the start and feared that the same would happen in WIPO. Referring to the statement of the Delegation of Turkey, he noticed that a specific Member State would like to determine who and which organization could participate, and who and which one could not, adding that in any event the organizations which were considered as dissident organization or opponents against their own governments would be denied participation. He said that it was for this reason that he did not want governments to intervene. As far as WIPO/GRTKF/IC/8/3 was concerned, he said that he had many comments to make but because of the lack of time, he would refer only to some aspects. Referring to Article 5(d), he noticed that the Delegation of India and the Delegation of Pakistan mentioned the definition of the term “indigenous peoples”. He said that this definition had been dealt with twenty years ago, recalling that the Vienna Convention of 1953 adopted a definition which stated that indigenous communities were people who were holders of intrinsic cultural values. He understood that the Committee could not go back to what had been already been decided in the UN system when it accepted the definition given by Professor Martinez Cobo. He also stated that developed countries had enough money to subsidize the participation in the UN of the communities coming from their own constituency. He wished that the Fund focused on poor developing countries such as those in Latin America or Andean countries, where indigenous peoples often formed a majority, noting that the transition process was almost over in countries in economic transition with some of them already members of the European Union, although minorities, such the gypsies, the rooms, travelers which also are holders of intrinsic cultural values, were also in need of funding there. Furthermore, he noted that the funding mechanism as foreseen in Article 6(a) would provide that “fund resources will come exclusively from voluntary contributions by governments,

NGOs and other private and public entities, without being taken, in particular, from the WIPO ordinary budget". He really doubted that governments would provide contributions to the fund. He said that it was not up to governments, but to States to provide for funding. Alternatively, other institutions, multilateral institutions and financial ones, for example, IMF, the World Bank and other funding agencies should also contribute to the fund. Furthermore, he was of the view that multinational companies were patenting GR and TK not just recently but for hundreds of years, at least since the existence of WIPO and that was the reason why in his view WIPO was the richest organization. He stated that Novartis, the pharmaceutical companies, with its seat in Switzerland, should also contribute since it was taking advantage from GR and TK of indigenous people. He suggested that 0.1 % of the money earned by companies based on international patents applications should go the fund. He said that the criteria of geographical distribution was an extremely important issue. Referring to paragraph 7 with regard to the membership of the Advisory Board, he said that members of indigenous communities had to be designated by their own communities and authorities and not through the interference of their governments or through private institutions or international organizations. Finally, with regard to the unanimity criteria, he recalled that his long experience of twenty years had shown that this criterion had paralyzed the UN. He was of the view that unanimity seemed unrealistic and would lead to an impasse. Therefore, the principle of consensus or unanimity should be replaced by the democratic way of voting so that the Committee would see who voted for or against an applicant.

79. The representative of the Indigenous People's Biodiversity Network (IPBN) stated that the participation of indigenous and local communities and their representatives was critical to enrich the discussions of the Committee and ensure the development of instruments of protection respectful to their interests and expectations. He added that participation of indigenous and local communities helped in bringing in local practical experiences and helped members of the Committee to better understand the complex issue which affected protection of TK and folklore. This participation also helped the dissemination within his communities of information on the Committee's process. He supported the comments made by other representatives of indigenous peoples as well as WIPO/GRTKF/IC/8/3, and asked that this document be the basis of the decision to be taken. Especially he supported the opinions expressed by the Delegation of Norway and the Delegation of Mexico and all those who expressed support for the establishment of this fund. Several Delegations of Member States had emphasized the need for active participation of indigenous and local communities in this forum. This would require not only funds but also a change in the operation of this Committee to ensure that representative of indigenous and local communities could fully and effectively participate. To this end, he recalled that the Working Group on article 8 (j) of the CBD had established a model to ensure full participation of indigenous communities in this intergovernmental process and mentioned also that the Group was co-chaired by a representative of indigenous communities. In this way the holders of TK had to work hand in hand with governments and ensure follow up with appropriate steps to ensure effective results for the protection of this TK. He suggested that this model be considered. He also drew the attention of the Chair to other activities which could lead to discrimination and which were of concerns for non governmental organizations active in the Committee since its beginning, specifically referring to an issue related to accreditation. He asked to put on record that in some cases despite having economic support, many accredited observer members with an official invitation from WIPO, specially women, were denied an entry visa because there were not considered as complying with the eligibility criteria or because they were members of traditional communities. He stated that this had been the case with one of his colleagues who was denied a visa and who was not allowed to come and share her experience in the Committee. He thought that this was the case with many other indigenous representatives.

He added that this kind of limits or barriers must be dealt with and sanctioned severely, because it impeded participation of indigenous communities in this forum.

80. The representative of Call of Earth (COE) congratulated the Chair because after seven sessions of the Committee there was finally a draft decision for the establishment of a voluntary fund on the table and expressed his support for the draft. He endorsed Delegations of Member States and representatives of indigenous peoples who expressed the fact that this fund should also be supplied by the regular budget of WIPO. The reason was very simple in his view: indigenous peoples throughout the world have made substantial contributions to the sustainable development of the Member without their prior consent. In this regard funding from the regular budget would be a fundamental way of recognizing their contribution. The denomination of 'NGO' for indigenous peoples was inaccurate in Latin America and did not coincide his definition and that of other representatives, added that it might in fact give rise to a lot of confusion and might have negative implications. He emphasized that in his region indigenous peoples were not NGOs nor local communities, but they were indigenous peoples, recognized as such by various countries and by the international community, particularly in the context of Convention 169 of the ILO on Indigenous Peoples and Tribes from Independent Countries. He concluded in saying that he supported WIPO/GRTKF/IC/8/3 with the added considerations.

81. The Delegation of India expressed its wish to clarify a basic misunderstanding arising from the interventions of representatives of indigenous communities. It might, perhaps, seem that its previous intervention was in some way against support for the participation of the representatives of indigenous and local communities. It wished to stress that it was never its intention to oppose the proposal of support for indigenous and local communities in any way. The Delegation had flagged a slightly different issue, namely that outside the so-called 'New World,' there was a lot of TK which resided in the society at large. To argue that the participation of civil society representatives who might have a particular interest in that TK could not be supported would be unfair, because a very large part of the world population did live in these societies and because a great deal of TK was embedded in these societies. As far as governments were concerned, the Delegation was not speaking about the participation of government representatives, but about the participation of civil society members who may have a special relationship with the TK simply by virtue of the fact that their group might be interested in that subject and might have a contribution to make to these discussions. In its view, those specific cases were not covered by the parameters of the definition set out in the proposed draft annexed to WIPO/GRTKF/IC/8/3, because those parameters spoke essentially of NGOs that were also indigenous and local communities. The Delegation indicated that India could rightly claim to possess a vast reservoir of TK. At the same time, it would not be correct for the Delegation to say that TK was the sole prerogative of the indigenous communities, because that concept did not fit well with societies in most of Asia, for example. Therefore, it felt that relevant NGOs which might have meaningful contributions to make to the Committee's work should also have the right to be supported and take part in the work of the Committee. The Delegation simply did not want the fund to exclude representatives of NGOs from developing countries whose work was directly relevant to the Committee's work. It reiterated its strong support for indigenous and local communities being supported for participation in the Committee's work.

82. After having registered the interventions of the participants to the Committee, the Chair invited the Committee to take note of the draft proposal and to ask the Secretariat to prepare a second draft proposal for the creation of a voluntary fund which would accommodate all the points which were made during the discussions based on WIPO/GRTKF/IC/8/3.



83. The Delegation of the United States noted with appreciation all of the work that had been done by the Committee on the voluntary fund over a number of sessions. It regretted that there was still no consensus on the terms of the draft for a voluntary fund to support indigenous participation. He added that there were still a number of open questions on eligibility, composition of the Advisory Board and ways of ensuring maximum participation. Those were essential and critical issues that must be resolved. It encouraged the Secretariat to redraft the proposal for the consideration of the Committee as was proposed by the Chair but stressed the fact that it would like to be able to consider these amendments before its transmission to the General Assembly. It encouraged in the meantime Member States to support individual participation from groups within their own states.

*Decision on Agenda Item 7: Participation of Indigenous and local communities:  
proposal for a voluntary funding mechanism*

84. The Chair took note of the comments made on the draft proposal and observed that broad general support for the proposal had been expressed in the Committee. The Chair proposed, and the Committee agreed, that:

(i) a revised draft of document WIPO/GRTKF/IC/8/3, taking account of the comments made within the Committee, would be prepared by the Secretariat and published by June 17, 2005;

(ii) Committee participants would be invited to provide comments on that revised draft to the Secretariat by July 15, 2005; and

(iii) a third version of the proposal would be prepared and published by the end of July for consideration by the General Assembly at its next session.

*Décision en ce qui concerne le point 7 de l'ordre du jour : participation des communautés autochtones et locales : proposition relative à un mécanisme de financement volontaire*

84. Le président a pris note des observations formulées à propos du projet de proposition et a constaté que la proposition a recueilli un large assentiment au sein du comité. Le président a proposé, avec l'accord du comité, que

i) un projet de document WIPO/GRTKF/IC/8/3 révisé, tenant compte des observations formulées au sein du comité, soit élaboré par le Secrétariat et publié pour le 17 juin 2005;

ii) les participants du comité soient invités à faire part au Secrétariat de leurs observations sur ce projet de texte révisé pour le 15 juillet 2005; et

iii) une troisième version de la proposition soit élaborée et publiée pour la fin du mois de juillet en vue de son examen par l'Assemblée générale à sa prochaine session.

*Decisión sobre el punto 7 del orden del día: Participación de las comunidades indígenas y locales: propuesta de creación de un fondo de contribuciones voluntarias*

84. El Presidente tomó nota de los comentarios formulados sobre el proyecto de propuesta y observó el amplio apoyo general expresado en el Comité en relación con la propuesta. El Presidente formuló la siguiente propuesta, aprobada por el Comité, a saber:

- i) que la Secretaría prepare un proyecto revisado del documento WIPO/GRTKF/IC/8/3 en el que se tengan en cuenta los comentarios formulados en el marco del Comité, y que dicho documento se publique antes del 17 de junio de 2005;
- ii) que se invite a los participantes en las sesiones del Comité a formular comentarios sobre dicho proyecto revisado y los transmitan a la Secretaría antes del 15 de julio de 2005; y
- iii) que se prepare una tercera versión de la propuesta y se publique esta última a finales de julio a fin de someterla a examen de la Asamblea General en su siguiente período de sesiones.

AGENDA ITEM 8: TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

85. At the invitation of the Chair, the Secretariat briefly introduced documents WIPO/GRTKF/IC/8/4, WIPO/GRTKF/IC/8/6 and WIPO/GRTKF/IC/8/10.

86. The Delegation of Luxembourg, on behalf of the European Community and its Member States, thanked the Secretariat for providing the Committee with two comprehensive documents, WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/6. The European Union also wished to confirm the contents of its submission sent to WIPO as a contribution to the discussions on the earlier version of WIPO/GRTKF/IC/8/4. The European Union underlined that the draft provisions should “continue to be neutral in so far as, and entirely without prejudice to, the legal nature of the instrument in or through which they might be contained and expressed”, as had been stated in paragraph 13 of WIPO/GRTKF/IC/8/4. It appeared to the European Union that, although work was progressing within the context of the Committee, in view of the importance of the subject matter and interests involved, work should not be precipitated. It was premature to take decisions about the final outcome of the work and the form it should take. Although some TCEs were already protected by IP, the EC and its Member States wished to reiterate that the current international IP system should not be interfered with to the detriment of the legal certainty already agreed upon. This would do a disservice to all individuals and communities in the cultural world. The Delegation added that greater use should be made of the current IP rights where appropriate and that non-IP instruments were available (such as rules against unfair competition, laws on blasphemy, etc). As discussed in previous meetings of the Committee and during the meetings on the Development Agenda held in WIPO in April 2005, continued and improved technical assistance for those countries so wishing had proved its efficiency as a number of countries who previously did not have an IP system, now had one. Some were already seeing, and others would see in the very near future, their cultural interests reaping benefits and bringing positive economic and social assets to their communities. The European Union noted the separation of the draft policy objectives and general principles into three categories, with the addition of a category now called “draft substantive provisions.” Discussions should continue

on all three sections, but particularly on the new substantive provisions which should remain compatible with basic elements of copyright protection. The Delegation agreed with other members of the Committee that “no one size fits all” (set out in the principle of flexibility and comprehensiveness on page 8 of the Annex to WIPO/GRTKF/IC/8/4). As a consequence, solutions should be flexible and designed in such a way as to take account of the specific needs and aspirations of the various indigenous and local communities, where emphasis was given to national measures. In view of the relatively few contributions already received by WIPO on the “policy objectives and core principles”, the European Union agreed with an extension in time for further written comments and for the encouragement of wider stakeholder consultation and expert review. This would enable the Secretariat to further refine the draft objectives and principles. The EU was open to considering options for further enhancing the role of the Committee in preparing future versions of the draft text. Regarding WIPO/GRTKF/IC/8/6, the European Community and its Member States took note of this document which contained useful information for potential future reference where required. As far as TCEs were concerned, the Delegation felt that international considerations should be based on practical and efficient solutions on a national level, the Delegation concluded.

87. The Delegation of Japan stated that it greatly appreciated that the draft provisions in WIPO/GRTKF/IC/8/4 were based on the principles of flexibility and comprehensiveness and recognized that it was unlikely that protection of TCEs could be achieved by a “one size fits all” or a “universal international template”. The Delegation was also pleased that the draft provisions were intended to give maximum flexibility to national and regional authorities and communities as to how to achieve the protection of TCEs. Further positive aspects of the document were the principle of respect for and consistency with international and regional agreements and instruments and that TCEs should be protected in a way that was respectful of and consistent with relevant international and regional instruments and without prejudice to specific rights and obligations under binding legal instruments. However, the draft provisions also included some aspects which the Delegation believed were not appropriate in light of these principles. First, there was a concern about the format of the document in so far as it consisted of articles, which implied one specific outcome. The Committee should continue to discuss a suitable format as well as content. In so far as draft Article 3 was concerned, it proposed a right of “prior and informed consent” and a form of exclusive IP right for certain TCEs. This did not allow national authorities flexibility to adopt appropriate protection measures in a manner that suited the national priorities and the legal and cultural environment of each country. The Delegation could not find that a right of “prior and informed consent” was compatible with many Member States’ systems which preferred to avoid new distinct property rights. There were also concerns with draft Article 6, which proposed an infinite time of protection. It seemed difficult to explain the relationship between infinite time of protection and the objectives of IP. The Delegation suggested the need for further discussion on several technical aspects, such as: what should be the criteria for authenticity of TCEs; how to define the community which could be the beneficiary of protection; how to identify and protect TCEs which had changed over time or in different geographical areas, and which had influenced each other; and, whether or not TCEs derived from other TCEs should require “prior and informed consent”. It was believed that such technical issues should follow further in-depth discussions on the objectives and general guiding principles which were still not commonly shared. In conclusion, the Delegation stated that the aim of the Committee’s discussion should for the time being not be a legal binding mechanism but a recommendation or guidelines taking into account the respect for the principle of flexibility and of comprehensiveness. The Delegation considered that the discussion first be focused on objectives and general guiding principles for protection of TCEs. Thereafter, technical

questions in order to implement the agreed objectives and principles should be identified and discussed.

88. The Delegation of the United States of America thanked the Secretariat for its continuing work on developing objectives and principles on issues and concerns related to TCEs/folklore. The excellent work of the Secretariat informed and advanced the ongoing discussions of complex issues before the Committee. The Delegation continued to believe that the elaboration and discussion of core principles and objectives was an extremely useful tool to enrich and deepen understanding of these complex issues. In its view, the clear articulation of such principles provided valuable guidance that Member States might wish to consider in addressing specific concerns and issues related to TCEs. Nonetheless, the Delegation wished to express its strong concerns about recent steps that might be viewed as an attempt to develop a premature consensus within the Committee around a particular approach, namely the establishment of a single, legal regime, to address the extremely diverse issues and concerns of Member States. In particular, the Delegation was concerned by the presentation of “draft articles” in the Annex to WIPO/GRTKF/IC/8/4. As the Delegation of Australia had noted, these articles were presented in a treaty-like format and set out extremely detailed “substantive” or “legal” standards. The Delegation was also concerned that non-legal and other measures which had been extensively discussed and had attracted wide support in previous meetings of the Committee were excluded from the Annex. The Delegation and other Members of the Committee had repeatedly stated their view that searching for a “one size fits all” or “universal template” to address the diverse issues and concerns related to TCEs was not the only way for the work of the Committee to proceed. Regrettably, however, the detailed legal standards set out in the draft articles in the Annex to WIPO/GRTKF/IC/8/4 came extremely close to providing just such a universal template. The Delegation, therefore, was opposed to taking any additional steps at this time to further develop or elaborate these draft articles as suggested in the decision paragraph in WIPO/GRTKF/IC/8/4. The Delegation declined the invitation set forward in paragraph 21 of this document. At the same time, the Delegation heartily endorsed and encouraged the continued work of the Committee with respect to TCEs/folklore. Much important work remained to be done. Among other things the Committee could clarify the definitions and boundaries of TCEs/folklore, further refine core principles and policy objectives and, most importantly, continue to deepen the understanding of the Members of the Committee of the available policy options and the legal mechanisms to address specific issues and concerns of Member States. The Delegation believed that a multi-faceted approach was appropriate, spanning a wide range of distinct national legal mechanisms, including IP law, unfair competition law, contract law, *sui generis* approaches and customary law. The Committee could continue to play an extremely useful role in providing much needed guidance to Member States including advice on matching available policy options and legal mechanisms to their specific needs and concerns. A large amount of work remained at both the national and international levels to identify the specific policy objectives to be advanced and the specific harm to be addressed. The Delegation believed that it was an appropriate time for discussion of such a work program within the Committee. Over the last several years, the Delegation had been pleased to provide information to the Committee on specific issues and concerns related to TCEs that had arisen in its domestic experience. The Delegation looked forward to continuing to learn from the experience of other Committee Members, with a particular interest in exchanging views and information of best practices in developing tools and databases for identifying, preserving and promoting TCEs which not only enriched societies but also contributed to the shared understanding among all societies.

89. The Delegation of Australia stated that at its seventh session, the Committee had asked the Secretariat to prepare a further draft of the objectives and principles for the protection of TCEs/EoF based on the comments of Committee participants. In that context, the Australian Delegation acknowledged the work of the Secretariat and noted that some of the written comments of Australia on WIPO/GRTKF/IC/7/3 had been incorporated in the revised WIPO/GRTKF/IC/8/4. For example, the Delegation noted the general guiding principle which referred to respect for and consistency with international and regional agreements and instruments. Many other amendments had also been made to the draft objectives and general guiding principles. For example, the prevention of the misappropriation of TCEs/EoF had been added as a policy objective and there were other amendments made to the general guiding principles dealing with flexibility and comprehensiveness. These changes were significant and warranted further discussion by the Committee. The Delegation was concerned by the inclusion of treaty-like language in WIPO/GRTKF/IC/8/4 in the form of substantive principles. While a number of Committee participants had expressed their support for an international legally binding instrument covering TCEs/EoF during discussion of WIPO/GRTKF/IC/7/3 at the seventh session of the Committee, and in subsequent comments submitted to the Secretariat, there was as yet no consensus on substantive outcomes. In fact, a number of written comments received by the Secretariat had highlighted the difficulties associated with an international legally binding instrument for the protection of TCEs/EoF. Although the Delegation was supportive of the international dimension of the Committee's work as part of its extended mandate, it considered the formulation of the draft provisions in WIPO/GRTKF/IC/8/4 as premature in the light of a lack of consensus among Committee members on the policy objectives and general guiding principles or any vehicle by which these matters could be taken forward. Although it was not appropriate at this stage to comment on specific text, the Delegation wished to raise some issues in relation to the draft provisions. One of the general guiding principles noted the importance of flexibility, yet the draft provisions were prescriptive and in some instances expressed in mandatory language, for example Article 3. In addition to defining the subject matter of protection Article 1, the beneficiaries in Article 2 and the proposed rights in Article 3, the draft provisions deal with the mechanics of TCEs/EoF system. In particular, Article 4 provided for the establishment of an agency to assist in the management of TCEs/EoF and Article 7 set out formalities. Although the Delegation considered transparency and administrative efficiency important factors in any system for the protection of TCEs/EoF, it was concerned by the prescription of new national institutions in these articles. The draft provisions also purported to deal with enforcement and transitional measures in Article 9. These were difficult and complex issues requiring careful consideration. The Delegation accepted the Secretariat's invitation in paragraph 21 of WIPO/GRTKF/IC/8/4 to provide written comments on the draft provisions by October 28, 2005. However, it was also important that participants focus their comments on the revised policy objectives and general guiding principles as these should be consistent before the work moved forward to more specific proposals. While supporting further consultation on the protection of TCEs at the national level, Australia could not support community, national and regional consultations on the draft provisions at this stage. The Delegation was very appreciative of the work that had been undertaken to date by the Committee on the issue of IP and TCEs/EoF, and appreciated the way this work had informed the debate on these issues at the international and national levels. It looked forward to contributing further to this work in a constructive manner.

90. The Delegation of Indonesia endorsed the principle of flexibility contained in WIPO/GRTKF/IC/8/4 which gave more room to governments in drafting national legislation. This principle should not, however, reduce a commitment to establish an internationally binding instrument. In general terms, it should be noted that an entire society could have an

ethnic culture. TCEs might have varieties. Tradition is that which had been in existence for some time and it might also still evolve. There was, therefore, creativity in tradition. Turning to WIPO/GRTKF/IC/8/4, the Delegation referred to Article 1(iv) which distinguished between “pottery” and “terracotta”, whereas terracotta was a form of pottery. As the document noted, TCEs could contain both tangible and intangible components. There was a need to discern between an original work, a translation, an adaptation and borrowing, all of which could lead to new works. Traditional communities should themselves decide whether a new work became part of their tradition or not. Regarding Article 4, it should be clarified that the Agency could be governmental or non-governmental. On Article 5, it was necessary to specify what was meant by “incidental use”. On Article 6(ii), it should be made clearer that TCEs which were previously secret could remain protected as TCEs if the other criteria for protection were met. Article 11 should also address the question of TCEs shared by two or more cultures across national borders. In such a case, as the Delegation of Egypt had stated at the previous session, the relevant countries should deal together with their shared cultural heritage. There was a distinction between a cultural heritage of which the time of inception was not known and a case where priority between two countries was known from historical records. There was, therefore, a pressing demand for research to identify priorities.

91. The Delegation of China stated that WIPO/GRTKF/IC/8/4 was very helpful. The Delegation first reported on the views of domestic experts who had been consulted on this question. First, the experts had confirmed that the issues were complex. One could not use conventional copyright which was not a good basis, and there was a need for new legislation. China was developing a law on the preservation and safeguarding of TCEs. Regarding the protection of intangible cultural heritage, the experts felt that in order to rescue, preserve and protect traditional Chinese culture, it was necessary to use legislation to strengthen the protection of folklore. However, it was insufficient and not comprehensive if one only started from the point of view of copyright because copyright law include particular criteria, requirements and ideology and it was a civil property law by nature. Therefore, it was believed that the law to protect intangible cultural heritage adopted by the Ministry of Culture of China was good, but it should include the preservation, compilation, classification and archiving of intangible cultural heritage. Regarding the international aspects of the question, the experts felt that the protection of the folklore was actually an embodiment of the expressions of the developing countries. In essence, the idea was to balance economic distribution on a global level. Regarding discussion within the country, it should concentrate on the transmission of the culture, while on the international level it should concentrate on the economic interest. In addition, the scholars of laws and customs were united in recommending that the protection of the transmitters and recorders of folklore should have an appropriate legal status and that their efforts should be recognized. Surveys on customary laws should also be carried out and customary rules for the protection of folklore should be recognized in legislation. Turning to specific views on WIPO/GRTKF/IC/8/4, and in particular regarding the policy objectives and guidelines, the Delegation appreciated the content of the document. It was hoped that it could be further refined. On Article 1 of the substantive provisions, the Delegation had noted that the creativity of individuals had been added, and this might confuse TCEs with works. Although there were always individuals who had contributed to the development of a TCE, what made it a TCE was that a whole community had taken part in its creation, perfection and development. The community also transmitted the TCE between generations and all community members enjoyed and benefited from it. The individuals who might have contributed to it were unknown. On Article 3, and regarding adaptation, in view of the sensitivity of this question, countries would have different views. The customary practices of communities would also have to be taken into

account. Therefore, it was proposed that the substantive articles should leave room for governments to formulate their own legislation.

92. The Delegation of the Islamic Republic of Iran thanked the Secretariat for the fruitful documents. The Delegation stated that during past sessions of the Committee, developing countries had discussed matters of their common concern. In this regard, the development of an international legally binding instrument had been regularly called for by developing countries. In this context, the main concern was the continuation of the work of the Committee with an international approach. In this regard, it should not be assumed that with the termination of the mandate of the Committee at this session, all of the issues surrounding this subject had been addressed and that the text was a final one. The draft articles in the text should be in accordance and balanced with the concerns of developing countries. There had been an attempt to follow a neutral approach. However, the present document had been prepared with an emphasis on the national approach and this was not consistent with the requirements of developing countries. This document particularly covered a large range of issues and went beyond its goals and objectives. On the content, in Article 1, in addition to the tangible and intangible TCEs/EoF, the combination of these two should also be incorporated into the subject matter. On Article 2, the different communities of indigenous peoples in different countries should be taken into account. There should be a broader approach and the local communities should also be added to the list of beneficiaries. In Article 3(a), the reference to “of particular cultural and spiritual value” was not clear. On Article 4, the work of the agency as reflected in Article 4(a) should be defined in the framework of national applicable law. In Article 6, the protection of secret TCEs after disclosure was not clear. Article 7(b)(ii) should refer to Article 3 in order to prevent the dissemination of secret registered information. The Delegation stated that the present draft provisions should be more balanced taking into account the international elements of concerns of developing countries. Regarding procedure, Geneva-based consultations should be encouraged. The approach of the document should be in accordance with the statements made by developing countries, with a focus on defining the framework of an international legally binding instrument as the first priority, the Delegation added. Because of the budget implications, the concerns of developing countries and the necessity of setting the timetable, the existing situation, with the supervision of the General Assemblies, was preferable.

93. The Delegation of Canada stated that the IP issues related to the protection of TCEs/EoF were of significant importance to Canada. The work of the Committee had not only furthered international understanding of the cross-cutting legal and policy variables associated with protecting TCEs/EoF, but it had also informed domestic dialog on these issues. Canada had begun its analysis of WIPO/GRTKF/IC/8/4 and welcomed the opportunity to provide written comments to the Secretariat by October 28, 2005. While Canada would be doing so, the Delegation nevertheless wished to share with the Committee some of its doubts and concerns about WIPO/GRTKF/IC/8/4. The Committee had, at its seventh session, asked the Secretariat to produce a revised draft of the policy objectives and principles relating to the protection of TCEs/EoF. The updated text was meant to be evolutionary and reflective of previous Committee discussions. It was not meant to preclude future work in this area nor pre-empt any particular outcomes. It was with significant regret that Canada did not consider these objectives to have been met. As some other States had stated, Canada was very concerned that the current article format of WIPO/GRTKF/IC/8/4 left the impression that the Committee supported moving forward with a treaty-like instrument on TCEs/EoF. This did not reflect Canada’s understanding of the Committee’s discussions to date. Canada fully encouraged the Committee to continue its most valuable work on draft policy objectives and principles in this area, but could not accept a

predetermined treaty outcome. This would be premature at this stage of the international discussions and did not reflect the concerns of all Member States. In addition, Canada had some initial doubts as to the contents of WIPO/GRTKF/IC/8/4. The Committee had repeatedly heard that there was a broad range of national experiences relating to protecting TCEs/EoF. In order to adequately and sufficiently accommodate this diversity, Canada considered it important that the language of WIPO/GRTKF/IC/8/4 should have adopted a greater degree of flexibility. Secondly, Canada realized that some useful and practical solutions to protecting such expressions might lie outside the field of IP law and policy. However, the Delegation cautioned that the mandate, expertise and capacity of the Committee lay specifically within the boundaries of IP and, as such, any further revision of WIPO/GRTKF/IC/8/4 should better reflect this focus. Thirdly, Canada was concerned with an unqualified and extraterritorial application of indigenous and customary laws and protocols. Addressing issues and questions about customary laws and protocols in the international dimension could have significant legal implications for Canada, some of which extended beyond the role of IP law and policy. Canada had negotiated and promoted a number of self-government agreements with indigenous communities, and as result of these experiences Canada had extensive experience with the practical considerations associated with the application of indigenous and customary laws. At the third session of the Committee, there had been approval from the Member States for a study on indigenous customary law. Canada supported calls by other Member States and NGOs for the Committee to move ahead with work in this area in its very near future. Finally, the Delegation of Canada noted its concerns with the suggestion in WIPO/GRTKF/IC/8/4 that foreign right holders could be accorded national treatment on an *erga omnes* basis. Canada recognized that in theory there might be some positive elements to such a suggestion. However, there were a number of practical issues, such as how would States ensure that such a form of national treatment was complied with effectively within their own borders as well as in other jurisdictions. What kind of transparency and notification mechanisms would be needed to ensure that such an international system worked? And, what would be and what could be the associated costs? To conclude, the Delegation of Canada stressed that IP issues related to the protection of TCEs/EoF remained of significant interest and importance to Canada as did the work of the Committee. It looked forward to submitting more detailed written comments on WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/6.

94. The Delegation of India pointed out that in India the expression “indigenous people” might not be appropriate. This should be noted in the different parts of WIPO/GRTKF/IC/8/4 where this expression occurred. The Delegation stated that the role of a national authority ought to be to identify the beneficiaries and ensure the flow of benefits to them by being able to negotiate on their behalf with potential users of TK, TCEs/EoF and GR. This applied specifically to the question of TCEs/EoF. The Government of India had always adopted a pro-active approach in relation to protection of TCEs, and the principles behind the protection of TCEs/EoF should recognize the role of the state in the preservation and protection of TK and TCEs/EoF. It was necessary to adopt common principles for protection of both TK and TCEs/EoF since there was a fairly strong interface between the two. This was in line with the Delegation’s wish for a holistic view on the protection of TK and TCEs. The principles of protection should reflect the combination of positive and defensive rights, including effective safeguards against illicit use. In paragraph 16 of WIPO/GRTKF/IC/8/4, there was a discussion of the term “protection.” The Delegation believed that protection should be comprehensive and include promotion, preservation and conservation, and reiterated the need to prevent misappropriation and to grant positive rights to both undisclosed as well as codified and non-codified expressions of folklore already in the public domain. Under “Objectives” in WIPO/GRTKF/IC/8/4, attention was drawn to the objective relating to the prevention of



misappropriation of TCEs/EoF in paragraph (iv), where the Delegation wished the word “promote” in the second last line to be replaced with the word “enforce”. The Delegation suggested adding the phrase “for innovations based on TCEs” after the word “property rights” in draft Objective (xii). In paragraph (xiii), the Delegation proposed that Governments be seen as facilitators and not be placed in the same category as commercial, academic, educational and other users of TCEs, and suggested the following formulation of that paragraph: “enhance certainty, transparency, mutual respect and understanding in relations between all peoples as well as traditional and cultural communities, on the one hand, and academic, commercial, educational and other users of TCEs/EoF on the other, with the close involvement of the designated national authority”. In relation to the draft principle of respect for and consistency with international and legal agreements and instruments (General Guiding Principle (c)), it was understood that the protection of TCEs/EoF should be in full conformity with human rights conventions. However, there was a possibility that this principle could be construed as making the protection of TCEs/EoF subordinate to IP rights protected in IP national and international laws and instruments, and it needed to be clear that rights in TCEs/EoF should not necessarily be subordinated to those rights. The Delegation was generally in agreement with the draft principle on flexibility and comprehensiveness, and the assertion that one size could not be made to fit all. However, it strongly believed that there was a need for an internationally binding instrument addressing the common concern of prevention of misappropriation and the need to provide positive rights for TCEs/EoF, independent of whether they were codified, disclosed or undisclosed. The Delegation recalled that the section on “substantive provisions” should be sufficiently broad to accommodate situations where the custodians of TCEs/EoF were not necessarily indigenous peoples. It suggested that Article 2, after the word “benefit”, should read “communities, including, where applicable, indigenous peoples and traditional and other cultural communities”. This would mean that the beneficiaries could include indigenous peoples where relevant but other communities would not necessarily be excluded. Regarding Article 4 on “Management of Rights”, there should be flexibility allowing management of rights by a national authority to ensure equitable access to TCEs. Article 5, on exceptions and limitations, should specifically not permit non-commercial research and private study unless approved by the designated national authority. There were several instances of misappropriation that had taken place in regard to or pursuant to non-commercial research and private study. Regarding Article 7 on formalities, the Delegation supported the concept of registration and notification. However, such registration should establish positive rights, be easy and inexpensive, and be handled by the designated national authority. On Article 11 on international and regional protection, it was suggested that protection should reflect a good balance between the rights and interests of those that develop, preserve and sustain TCEs and those who use and benefit from them. The question often was “who is the custodian of the cultural form - the performing artist, an institution or the Government?” The role of the Government in relation to creative communities needed to be better defined. Finally, the Delegation stated that the conditions for eligibility of foreign beneficiaries should be defined in unambiguous terms. This was essential because the draft Article 11 proposed that foreign beneficiaries would have the same rights as national beneficiaries.

95. The Delegation of Bolivia stated that it supported WIPO/GRTKF/IC/8/4 and the possibility for further comments as set out in paragraph 21. The Delegation stated that it was still disappointed to see that there was not more tangible progress in the discussions but the document was a first step. There was concern, however, that this was probably the last session of the Committee, and the Delegation affirmed that as long as there was not an international legally binding instrument which would protect TCEs/EoF against misappropriation, the Delegation would not be satisfied. If at the international level these

expressions were not protected, national measures were insufficient. For national measures, delegations would not be discussing these issues in a multilateral organization. Since WIPO/GRTKF/IC/8/4 was, however, the first step, it should be followed by an acceleration in the work in order to arrive at a meaningful result. The Committee's mandate should be renewed.

96. The Delegation of Colombia recalled its interest in the work of the Committee and that it wished to achieve a binding international instrument to protect TK and TCEs/EoF. Document WIPO/GRTKF/IC/8/4 was a good basis for the Committee's work and it defined the elements that could be found in a treaty. Colombia was committed to the Committee and this was reflected in the observations and comments that the country had made on the previous version of the objectives and principles, and which had been reflected in the revised version. Turning to the draft provisions in the document, the Delegation suggested that the Committee work on definitions that would enable participants to understand the terms used and to have unified definitions of the various terms found in the text. This should not be left to regional or national levels. The Delegation had studied the document and had a few difficulties in understanding some of the terms such as "incidental use" and "protection", just to give a few examples. If TCEs/EoF were by definition expressions that were manifested and expressed by communities, then it was not clear how secret expressions could be protected. The Delegation did not agree with the suggestion that certain TCEs/EoF be registered in order for them to be protected.

97. The Delegation of the Russian Federation thanked the Secretariat in WIPO/GRTKF/IC/8/4 and was of the opinion that the incorporation of comments of the Russian Federation in the provisions for the protection of TCEs/EoF had been acceptable. The draft provisions were appropriate for protecting TCEs, such as through declarations, recommendations and guiding principles. These were acceptable for protocols and international agreements. The Delegation supported a gradual approach towards an international instrument for protecting TCEs, particularly in the light of national efforts by Member States at WIPO at different levels of development. In some states, such as the Russian Federation, folklore was not protected by law. Therefore, the Delegation supported further consultations particularly with indigenous communities. It was necessary to broaden the debate regarding an international instrument for the protection of TCEs in order to increase the number of states involved. The Delegation supported the adoption of the recommendations in paragraph 21(4) of WIPO/GRTKF/IC/8/4.

98. The Delegation of Singapore confirmed its strong support for the work of the Committee and the continuation of further work and discussions on IP and TCEs. Singapore thanked the WIPO Secretariat for the enormous amount of work that had been put in to produce the revised draft WIPO/GRTKF/IC/8/4. The Delegation advised that the Intellectual Property Office of Singapore had held a number of meetings and consultations with government agencies in Singapore to highlight and provide them background information on the work of the Committee. Singapore acknowledged that it was important for the work of the Committee to continue and recognized the benefit of the Committee reaching some consensus on policy objectives and guiding principles on TCEs/EoF. However, Singapore also wished to emphasize the significance of further discussion, debate and capacity-building at regional or interregional levels in relation to the underlying issues, before pursuing comprehensive consideration of core principles and policy objectives. In this respect, Singapore was of the view that it would be of benefit to have training or capacity-building workshops on IP and TCEs/EoF and/or TK in the ASEAN or Asia-Pacific region in the forthcoming years. Turning more specifically to the document, the Delegation stated that it

was particularly supportive of a flexible approach in developing any national or international policy relating to TCEs/EoF and/or TK. Singapore considered that a “one size fits all” or “universal template” approach was unrealistic or unlikely to be practical to address IP and TCE issues comprehensively in a manner that was compatible with the national priorities, the legal infrastructure and cultural environment of all regions and/or countries. Singapore submitted, therefore, that it was essential for each State to preserve flexibility in the implementation of policies that best fitted into their respective jurisdictions. The Delegation therefore believed that the principle of flexibility and comprehensiveness as stated in the draft document was of significance in the continuation of the Committee’s work. The Delegation also affirmed the principle of respecting and co-operating with other international and regional instruments and processes. In particular, where the outcome would impact on existing IP regimes, Singapore submitted that current international obligations should take precedence in such cases. Singapore also considered that the principle of consistency with existing legal systems was important. The Delegation stated that any recognition of TCEs or TK must not have a superseding impact on other existing IP rights and should be consistent with, and supportive of, existing IP systems. The Delegation appreciated this opportunity to comment on the draft objectives and principles and was committed to ongoing and constructive discussions of the future versions of the document and the issues that were still non-conclusive or unsettled. The Delegation looked forward to contributing positively to the further development of the Committee’s work.

99. The Delegation of New Zealand stated that it supported the continuation of the Committee’s work on the protection of TCEs. The Committee’s consideration of the underlying policy objectives and principles of protection was essential preparation for WIPO Member States in thinking about protective mechanisms. While the draft policy objectives and principles contained in WIPO/GRTKF/IC/8/4 had come a long way since the early days of the Committee, they did require further consideration and refinement. A number of changes had been made to certain objectives and principles, and it was important that Committee participants had the opportunity to digest these. The Delegation therefore suggested that the Committee focus its immediate efforts on the policy objectives and principles, rather than the “substantive provisions” in the latest version of the document. On the question of the international dimension, the Delegation thanked the Secretariat for WIPO/GRTKF/IC/8/6, and agreed with others that questions about the form of the international dimension were premature. New Zealand, therefore, welcomed the opportunity to make further comments and specific drafting suggestions and submit them in writing during the next commenting period, if the Committee decided to keep the documents open as was suggested in paragraph 21(4). This would enable the Delegation to more thoroughly assess the document and the most recent changes, seek expert peer review, and consider and reflect on the views of various domestic stakeholders, including Maori. For the time, it reserved its position on the various principles, policy objectives and “substantive provisions”, but certainly supported the general approach of preserving flexibility, achieving balance, respecting international agreements, and meeting the needs of indigenous and local communities. It was suggested that it might be useful for the Secretariat to compare and contrast the principles and objectives that were common to both WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 and those which were similar but not identical and determine if there was a reason for this or if there would be benefits in standardizing language. New Zealand’s recent endeavors to engage domestic stakeholders on the principles and objectives had shown that this was not a task that could be rushed, particularly given the complex subjects the Committee was dealing with. The Ministry of Economic Development of New Zealand had held a number of workshops around New Zealand earlier in the year to introduce stakeholders to the Committee’s work, and seek comment on the principles and policy objectives. The

feedback was that more discussion, debate and capacity-building on the underlying issues was needed at the local level before comprehensive consideration of the proposed policy objectives and principles could be undertaken. New Zealand, therefore, supported the suggested recommendations in paragraph 21 of WIPO/GRTKF/IC/8/4. The Delegation stated that its comments on WIPO/GRTKF/IC/8/5 regarding TK were of a similarly general nature, and asked that these comments be ascribed to New Zealand in relation to the discussion of that document as well. Turning to domestic experience on the protection of TCEs, the Delegation noted that at the fourth session of the Committee New Zealand had given a presentation on a *sui generis* model for the protection of TCEs using trademark law. The New Zealand Trade Marks Act, 2002 contained an absolute ground to refuse the registration of a trademark where its use or registration was likely to be considered offensive to a significant section of the community, including Maori. A Maori Trade Marks Advisory Committee had been established to provide advice to the Commissioner of Trade Marks on whether trademarks based on Maori text and imagery were likely to be considered offensive. Two members of the Maori Trade Marks Advisory Committee were with the New Zealand Delegation at the session, Ms. Karen Te O Kahurangi Waaka, the Chair of the Committee, and Dr. Deidre Brown. The Delegation then passed the floor to Ms Waaka to provide, in her personal capacity, some observations on the operation of the Advisory Committee to date. Ms. Waaka stated that in the review of IP legislation in New Zealand in 1995 Maori had actively raised issues regarding their concerns with the unauthorized taking and inappropriate use of their language, stories images, designs and traditional arts and customary practices. Maori had generally questioned the ability of the legislation and regulations under IP to protect their TK and TCEs and had come to the realization that IP law on its own was not sufficient to protect the IP concerns they had. As a consequence, there were many ways through which both the Government and Maori had decided to deal with these issues. One was through the “WAI 262” claim, concerning Maori cultural heritage, treasures and practices, lodged before the Treaty of Waitangi Tribunal. Another way was for activities which increased awareness of the significance of Maori culture, images, language and practices. Ms. Waaka provided examples, such as the National Maori Performing Arts Committee (Te Matatini), which was involved in encouraging improved IP practices for Maori performers & performances; the Maori Art Educators & Curators National Body (Matakura), which promoted the responsible teaching and presentation of Maori visual art for tertiary institutions, museums and art galleries in NZ; and, the Maori Television Service, which had been a major influence. Recent statistics had found that 60% of the audience of a Maori language program were non-Maori. Another more immediate mechanism was the amendments to IP law to reflect the concerns of Maori. Changes had been made in the trade marks area and amendments to patent law were still being made. One tangible outcome had been the creation of the Maori Trademarks Advisory Committee in 2003, which Ms. Waaka described as a world first *sui generis* indigenous consultative body in IP legislation. The Committee comprised four other members who brought a range of skills to providing advice to Commissioner of the IP office of NZ. The Committee had collective experience in or knowledge of matakura Maori (Maori knowledge); Maori imagery and iconography; contemporary Maori issues, with strong Iwi (Maori tribal) networks; business and/or law; and, Te Reo Maori (Maori language). The Committee had to date seen approximately 500 trademarks in a range of classifications, which were or appeared to be, derivative of a Maori sign, including text, and/or imagery. Initially, IP lawyers and applicants had been concerned that the Committee process would lock up Maori language and imagery, add significant costs and cause delays to the registration of trademarks. However, since the Committee had been in operation, feedback from IP lawyers had been supportive. They had expressed surprise at the efficiency of the Committee in dealing with the applications and satisfaction with the guidelines which had been developed to assist applicants regarding

appropriate use of Maori text and imagery in trademarks. One of the difficulties that the Committee had faced, in making its recommendations to the Commissioner of Trade Marks, was defining the threshold of where “inappropriateness” became “offensiveness”. The Committee could not refuse registration on the grounds of mere inappropriateness, which was also a far more subjective standard. To date, only three applications had been recommended to the Commissioner as “offensive” and six as “likely to be” offensive to Maori. These marks had generally included references to ancestral names, deities, or significant concepts that in use would have been associated with alcohol, biomedical or other conflicting products /services. The conflict existed where the trademark use or classification would generally be considered by the Committee to have a profane element in conflict with customary beliefs or practices. A key outcome of the work of the Committee was the development of guidelines to assist applicants and improve their awareness of what might constitute more culturally-appropriate trademarks that contain Maori text and imagery (see [www.iponz.govt.nz](http://www.iponz.govt.nz)). The New Zealand Trade Mark model, originally proposed to the Government by a Maori focus group, was just one example of the continued efforts of Maori to ensure their identity and the recognition of their cultural and IP rights over their language, cultural expressions and practices.

100. The representative of the Saami Council stated that his organization was grateful for WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 and, in particular, their annexes which were of very high quality. Furthermore, the Saami Council expressed its gratitude to the Secretariat for carefully taking into account the proposed amendments to the previous versions of the draft objectives and principles submitted by indigenous peoples’ organizations. The revised documents were a clear improvement in the previous versions. Yet, the representative had some specific concerns with aspects of WIPO/GRTKF/IC/8/4. It was noted that paragraph 21 invited participants to submit comments in writing before October 28, 2005, and the Saami Council wished at this stage to make some general comments. While it was in general happy with the draft objectives in WIPO/GRTKF/IC/8/4, it had to be clarified that in the balancing of conflicting positions, interests could never be balanced against rights and particularly not when these were human rights. The Saami Council reiterated that such a decision would violate the UN Charter. Furthermore, the Saami Council believed that the objectives should further highlight the importance of customary laws for the protection of TCEs. As to the draft general guiding principles, it was suggested that paragraph (c) needed to refer also to international customary laws. It was noted with satisfaction that the commentary to the principles clarified that the articles encompassed indigenous customary law but this should be expressly reflected in the actual provisions. Addressing the substantive provisions, the Saami Council repeated its appreciation to the Secretariat for taking many of its comments into account when drafting WIPO/GRTKF/IC/8/4. Even while realizing that the issue of the folklore in the so-called “public domain” was a sensitive one, it was not believed that WIPO/GRTKF/IC/8/4 managed to strike the right balance. Articles 1, 2, 6, 9 and, in particular 3 and 7, all had relevance to the issue of the “public domain” and in the Saami Council’s opinion fell short of protecting many elements of indigenous peoples’ TCEs that conventional IP systems regard as “public domain” but that deserved protection. The introduction of the principle of “free prior informed consent” in the document was welcomed, which was an already established principle in international law, but it was believed that Article 3(a) was too narrow when defining which TCEs would be subject to this principle. Furthermore, even if the wish for certainty and transparency as outlined in the commentary to Article 7 was understood, the Saami Council was concerned with the requirement that TCEs protected under the principle of “free prior informed consent” would require registration. As raised by the indigenous representatives on various occasions, the issue of registration of TCEs was highly sensitive in many indigenous communities. Indeed, it might for cultural

reasons often be impossible to register such elements of indigenous peoples' TCEs that Article 6 specifically addressed. Furthermore, the representative stated that there was concern with the unqualified respect for third party rights in draft Article 9(b) which unduly limited the application of the provision. The representative ended by affirming that these were the Saami Council's general and initial comments. In the event that the Committee supported the draft decision in paragraph 21(4) of the document, the Saami Council would submit written comments before the required deadline.

101. The Delegation of Brazil commended the Secretariat for the preparation of the valuable WIPO/GRTKF/IC/8/4. It was clear that the Secretariat had made a very serious effort to take into account concerns that had been expressed in the discussions of the Committee and the suggestions that were submitted by Members both in writing and in the course of discussions. The document very clearly set out all the major issues that one would have to grapple with in seeking to establish a system for the international protection of folklore and, therefore, it was considered to be an appropriate basis for the work of the Committee in so far as the protection of folklore was concerned. The Delegation did have comments in respect of several of the provisions contained in the document and would submit these in writing to the Secretariat. The Delegation wished to flag at this point that it had concerns with some of the provisions dealing with the subject matter of protection, formalities, the way the issue of "prior informed consent" was dealt with, the application of "prior informed consent" and the role of customary law. That said, the document was a valuable basis for discussion. As a general remark, the Delegation stated that it was very important that the Committee addressed effectively the international dimension of the issues under its mandate. Misappropriation and biopiracy constituted global international problems that required truly international solutions. Relying on national measures alone could not effectively address the misappropriation problem. Despite that this document was valuable, it did not effectively address the international dimension, as was recognized in the document itself as well as in WIPO/GRTKF/IC/8/5 and WIPO/GRTKF/IC/8/6. The Committee must address the international dimension in its future work if there was a renewal of its mandate. With respect to future work, and responding to the invitation of paragraph 21 of the document, the Delegation believed that the document provided an appropriate basis for the continuing work of the Committee. It was understood that this discussion did not prejudge the decision that the Committee and subsequently the General Assemblies might take on whether to renew the mandate of the Committee, but assuming that the Member States of WIPO did ultimately do so in so far as folklore was concerned, the next logical step for the Committee would be to further elaborate and discuss the document and its various principles, objectives and substantive provisions. The Delegation believed the document could be a basis for future negotiations on this issue. The Delegation did not agree with the suggestions of certain other delegations that the Committee should undertake activities such as capacity-building and the exchange of national experiences and that the Committee should play an advisory role, even *vis-à-vis* other international forums. The Committee had an overloaded agenda and if there was an agreement on renewing its mandate, it would be very important that it have a focused workplan that did not detract from what should be the main focus of its work. In addition, the Delegation did not understand what was meant by the Committee "playing an advisory role", and was not aware that other international forums depended on or required WIPO's advice. The Committee was never intended to play this kind of advisory role which was perhaps not even foreseen within its terms of reference. If the work of the Committee continued, the work should focus on a further elaboration of the draft materials currently before the Committee. It was very important that discussions on folklore should proceed in an open-ended, transparent, inclusive and Member-driven manner. Inter-sessional consultations could be useful and they should take place in Geneva and be open-ended. Perhaps this could be a way to enhance the

role of the Committee in preparing future drafts of the provisions laid out in WIPO/GRTKF/IC/8/4.

102. The Delegation of Morocco, speaking on behalf of the African Group, paid tribute to the work of the Secretariat in preparing WIPO/GRTKF/IC/8/4. This had been a very important updating exercise and the developments recorded so far in this process should prompt the Committee to continue its work. The African Group also noted with satisfaction that the document reflected a number of proposals put forward by the African Group at the preceding sessions of the Committee, emphasizing, *inter alia*, the importance of the international dimension and the non-contradiction of the international instrument with other instruments. The African Group also welcomed the draft provisions set out in the document which represented a trend towards the setting up of an internationally legally binding instrument. This was the best safeguard to ensure effective and efficient protection of TCEs/EoF. In a positive and constructive spirit, the Group reserved its right to submit comments at a later stage concerning the revised provisions after having given them in-depth consideration.

103. The representative of the Indigenous Peoples Caucus of the Creators' Rights Alliance (CRA) informed the session that the CRA was a national organization established in 2001 to represent the IP rights of approximately 40 artists organizations representing 30,000 artists in Canada. The Indigenous Peoples Caucus (IPC) of the CRA represented the IP and TK rights of indigenous artists in Canada. The IPC had recently completed a project entitled "Old Ways, New Paths: The Transformation of Traditional Knowledge through Indigenous Artistic Expression" (supported by Industry Canada and the Canada Council for the Arts). The project had been completed in March 2005 and had included the participation of approximately 500 indigenous artists and representatives of other interested parties. The IPC had also been directly involved in an initiative to form a national representative organization of indigenous artists. With reference to the findings of the Old Ways, New Paths Project, the representative outlined a basic model concerning the use of TCEs. In terms of this model, indigenous artists had inherited the TCEs developed by their ancestors as a sacred trust, and they had the exclusive responsibility for the continuance of TCEs, both in their original and contemporary innovative forms, based on principles of customary law. Indigenous artists had also, based on customary law, a primary right to access and promote TCEs, and an exclusive license to promote and innovate TCEs as a cultural representation and expression of the identity of indigenous peoples. Furthermore, they had asserted that if TCEs were to be accessed and/or used by non-indigenous peoples or corporations, this must be done based on prior and informed consent (PIC) and an agreed understanding of possible regulation and remuneration. In addition, indigenous artists were responsible to their collective indigenous nations to respect customary law in the use of TCEs and TCE innovations. The indigenous nation, as a collective, in turn granted the indigenous artist a permission to use and innovate TCEs – a concept which could be called an "Indigenous National Artistic License" (the representative noted that a somewhat comparable concept "re-creation of TCEs" was referred to in WIPO/GRTKF/IC/8/4). Therefore, through this relationship, indigenous artists had a moral right to use and innovate TCEs. But non-indigenous people and corporations did not have such a right. Nonetheless, the representative stated, TCEs were commonly misappropriated and misrepresented by non-indigenous individuals and corporations. Consequently, misappropriated TCEs acquired without PIC appeared in an array of commercial products including umbrellas, lampshades, books, films, posters, alcohol labels, clothing, and sports team and other corporate logos – including the recently trademarked logo of the 2010 Olympic Games in Vancouver. These misappropriations were often offensive to indigenous peoples and in many of these cases those misappropriating the TCEs had used the IP system to protect their misappropriations. This resulted in the absurd situation where

indigenous peoples had lost access to and control of their own TCEs as if they were in the public domain. The resolution of this general problem was one of the key tasks before the Committee and other international UN forums such as UNESCO, the CBD, the Working Group on Indigenous Populations and the Permanent Forum on Indigenous Issues. However, in the light of recent disappointment with negotiations concerning the UNESCO Convention on the Protection of Cultural Contents and Artistic Expressions regarding protection of artists' rights, the representative stated that the WIPO Committee had done more advanced work and, more so than other forums, was well positioned to take decisive and progressive action. He also commended the Committee and the WIPO Secretariat on the incremental improvements made to the TCE and folklore documents and the notable improvements in WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/6. The representative added that indigenous artists in Canada had a vested interest in the Committee and other international discussions and would like to participate more actively. Finally, the representative acknowledged Ms. Terri Janke, an indigenous lawyer from Australia who had done extensive work on protecting the rights of indigenous artists in Australia and at the international level. Ms. Janke had attended the sixth session of the Committee when WIPO launched the publication of her study "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions".

104. The Delegation of Congo thanked the Secretariat for having taken into account the many proposals made during the preceding sessions of the Committee. Congo had a cultural wealth and was very rich in folklore and TK because it had a vast forest in the Congo basin which was like the Amazon. Congo was fully aware of the work that had been done and that would still be done by the Committee. The Delegation stated that since the technical meeting of the Scientific Committee of OAPI in Dakar, a number of comments had been submitted by OAPI which had been taken into account by the Secretariat. Document WIPO/GRTKF/IC/8/4 was a sure basis for setting up a legally-binding instrument. This would be a document accepted by everybody because it took into account customary law. In Congo, cultural heritage had been kept for a long time because of customary law. Therefore, Congo would encourage taking into account customary law. The Delegation wished that the mandate of the Committee be continued and this would help the creation of international legally-binding instrument. The Delegation concluded by expressing its support for the statement made on behalf of the African Group.

105. The Delegation of Canada stated that many other delegations and representatives had spoken of the need for the Committee to continue its valuable work on the protection of TCEs/EoF. Nonetheless, the Committee had also heard that this progress should happen at a measured and effective pace to be as reflective and inclusive of Member States' concerns as possible. It should also be conducted in a transparent manner as expressed by the Delegation of Brazil. In this regard, Canada suggested a change to the wording of paragraph 21 of WIPO/GRTKF/IC/8/4, namely that the phrase "draft provisions" in paragraph 21 be deleted each time it appeared and be replaced with the phrase "draft objectives and general guiding principles". Accordingly, the Delegation suggested that paragraph 21 read as follows: "The Committee is invited to: (i) review and comment on the draft objectives and general guiding principles as expressed in parts 1 and part 2 of the Annex (here and after known as 'draft objectives and general guiding principles'); (ii) call for the draft objectives and general guiding principles to be disseminated further to enable wide stakeholder consultation and expert review, in particular wider consultations with indigenous peoples and local communities; (iii) encourage Committee participants to continue and expand community, national and regional consultations on the draft objectives and general guiding principles; (iv) call for written comments on the draft objectives and general guiding principles including



specific suggestions for wording before October 28, 2005; (v) request the Secretariat to produce on a basis of parts 1 and 2 of the Annex and all inputs and comments a further revision of the draft objectives and general guiding principles to provide a basis for the Committee's substantive work on TCEs/EoF at its next session and to prepare a compilation of all written comments received from Committee participants; and (vi) consider options for further enhancing the role of the Committee and possible subsidiary bodies in directly preparing future drafts of the objectives and general guiding principles".

106. The representative of ARIPO expressed its appreciation to the Secretariat for providing the Committee with a revised version of the policy objectives and core principles concerning TCEs/EoF which aimed to establish a range of important policy objectives for preventing misappropriation and curtailing the grant or exercise of improper IP rights over TCEs/EoF. ARIPO was committed to this approach of the work of the Committee and had made significant input towards its present form. ARIPO also associated itself with the statement made by the Delegation of Morocco on behalf of the African Group. The representative stated that he hoped that the revised document would be further developed to serve as a basis for the development of an international instrument. The Committee had since its establishment discussed various conceptual issues and considered different approaches that would best protect TCEs/EoF and ensure that the gaps and shortcomings in the existing IP system that allowed misappropriation were addressed. In the view of ARIPO, the continued work of the Committee would only be justified if there was a clear focus towards the development of an internationally binding instrument. As had already been alluded to by many delegations, a legally binding instrument constituted the most concrete outcome that could provide an effective and comprehensive solution to the misappropriation and illicit use of TCEs/EoF. ARIPO had studied WIPO/GRTKF/IC/8/4 and wished to make two comments. The first related to the lack of adequate measures provided in the substantive provisions to implement draft objective (iv) of the document, particularly measures aimed at preventing misappropriation TCEs/EoF and the grant and exercise of existing IP rights over TCEs/EoF. ARIPO suggested that draft Article 8 of the substantive provisions, for instance, could be broadened to preclude the registration of improper IP rights in tangible TCEs/EoF. With respect to the international and regional protection, provided for in Article 11 of the substantive provisions, ARIPO recognized the importance of the principles of national treatment and reciprocity found in international instruments and generally agreed with the text of Article 11. However, it would also be important that further consideration be given to the question of "regional folklore". This was because in a number of developing countries, folklore cut across national frontiers and were multicultural and, therefore, a practical relationship with the international dimension should be explored. The representative stated that ARIPO would be grateful if issues of regional folklore were reflected in Article 11 to enhance the mix of approaches that the Committee sought to achieve.

107. The Delegation of Burkina Faso thanked the Secretariat for WIPO/GRTKF/IC/8/4 and for the outstanding summary of the issues it contained. The Delegation appreciated the principle of flexibility suggested in the document. The Delegation agreed with the African Group and other delegations regarding the need for a binding international instrument. Concerning the principle of respect and consistency with other international instruments, this principle was very useful, as the protection, safeguarding and preserving of TCEs were needed as part of a cross-cutting approach to achieve true protection, as the document stated. The Delegation added, with reference to general guiding principle (a), that the protection of TCEs should promote cooperation among communities and not lead to competition or conflict, and that this principle should also apply within traditional communities that identify with a certain TCE. Regarding Article 2, which addressed beneficiaries, this draft provision

aimed at indigenous and local communities and not individuals, based on the collective nature of TCEs. It was also important to recognize that an individual could achieve classical IP protection but this could be difficult so it might be useful to leave it up to States to determine the scope of beneficiaries. In Burkina Faso, for example, the laws on the protection of literary and artistic works were deeply rooted in TCEs and, in this context, individuals benefited from the protection of TCEs. There was also a national fund for protection that the entire nation benefited from regardless of the source of the TCE that contributed to this fund. This was also in a context in which an individual could be identified. In addition, the authorization to use a TCE was subject to a collective protection system under the auspices of the Ministry of Culture. In conclusion, the Delegation referred to Article 6 on the duration of protection with which it was not comfortable. It was not believed that Article 6(2) was appropriate for TCEs because regardless of the way in which a TCE was used and disclosed, protection should nevertheless continue. This article, therefore, needed further reflection, the Delegation concluded.

108. The Delegation of Morocco thanked the Secretariat for the preparation of the excellent documents, in form and in substance, before the Committee. The Secretariat had always shown a great proficiency in reflecting the interventions and proposals of all delegations, including of Morocco. Undoubtedly, WIPO/GRTKF/IC/8/4 reflected fully what the Delegation had presented as far as comments and proposals were concerned in the seventh session. Therefore, the document was welcomed as a very important step forward in the work of the Committee. The Delegation also welcomed the policy objectives and guiding principles set out in the document. It wished to present some preliminary remarks while reserving its right to present more detailed proposals and comments at a later date. As far as the objectives were concerned, it was noted that the policy objectives need some synthesis because many of them were similar. Another objective could be added related to the codification, management and use of the TCEs and folklore. As regards Article 1, concerning definitions, the Delegation considered that works derived from TCEs/EoF should be added. As far as Article 2 was concerned regarding beneficiaries, there was no reference to what the Delegation had said at the seventh session regarding recognition of the role of the State in promoting, protecting and maintaining TCEs/EoF and the text on beneficiaries needed further precision. There was a reference to this in the commentary to that article but not in the substance of the article itself. As far as Article 3 was concerned, when there was a reference to broadcasting and public performance, technological progress must be taken into account. Therefore, the reference to broadcasting was not sufficient and needed further clarification. Regarding the draft exceptions and limitations in the document, they were quite limited and it was important to take into account the role of archives and libraries regarding exceptions and limitations. Concerning the period of protection, the Delegation had said previously that taking into account the diversity of TCEs, there was a need to specify different terms for diverse forms of TCEs/EoF.

109. The Delegation of Nigeria joined other delegations in commending the Secretariat for the work that it had done so far and in progressively building a body of invaluable information on the various issues confronting the international community as far as the protection of TK and TCEs/EoF were concerned. The Delegation was particularly delighted to note the significant improvements in the revised objectives in WIPO/GRTKF/IC/8/4, and it was also grateful to all those who had furnished the Secretariat with informed comments during the review process. Having read some of these comments in WIPO/GRTKF/IC/8/INF/4, the Delegation was more than convinced that there were genuine concerns on how best to address some of the specific issues of concern. For instance, the Delegation noted the difficulties in evolving a clear, acceptable definition of terms and the

scope of protection. It also noted the issues arising from the delineation of the exceptions in a manner that would neither defeat the essence of the protection sought nor impinge on the normal activities of society. Having read the explanation of the Secretariat in paragraphs 13 and 14 of WIPO/GRTKF/IC/8/4, it was the Delegation's understanding that what was presently before the 8<sup>th</sup> session of the Committee was without prejudice to the legal nature of whatever instrument by which the draft provisions in the Annex to the document might ultimately be expressed. The Delegation accordingly approached consideration of the substantive provisions with some flexibility, knowing that they were open-ended and intended to facilitate future decisions by Member States on the legal form or status that might be assumed at the international level. The Delegation fully appreciated the concerns raised by many delegations over WIPO/GRTKF/IC/8/4, particularly over the language of the draft provisions, and it had taken note of the genuine fears and worries of some delegations at the pace at which the objectives and principles were crystallizing into more substantive provisions. It was also worth noting, the Delegation went on, that this process had been on for quite a while. Seeing what the Committee had to show after the 7<sup>th</sup> Session of the Committee, the stage it had reached now could hardly be described as hasty and the documents were not premature. Unfortunately, while these debates were going on, bio-resources were being plundered, TK was being misappropriated and the unauthorized exploitation and insulting desecration of TCEs/EoF went unchecked. In fact, they were increasingly sought after as alternative sources of wealth in an increasingly commercial society while the holders of these traditional assets were further impoverished. The Delegation believed that considering the huge losses accruing to traditional communities, the present pace would appear slow. The Delegation stated it had examined WIPO/GRTKF/IC/8/4 carefully and did not see it as suggesting a particular form or forms of instruments. Nigeria was therefore unable to accept the proposal by the Delegation of Canada that the invitation in paragraph 21 of the document be reworded. It was also unable to accept a zero sum option in which the substantive texts that had evolved as part of the work of the Committee would be abruptly terminated merely because of their perceived resemblance to a legally binding instrument. This would be akin to throwing away the baby with the bath water, the Delegation added. The Delegation fully endorsed the statement made by on behalf of the African Group and Nigeria was unable, at this point, to accept a proposal for anything short of an international binding legal instrument. However, in the spirit of consensus building and in the larger interest of its people and local communities, the Delegation welcomed the suggestion that further discussions on this and other associated matters should continue in an open-ended, transparent, inclusive and member-driven manner. This left open the possibility of future meetings and consultations. The Delegation was for this reason even more convinced that the text of the principles and objectives as well as the substantive principles contained in WIPO/GRTKF/IC/8/4 should form the basis of future negotiations amongst Member States. The Delegation was under no impression that an international legally binding instrument in this area would necessarily derogate from efforts in other international forums, neither was the possibility of having other instruments at national and regional levels to address other issues relating to the promotion and protection of TK and TCEs/EoF ruled out. Having said this, Nigeria was not entirely in agreement with some of the specific formulations in WIPO/GRTKF/IC/8/4 but in the spirit of consensus building, it accepted the invitation in paragraph 21, particularly the call for wider consultation and review. To this end, Nigeria would be making specific suggestions for wording, either separately or in consultation with other Member States from the region. In closing, the Delegation stated that it did not see the present draft as a "one-size-fits-all" solution. Rather, the document was a genuine effort to craft the emerging documents in a way that every size and color was accommodated. Yet, there were many international IP instruments that fell short of balance and equity, such as instruments that had been cast in sizes that only fitted a

particular end of the economic divide while frustrating the development efforts of the other. Many developing countries had complained about these “one size fits all” norm-setting regimes but these complaints had never been accepted as sufficient reasons to renounce them. The Delegation noted finally that while the sharing of experiences at national levels was very enriching and always welcome, this should not be seen as an end in itself, and it should not become the preoccupation of the Committee. National and regional arrangements were not enough and there was need to evolve an international regime of protection. The outcome of the Committee would fall short of Nigeria’s expectation if the rights recognized were not legally enforceable. It was the Delegation’s suggestion, therefore, that the Committee proceed within its mandate to provide an acceptable legal framework at the international level. The proposed drafts could be considered as concrete steps forward towards the evolution of an international legally binding instrument. Nigeria would accept the invitations in paragraph 21 of WIPO/GRTKF/IC/8/4, the Delegation concluded.

110. The Delegation of Australia supported the amendments to paragraph 21 of WIPO/GRTKF/IC/8/4 as proposed by the Delegation of Canada. The Delegation also responded to the intervention by the Delegation of Brazil which had dismissed the value of sharing national experiences and any focus on national approaches. The Delegation’s consistent view had been that appropriate, workable national approaches to the protection of TCEs/EoF were an essential prerequisite, a fundamental building-block, for a useful and effective international approach. It was for this reason important to get the policy objectives and general guiding principles right from both the national and international perspective before the Committee went further.

111. The Delegation of Japan stated that the proposal made by the Delegation of Canada was very interesting. It was necessary to discuss first the two more important parts of the document, namely “policy objectives” and “general guiding principles” and when the Committee had some common understanding on these parts it might be easier to discuss the substantive provisions. The Delegation supported the proposal made by the Delegation of Canada.

112. The Delegation of Zambia supported the statements made by the African Group and ARIPO. It attached great importance to the realization of an international instrument that would be legally binding and respected by the international community. It was not in the interest of any Member State to disregard or abandon the good work already done by the Committee towards the establishment of an international instrument. Therefore, the Delegation believed that the mandate of the Committee should be extended.

113. The Delegation of Egypt stated that there was a need for a *sui generis* system in which distinguishing between EoF and TK was not useful. If there were going to be definitions in the texts, these should just serve as examples. It appeared that there was a huge cultural diversity in humanity, be it at a national or global level, and therefore it was necessary to recognize the characteristics of different societies, taking into account their different traditions and cultural characteristics. The Delegation stated it was necessary to have the freedom to protect each society’s traditions and culture. Therefore, it was necessary to protect the rights of the creators of expressions of folklore and TCEs and a legally binding instrument within a *sui generis* system was needed. Such a system should allow for a diversity of national systems, allowing States to have conservative legislation. At an international level, existing *sui generis* systems should be a point of reference for the Committee to use as a basis towards a legally binding instrument. Developed countries might have doubts about such a system thinking that this might be arbitrary. However, it was believed that this system should be

based on fundamental principles, particularly “prior informed consent” and benefit-sharing, it should not be limited to material compensation and it should also take into account the technological aspect. It was also necessary to ensure that such a system provided minimum protection while accepting the principle of reciprocity. A dispute settlement mechanism which would work in different countries following the example of the WTO was also desirable, the Delegation concluded.

114. The representative of OAPI congratulated the Secretariat for the excellent documents whose content and the approach should help the Committee achieve its objectives. The Committee should aim to continue with its work and should not exclude discussion of WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5. The draft provisions on TCEs/EoF in WIPO/GRTKF/IC/8/4 were very satisfactory and were a good working basis towards creating an internationally legally binding instrument. Many issues had been debated, national and regional experiences had been shared, various studies had been undertaken, there had been regional and national workshops, and there were other international fora that had looked at these issues. Now the Committee had to move to the next level and each participant should show the flexibility often spoken about in the Committee. The representative added that he was satisfied to see that OAPI’s comments on the previous versions of the document had been incorporated into WIPO/GRTKF/IC/8/4. OAPI could not accept the amendment suggested for paragraph 21 by the Delegation of Canada, supported by the Delegations of the United States of America and Japan, because this would be taking a step backwards. In this context, OAPI supported the statement made on behalf of the African Group which had been echoed by the Delegation of Nigeria.

115. The Delegation of Morocco stressed that a large effort had been put into the work of the Committee, that a lot of progress had been made and that the work was going in the right direction. The Committee was working towards adopting a legally-binding international instrument to protect TCEs, and this was what the African Group had called for and would support. The Delegation stated that the Committee could not afford to move backwards. The Delegation was, therefore, against the proposed amendment to paragraph 21 suggested by the Delegation of Canada because this would counteract all the efforts that had gone into the work so far. The Delegation was in favor therefore of maintaining paragraph 21 without any amendment.

116. The Delegation of Switzerland stated that it had studied WIPO/GRTKF/IC/8/4 on the revised objectives and principles for the protection of TCEs/EoF with interest and care and thanked the Secretariat for this revised document. The Delegation had also listened with interest to the debate on this document and the various proposals put forward with regard to the future work of the Committee on TCEs/EoF. The Delegation also held the view that the next step should be to focus on the policy objectives and the general guiding principles before taking any further steps, including substantive provisions. For this reason, the Delegation supported the proposal made by Canada with regard to the rephrasing of the invitation contained in paragraph 21 of WIPO/GRTKF/IC/8/4.

117. The Delegation of Pakistan highly appreciated the work of the Secretariat in preparing the excellent WIPO/GRTKF/IC/8/4. Pakistan was proud of being able to claim an ancient civilization and the Delegation fully supported promoting and protecting TCEs/EoF. Almost every part of the world had its own cultural heritage which might be exchanged for the betterment of humanity, keeping in mind that mutual respect might be the key factor in evolving a system wherein the IP regime, with some extended *sui generis* systems, might be the answer to such complex issues. The Delegation believed that copyright and related-rights

laws, with some amendment to the concept of the public domain, might facilitate the protection of TCEs/EoF, as could trademark law, again with some amendments, protect or facilitate protection of certain names, words, expressions of any community. It was noteworthy that cultural heritage had always been present but problems had started with commercial use and then people had thought that there should be legitimate benefit-sharing and that their cultural heritage should be prevented from acts of misappropriation. WIPO/GRTKF/IC/8/4 might be a foundation - stone in deriving a legal instrument for protection at national and international levels. The Delegation believed that almost all the provisions in the document were or might be agreeable to all the Member States. However, the Delegation had a few suggestions or reservations concerning Article 3(b)(ii), to which should be added “unauthorized modification”. Secondly, the Delegation also wished clarification on the use of the term “agency”, which might confuse especially indigenous and local peoples. It was unclear what the agency would do, what would be its jurisdiction, where it would work and whether it would work in accordance with the wishes of affected communities. In conclusion, the Delegation stated that the document provided a basis for future work and that if proper and serious attention were given to the document, there would be progress towards a legal instrument for protecting TCEs/EoF.

118. The Delegation of South Africa commended the Secretariat for synthesizing the inputs and comments made by Member States and various other stakeholders in order to produce WIPO/GRTKF/IC/8/4. While most Committee participants were representative of governments, it was assumed that extensive consultations had taken place and would continue to take place with the communities that are spoken about in the documents. This was, however, not necessarily the case, as some Governmental representatives seemed to provide inputs and comments that were not in agreement with those of the indigenous peoples and local communities whose TCEs/EoF were in danger of misappropriation. The Delegation commended those countries where this was not the case, and especially those who had included community members as part of their delegations. This had been one of the lessons learned in the First National Workshop on Indigenous Knowledge held in South Africa in September 1998. With respect to draft Article 1 of WIPO/GRTKF/IC/8/4, which dealt with the subject matter of protection, indigenous drawings, designs, paintings, carvings, pottery were found among communities all across South Africa. These continued to be exploited and misappropriated nationally and internationally and most of these communities remained poor. National provisions were not sufficient and for this reason the Delegation supported the statement made on behalf of the African Group regarding the need for an international legally binding instrument. Finally, the Delegation recommended the inclusion of a new General Guiding Principle “Principle of continuous consultation with the holders and owners of the knowledge”. This could be achieved through advisory committees such as the Maori Trade Marks Advisory Committee in New Zealand.

119. The representative of the International Publishers Association (IPA) stated that the IPA appreciated the importance of recognising TCEs/EoF. For this reason, the IPA had been actively participating in the Committee since its first session. The representative stated that publishers promoted and passed on TCEs/EoF in many different ways. For example, local publishers of children’s books and school books made reference in their works to the cultural context and environment of their readers; many writers of fiction were inspired by their local customs, traditions and the social environment in which they were raised; and academic publishers published works of scientists describing ethnological observations. Publishers therefore operated as both preservers and developers of TCEs/EoF, within and between cultures. The representative drew attention to two particular issues, both of which she said could impact on human rights. First, regarding the definition of protectable subject-matter,

the draft articles in WIPO/GRTKF/IC/8/4 did not seek to protect a specific manifestation of an idea but nearly *any* manifestation of an idea or element of knowledge. This broad, or virtually catch-all, approach meant that the possibility of reporting or disseminating content or expression was severely restricted. This disproportionately curtailed the freedom of expression of individuals, a fundamental right recognised in various international treaties. As currently drafted, even if tied to some “originality” requirement as the commentary to the draft Article 1 appeared to suggest, the criteria for protection were too wide, the IPA believed. Regarding the proposed administrative framework, this not only created a time-intensive and possibly financial burden, but also raised significant freedom of expression issues. The creation of any administration that had to be involved before a literary work could be published was a serious impediment to freedom of expression and the freedom to publish of writers and publishers respectively.

120. The representative of the Tulalip Tribes thanked the Secretariat for preparing the documents for this meeting, which were found to be substantively progressive and worthy of continued development. Regarding policy objectives for the protection of TCEs, the Tulalip Tribes suggested the addition of an additional policy objective concerning judicial measures. The representative explained that even if the existing objectives in WIPO/GRTKF/IC/8/4 were perfected and implemented, there would remain disputes among indigenous and local communities as to the ownership and disposition of TCEs, and between such communities and users of TCEs. Indigenous and local communities were often in a poor position to defend their rights, and the costs of litigation could be an undue burden. Measures should be taken to provide for fair and equitable dispute resolution, with appropriate weight given to the application of customary law in the resolution of the disputes. Other measures should address the presentation of evidence, as testimony might become part of the public record or part of the public domain which might violate customary laws. Without such measures, members of indigenous and local communities might find the costs of litigation and the failure of courts to recognize customary law and indigenous forms of evidence an effective bar to the defense of their rights. With this background, the representative proposed the new objective as follows: “Promote the transparent, equitable and efficient resolution of disputes, measures for providing legal aid, and sufficient weight for the use and protection of customary law and evidence”. Regarding Article 5 on Exceptions and Limitations in WIPO/RTKF/IC/8/4, the Tulalip Tribes believed that the exceptions as written were too broad to effectively protect the rights of holders of TCEs/EoF. A core issue for indigenous peoples was that the breaches of law that mattered to them were breaches of customary law, not breaches as defined under IP law. The use of standard “fair use” guidelines could become a conduit for misappropriation, as an open-ended interpretation of these standards did not recognize the limitations on use set by customary law. Regarding teaching and learning, the Tulalip Tribes had experienced a case in the Pacific Northwest where a Skagit elder had shared a personal story in a public meeting that was recorded, transcribed and used in a classroom for teaching purposes. In the Skagit way, the story was shared as a gift without any implied consent to the listeners to share it further, as it remained in custodianship with the elder. The derivative use of the story, even in the classroom, was extremely offensive and hurtful to the elder. Research exemptions were a common pathway by which TK became published and part of the public domain. If research was supported by public funding, the underlying data in some jurisdictions was subject to freedom of information requests. Reporters did not always know or respect customary law, and some sacred, individually owned or family owned knowledge might be shared at public events. Indigenous participants were aware of their obligations at such events, and although they outwardly appeared to be public performances and expressions to foreign eyes, they were regulated by customary law. The use of TK in legal proceedings was also problematic. Although indigenous peoples had supported the creation of archives and

inventories, and were often grateful for the existence of historical records that were obtained under conditions that today might be recognized as misappropriation, some were uncomfortable with recordings, and for various reasons wished historical recordings to be repatriated or access to be regulated or prohibited. There had also been much speculation among indigenous groups as to what incidental uses might be. In addition to uses of TCEs/EoF obtained directly from communities, there were also concerns related to derivative uses. Even if consent was given for a researcher to use and publish TCEs/EoF, there might be no implied consent for others encountering the knowledge and expressions to use the knowledge, and these derivative uses raised many concerns for indigenous peoples. Those sharing knowledge might be quite unfamiliar with the academic systems, and not aware that published materials would eventually fall into the public domain. Some museums, libraries and research collections had made positive steps in dealing with some of these issues. In Australia and New Zealand, libraries had established special library sections not accessible to the public and containing materials deemed sensitive or offensive to indigenous communities. Researchers wishing access had first to obtain the permission of the relevant aboriginal communities, who might set limits on the researcher's use of the materials. Similar procedures had been established at the Smithsonian Institution in the United States of America, which had also begun to repatriate some of its archival material. While it was noted that the current text restricted exemptions to cases where "such uses would not be offensive to the relevant community", this was weak and put the burden on the user to make the determination of the potential offensiveness of use. The representative also believed that measures needed to be developed to allow communities to lodge claims in respect of TCEs/EoF that appeared to have no ownership, much as tribes in the United States of America had the right to petition for ownership of human remains and traditional cultural objects. The Tulalip Tribes therefore proposed a stronger standard of prior informed consent to ensure that indigenous and local communities might claim ownership over unaffiliated TCEs/EoF. The representative proposed the following new opening language for Article 5: "[Measures for the protection of TCEs/EoF should] not apply to utilizations of TCEs/EoF in the following cases, provided that due diligence has been followed to obtain the prior informed consent of the relevant communities where those communities may be identified:", and the following new language for the end of Article 5(iii): "provided in each case that such uses are compatible with fair practice, and provided that measures are developed for communities to make and substantiate claims to the ownership of TCEs/EoF in cases where relevant communities are not initially identifiable, which would become subject to their prior informed consent". Finally, on the issue of using registers for positive protection, this was likely to be difficult both for indigenous and local communities, and for any regime that envisioned broad international assumption of obligations to monitor and enforce these obligations. Indigenous peoples varied widely in their technical capacity, and their understanding of IP law. Elders were sometimes reluctant to provide information even for digital storehouses designed solely for internal community use. The sacred and fluid nature of much of the knowledge made codification difficult for some knowledge, as it violated customary law surrounding the use of the knowledge. It was also difficult to conceive, given the diversity of national IP systems, that an agreement could quickly be reached on the protection of thousands upon thousands of TCEs/EoF. One possible way out of this impasse was to take a staged approach to international protection and enforcement. One approach common in international instruments was the use of annexes to specify objects and measures, such as the annexes the CITES Convention used to protect endangered species. Although misappropriation might be widespread, it might be possible to identify leading cases. Indigenous peoples could develop "cultural heritage red lists" identifying some of the most important items they would like protected in the near term - items that had high sacred values or exemplify great cultural offense. The experience gained in international recognition and



enforcement of smaller lists would not preclude the development of international agreements on wider lists of TCEs/EoF, but would allow the development of experience in international cooperation, allowing the establishment of a legal and technological infrastructure to make larger scale protection possible. Because extensive proactive defense of TCEs/EoF was not likely to occur quickly for the reasons above, reactive and litigation-based approaches were likely to dominate early in any regime. Even if jurisdictions were to recognize “cultural heritage red lists”, measures would need to be developed to streamline and facilitate access to foreign jurisdictions, and this could be part of a near-term program of work. In summary, a staged approach to implementation of a regime would allow forward movement on some implementation measures without waiting for the emergence of a perfected regime. The Tulalip Tribes were concerned that the pursuit of perfection was delaying the implementation of measures for protection that could be achieved today.

121. The representative of the American Intellectual Property Law Association (AIPLA) stated that AIPLA fully supported the goals and objectives of the Committee in recognizing value, promoting respect, and preventing misappropriation of TCEs and TK. It also recognized that a balance had to be struck with existing principles of IP that served to stimulate and reward innovation and creativity. Established principles of IP provided for limited time periods of exclusivity for original creations and innovations. This exclusivity was awarded in exchange for donation of the innovations and creations to the public domain. A balance was achieved between the reward of exclusive rights and a public disclosure enabling common use and sharing that stimulated further innovation and progress. AIPLA was concerned that the proposed articles in WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 might provide for rights that were out of balance with existing principles of IP. The articles appeared to provide exclusive and perpetual rights to subject matter that was not fully defined and not fully disclosed, including derivations and adaptations. AIPLA believed that such imbalance would inappropriately serve to stifle creativity and innovation. It was mindful of the need of indigenous communities to preserve and protect TCEs and TK from unlawful and inappropriate uses. While supportive of the principles and objectives that were at the core of the Committee’s work, however, the representative urged the Committee to fully study and consider the impact of suggested protective measures on existing principles of IP, and to strive to achieve harmonious solutions.

122. The representative of the Max Planck Institute (MPI) believed that the inclusion of concrete, substantive provisions in the Annex of WIPO/GRTKF/IC/8/4 was extremely useful, whether or not these provisions would serve as a model for an international instrument, a regional one or only national legislation. An analysis at such a detailed level could only advance knowledge, she added, by showing the difficulties and thereby optimizing possible solutions irrespective of the purpose the draft provisions would finally serve. On Article 3, the representative had major doubts on the condition of registration or notification for obtaining full protection, as this might mean that in a large number of cases such protection might not be achieved. While a need for legal certainty was appreciated, a registration/notification requirement, within a three-layered system of protection, would be too remote from indigenous peoples’ thinking, too complicated and too demanding. Intensive training and, if registration was fee-based, financial assistance would be needed. The representative reminded the Committee of the reasons for the “no formalities” rule in the Berne Convention, which was too facilitate protection for authors who might not be able to comply with complicated formalities requirements. Article 4(a)(ii) seemed to presuppose that the Agency which granted protection would also collect the benefits, while the commentary to the article suggested that the Agency would only act at the request of communities. It should

be possible for a community to request an Agency only to negotiate on its behalf but stipulate that the benefits be granted directly to the community. The representative stated that the role of governments in relation to their indigenous peoples had been referred to in the indigenous panel which had taken place before this session of the Committee. The representative continued that she was not convinced of the need for subparagraphs (i) and (ii) of Article 6. With reference to (i), it seemed preferable to link continued protection with continued use of the TCEs/EoF, rather than to whether or not registration remained. It was in any event unclear under which circumstances, by whom and how registration might be cancelled. On (ii), the words “as such” were not clear. If they referred to the secret nature of TCEs/EoF, the provision would not be necessary since the condition of protection under Article 3(c) would not be met anyway. If they referred to secret TCEs/EoF with an emphasis on their being TCEs/EoF, the provision would run counter to the principle, elsewhere stated in the document and with which the representative agreed, that duration of protection should be linked to the continuing use of the TCEs/EoF, irrespective of whether they were secret or not. Such ongoing use was not new in IP, the representative noted, with reference to examples of ongoing or renewable protection of trademarks and, in some jurisdictions including the European Union, of non-original databases. Similarly, TCEs/EoF should receive continuing protection while and for as long as they remained part of living heritage.

123. The Delegation of the United States of America supported the proposal made by the Delegation of Canada to focus the decision paragraph of WIPO/GRTKF/IC/8/4 on objectives and principles. The Delegation noted that a wide range of views on objectives and principles had been expressed in the Committee and believed that many of them had not been sufficiently taken into account in the document. The Canadian proposal would allow achievement of a greater convergence of practical policy objectives and core principles before proceeding to discuss appropriate steps forward in a member-driven process. On the other hand, if the Committee were to prematurely accelerate its work on the draft articles without greater convergence on policy objectives and principles, the process would be less likely to achieve a successful outcome, the Delegation concluded.

124. The representative of the *Federacion folklorica La Paz* stated that his organization was participating in the session as a sign of its concerns and the significance that Bolivia gave to these important issues. The representative stated that he was present to denounce cases of misuse and misappropriation of Bolivian folklore with regard to clothing and music. This was happening in the dance world, and there were over 300 hundreds different dances registered in Bolivia. They were divided into indigenous, ceremonial and traditional dances and these dances were very much appreciated. Neighboring countries also used these dances in their celebrations, such as Peru, Chile and Argentina. Thus, Bolivia found its dances being misused and infringed in these countries. These dances had been created by the ancestors and were part of traditional identity, the representative stated, and Bolivians wished to have these dances preserved, as well as other TCEs/EoF which had economic benefits and created jobs for crafts peoples and for musicians. Expressions of Bolivian folklore had been declared by UNESCO to be part of humanity’s cultural heritage. The representative wished that various festivals that took place in Bolivia be recognized and for this reason, he supported the statement made by the Delegation of Bolivia that legal security at the international level was needed, and that to this end there was need for a legally binding international instrument. Finally, the representative stated that his organization was not against its brothers in neighboring countries, such as Peru, Chile and Argentina. It did not mind them using the dances; it just wanted it to be recognized that they were Bolivian dances or dances coming from a particular part of Bolivia. In conclusion, the representative thanked the Indigenous

Council of South America which had provided support enabling it to speak at the session, and appealed for the establishment of a voluntary contribution fund at WIPO.

125. The Delegation of Brazil stated that it was concerned that certain delegations were proposing amendments to paragraph 21 of WIPO/GRTKF/IC/8/4, which just invited the Committee to take certain actions regarding this document. The Delegation asked the Chair for guidance as to how he intended to proceed as regard the overall outcome of the meeting. The Delegation wished to consider the outcome and to deal with it as a whole regarding all the issues of the agenda.

126. The Delegation of Ukraine stated many monuments in Crimea had been destroyed and the Crimean people had been told that they didn't have their own cultural traditions and architecture, which was not true. Town-planning and buildings should be included in the scope of the cultural heritage of indigenous peoples. The Delegation suggested that the Committee create a working group that could deal specifically with the architecture and town-planning of local and indigenous communities in Crimea and other parts of the world.

127. The Delegation of the Islamic Republic of Iran supported the statement made by the Delegation of Morocco. The work of the Committee was advancing and the Secretariat had done much to collect all the views in previous sessions. The Committee should not take a backward step.

128. The Delegation of Bolivia thanked the representative of the *Federacion folklorica La Paz* for his statement. Bolivia seemed to be a victim of its own creative success and the experiences spoken of by the representative showed the need for an international legally binding instrument to effectively protect TCEs/EoF. The Committee needed to move forward with its work with concrete steps and it was necessary to renew the Committee's mandate. With Nigeria and Morocco, the Delegation had a difficulty in accepting the suggested amendments to paragraph 21.

129. The representative of the United Nations University (UNU)-Institute for Advanced Studies (IAS) recognized there were many complex issues facing the Committee in the development of international law in this area. Legitimate concerns that IP law might not be able to respond to the need for *sui generis* protection of TCEs and TK were also noted. The representative stated that his further comments were relevant to both TCEs/EoF and TK and applied to both WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5. The Committee was now faced with determining its future and whether it considered itself the appropriate forum to deal with the complex issues before it. It was appropriate that it should reflect deeply on these questions prior to seeking an extended mandate from the General Assembly for while it was the General Assembly which granted the Committee its mandate it was for the Committee to advise the Assembly as to what that mandate should be. In doing this, there should be no equivocation or misunderstandings, the representative continued. Delegates and indigenous and local communities, as well as other forums such as the CBD, should have a clear idea what the Committee could and could not do and, more importantly, what the Committee was prepared to try to achieve. The Committee had during the past seven sessions and during this session moved forward in fits and starts, sometimes surprising those who thought it would not make substantial advances and frequently frustrating with the sometimes painfully slow speed of that advance. Now the Committee found itself at a crucial decision point. Could it obtain and maintain the confidence of indigenous peoples, local communities and developing countries or would it squander the goodwill obtained to date by procrastination and inordinate delay, the representative asked. It was clear that some

delegations were not been pleased to find before them texts that pointed towards the development of legally binding measures for the protection of TCEs/EoF and TK. It was equally clear that there were delegations that felt the present texts did little more than provide guidelines and did not articulate mechanisms for positive protection. It would be surprising if the Secretariat had achieved the impossible and provided texts which would be acceptable to all at first instance. The Secretariat must, however, be commended for having provided well-articulated and reasoned documents upon which negotiations could continue. That they point in the direction of legally binding instruments was not only understandable but also crucial. The representative stated that if the Committee was not committed to developing legally binding mechanisms for the protection of TCEs/EoF and TK, then it might as well terminate its work. There was nothing to be gained from having a directionless debate which sought only to agree upon some general objectives and principles. As Alphonse Kambuso well said during the indigenous panel held just before the commencement of this session, there was nothing new in the concept of misappropriation as it had been around since time immemorial. If the Committee's goal were merely to reiterate a set of principles regarding moral values and equity without developing mechanisms to prevent misappropriation there seemed to be little need for it to continue its work. In that case, continuing debate in the Committee might do little more than distract, and perhaps detract, from the opportunity to advance work on the protection of TK in other forums such as the CBD. The CBD's Working Group on 8(j), in the face of significant advance at the WIPO Committee, would need to recover the initiative in the development of proposals for *sui generis* regimes for protection of TK. The representative stated that it appeared clear that the time had come for the Committee to decide its own objectives. Could it serve as a forum of change, unafraid to tackle the challenging issues before it or should it bow out gracefully and leave the stage to other intergovernmental forums committed to early protection of TCEs and TK? Agreeing to work towards the development of effective mechanisms for protection would require that work progress in an orderly fashion, with first a definition of objectives and principles and then negotiation of substantive text. Those steps should not, however, paralyze the process and signify a step back. Accordingly, the invitation for comment in paragraph 21 should encompass the whole of the text prepared in WIPO/GRTKF/IC/8/4 (and the same for WIPO/GRTKF/IC/8/5). Anything less would be an abdication of the Committee's responsibility, the representative stated. As noted by the Delegation of the United States of America, the documents prepared by the Secretariat did not fully reflect the objectives and general principles in the substantive provisions. Rather than serving as a reason for not including the substantive provisions within the call for comments on WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5, this lack should be reason to maintain the call for comments as currently drafted in paragraph 21. In doing so, the Committee would empower all stakeholders and the Committee itself to participate in a more informed debate on the options available for securing effective protection of TCEs/EoF and TK.

130. The representative of Tupac Amaru thanked the Secretariat for WIPO/GRTKF/IC/8/4 and its Annex which contained clear specific proposals for an international instrument dealing with TCEs/EoF. The representative would have liked to discuss the document paragraph by paragraph. The Delegation of the United States of America had said it was against the text, or at least against studying it further, and it had been supported by Canada. Regarding the objectives in WIPO/GRTKF/IC/8/4, the cultural heritage of indigenous peoples was the very essence of their life, philosophy and identity. It could not be considered a good, or merchandise, or be the subject of business in order to reap profits. This should be expressed in draft objective (i). The objectives should also reflect that the cultural heritage of indigenous peoples was part of the common heritage of humanity. Draft objective (iii) should also refer to environmental and ecological development. To draft objective (iv) should be

added “equitable benefit-sharing for the use of these resources”. Regarding empowering communities, the representative stated this had to do with self-government and self-management for indigenous peoples to exploit and use their own resources, TCEs/EoF and TK, which linked also to the right and self-determination. The representative stated that one of the guiding principles in the document should be the principle of prior and informed consent, as well the issue of compensation for damages caused to indigenous peoples’ cultural and genetic heritage. Indigenous peoples were only asking for just compensation for material and moral damage caused by national and international biopiracy. Another mechanism that was needed as a dispute settlement mechanism dealing with the exploitation of GR and TCEs. In conclusion, the representative agreed with those who had said that the priority was to consult with indigenous peoples.

131. The Delegation of Algeria supported the two statements made by Morocco on behalf of the African Group.

*Decision on Agenda Item 8: Traditional Cultural Expressions*

132. The Committee adopted a composite decision on this item in conjunction with its decision on agenda item 9 (see paragraphs 162 and 163, below).

AGENDA ITEM 9: TRADITIONAL KNOWLEDGE

133. At the request of the Chair, the Secretariat introduced WIPO/GRTKF/IC/8/5, WIPO/GRTKF/IC/8/7 and WIPO/GRTKF/IC/8/8.

134. The Delegation of Luxembourg on behalf of the European Communities and their Member States expressed its appreciation for the efforts of the International Bureau to take into account in WIPO/GRTKF/IC/8/5 the written and oral observations that had been made on the draft objectives and principles set out in WIPO/GRTKF/IC/7/5, including in particular the written comments submitted by the European Communities and their Member States. The European Communities and their Member States reiterated their readiness to participate constructively and in a positive manner in the discussion in the Committee on the protection of TK. In particular, the European Communities and their Member States supported further work towards the development of international *sui generis* models for the legal protection of TK. Following its call for additional comments, WIPO had received relatively few contributions on WIPO/GRTKF/IC/7/5 and it should be acknowledged that issues related to TK were complicated. It appeared that the revised text of the draft provisions needed to be discussed in more depth and further improved, for example, in order to provide more legal certainty on a number of issues, including the proposed definitions. Some terms and principles also needed better definition and the consequences of implementation of some principles had to be further studied and measured. Without prejudice to a future mandate of the Committee, the European Communities and their Member States therefore supported the suggestion, laid down in paragraph 16 of WIPO/GRTKF/IC8/5, to provide for an extension period and enable Committee participants to submit additional comments to WIPO before October 28, 2005. The European Communities and their Member States also agreed with the suggestion to disseminate further the draft provisions to enable wider stakeholder consultation and expert review. They requested that, on the basis of these inputs and comments, the Secretariat should prepare a compilation and further refine the draft objectives and principles. In addition, the European Communities and their Member States were open to considering options for further enhancing the role of the Committee in preparing future versions of the

draft text. The European Communities and their Member States wished to reiterate that, at this stage, they did not prejudice the legal status of the outcome of the work on the protection of TK. They also took note of the contents of WIPO/GRTKF/IC/8/6 on the practical means to giving effect to the international dimension of the Committee's work. The European Communities and their Member States recognized that the document contained useful and appropriate background information. It enlightened participants on some important questions such as the possible ways that foreign right holders could be recognized in domestic laws. In this context, the European Communities and their Member States encouraged the Secretariat to make a more detailed study and analysis on the way that at present foreign right holders or interests are taken into account in specific national laws. The European Communities and their Member States also agreed with the view expressed in both WIPO/GRTKF/8/5 and WIPO/GRTKF/8/6 that the international dimension should not be considered as a distinct issue but should form an integral part of the substantive consideration of TK protection. However, they also wished to reiterate that, in line with their preference for internationally agreed *sui generis* models, the final decision on the protection of TK should be left to the individual Contracting Party.

135. The Delegation of Japan appreciated the efforts made by the International Bureau to compile the comprehensive WIPO/GRTKF/IC/8/5, which reflected the wide variety of opinions existing on this subject. It recalled that the present discussions were taking place in WIPO, which generally dealt with IP and, consequently, the Committee's exercise should be made only from an IP view point and on the basis of IP. Firstly, it believed that when the Committee considered a system for protection of TK it was necessary to take into consideration both predictability and transparency. It was very important to know which kind of TK was being protected and which not. Without such predictability and transparency a third party might find itself in a difficult situation regarding the protection of TK. Secondly, the Committee's exercise should not contradict existing national, regional and international norms. It reiterated that it was necessary to keep flexibility in mind, considering the variety of national practices that the Committee members currently had. Thus, the Delegation proposed that the draft objectives and principles should assume the form of Guidelines or Recommendations, rather than a rigid form for the protection. This would allow having a general system of protection which corresponded to the situation in each country. The Delegation pointed out the necessity to continue the Committee's discussion on the form of the final outcome. It had noticed that some Committee members had asked for the legally binding nature of the Committee's exercise, but, at the same time, other Members, including its own Delegation, felt that it was still premature to have a Treaty immediately. Paragraph 4 of the document, which stated that the substantive standards under consideration were neutral in form, should be kept in mind, so as not to preempt any decision by the Committee. Thirdly, the Delegation believed that the decision paragraph and further work on this document should be dealt with in a concurrent manner with WIPO/GRTKF/IC/8/4.

136. The Delegation of Australia noted that at its seventh session the Committee had asked the Secretariat to prepare a further draft on the objectives and guiding principles for the protection of TK, based on the contributions made by Committee participants. The Delegation wished to record its appreciation for the Secretariat's work on a new draft of the paper contained in WIPO/GRTKF/IC/8/5. As the Delegation had noted under the agenda item on folklore, it had deep reservations about the inclusion of treaty-like language in section 3 of the Annex of the documents in the form of articles setting out substantive principles. In its view, this ran a serious risk in its view of prejudging the outcome of the Committee's work and also might risk concentrating the Committee's valuable time on detailed discussion of what might tend to be viewed as a draft outcome, where there was no

consensus as yet in the Committee on the form or forms of an outcome. It also called into question how a consensus on the form of an outcome could be reached at the present time, given that the Committee was still in the process of moving towards a consensus on the underlying principles that formed the substance of the outcome. The Delegation did not want to infer that the Committee was far from a consensus on these underlying principles. On the contrary, it considered that there was sufficient common ground on these issues that consensus could be achieved in a reasonable timeframe. It urged the Committee to concentrate its efforts on further discussion of, and on gaining consensus upon, the basic principles in the policy objectives and general guiding principles. Once agreement had been reached on these underlying principles, the Committee could usefully then focus on a thorough germination of the full suite of mechanisms by which such objectives could be achieved. It noted that one of the policy objectives had been altered in a manner that was inconsistent with the stated nature of the policy objective, as set out in paragraph 2 of WIPO/GRTKF/IC/7/5, namely to 'set common general directions for protection and provide a consistent policy framework'. Subparagraph (i) of objective (xiv) contained a very prescriptive element on how that objective was to be achieved. The suggested inclusion was only one of a number of mechanisms that could be employed to achieve the objective and may not, in the end, prove to be the most useful one. However, it was singled out as a mandatory mechanism of protection. The text presupposed an outcome regarding a mechanism that the Committee might consider appropriate to achieve the objective itself. It was the Delegation's view that this type of subject matter, i.e. a specific mechanism to achieve an objective, was not consistent with the nature of an objective and it therefore suggested that the text that was added to the current draft should be deleted. It also noted the deletion of general guiding principle A.6(ii) from the previous draft contained in WIPO/GRTKF/IC/7/5, which provided that TK protection should be consistent with, supportive of and not derogate from, existing IP systems. It considered this to be a fundamental guiding principle and wished to see this important element reinstated. It recalled that decision paragraph 16 of WIPO/GRTKF/IC/8/5 invited review, comments and consultation on the draft provisions contained in that document. The Delegation considered it very important that the Committee's participants be invited to provide further comments on the policy objectives and general guiding principles contained in WIPO/GRTKF/IC/8/5, but that review, comment and consultation on the draft substantive principles should not be invited at this time. The Delegation emphasized that it was very appreciative of the work that had been undertaken by the Committee on IP and TK. That work had informed the debate at both the national and international levels and brought greater clarity to difficult and complex issues. The Delegation looked forward to further contributing to the Committee's work in this area.

137. The representative of the International Federation of Pharmaceutical Manufacturers Associations (IFPMA) noted that it would be premature to comments specifically on draft provisions before the Committee reached consensus on policy objectives and guiding principles, and therefore her comments were general in nature. She expressed her concern that WIPO/GRTKF/IC/8/5 provided an unlimited term of protection for TK. Existing forms of IP were limited in term and this limited term provided the incentive for continued research and development into new innovations. She feared that the scope of the document might unnecessarily impede on existing IP protection systems. She noted that the scope of activities that were viewed as misappropriation gave the impression that any use of TK, even if it was in the public domain and even if the user was a TK right holder, would constitute misappropriation. In her view, the draft provisions provided insufficient flexibility for various different forms of TK and, as a result, might have a chilling effect on investment in the development of new products, the research required for that development, and, as a

consequence, continued innovation. Indeed, not only did the scope of WIPO/GRTKF/IC/8/5 threaten existing forms of IP, but it also might threaten the general practice of knowledge-sharing that had benefited all societies for centuries.

138. The representative of the Third World Network (TWN) stated that one of the most complex set of problems in the future of TK came from misappropriation and potential misappropriation of TK belonging to local communities and indigenous peoples, who were the rightful owners. The Committee had heard many times from indigenous peoples and delegates from developing countries recounting numerous incidents of misappropriation of TK that took place in their countries. A recent World Bank study stated that of the approximately 120 pharmaceutical products derived from plants in 1985, 75 per cent had been discovered through the study of traditional medical uses. Yet benefit-sharing agreements between the holders of TK and the pharmaceutical corporations were still relatively rare. Another study by the UN estimated that developing countries were losing at least 5 billion US dollars annually due to unpaid royalties by multinational corporations which had appropriated TK. This was the magnitude of the problem that had been facing Committee members for many years now and the problem to which the Committee needed to find a solution urgently. The Committee had been set-up to be a forum for discussion among Member States on IP issues that arise in the context of access to GRs and benefit-sharing, protection of TK, and protection of EoFs. Over the past five years discussions had taken place endlessly, however with no concrete solutions in sight. In fact, she saw that many developed countries were using this forum as an excuse to not discuss these matters in other important negotiating fora, particularly in the different Standing Committees of WIPO, the CBD, and the TRIPS Council. Thus, in her opinion it was high time for WIPO Member States to have a serious rethink of the mandate of this Committee, its terms of reference, its role and what it was to achieve. Returning to WIPO/GRTKF/IC/8/5, she had two preliminary comments. On the section relating to general guiding principles, she was of the view that other, additional principles should form part of this section. First was the preservation of the ways of life and customary practices of indigenous peoples and local communities. TK could not be considered separately from these matters. TK only thrives in the context of traditional ways of social and economic and customary practices. Thus the Committee needed to consider preserving this context as well. Second, was the principle of restoration, restitution, retribution and repatriation. Noting the widely recognized plundering of TK, particularly by multinationals, usually at the expenses of indigenous peoples and local communities, it was essential for these principles to be recognized. She announced that TWN would forward further comments on the document later.

139. The Delegation of Peru stated that WIPO/GRTKF/IC/8/5 represented an effort to collect different views and experiences working towards protection for TK and folklore and it thanked the Secretariat for that effort. It particularly appreciated the format of the text and thought that this would help in the future to perhaps discuss the draft provisions and sooner or later manage to adopt an international legally binding instrument. Along these lines, the Delegation also thought the Committee could look at the Peruvian law in dealing with these issues. It was also grateful for the new version of the document in Spanish, since it would help the authorities in the capital and particularly the representatives of the indigenous peoples. It announced that it would like to submit formal comments and would do this within the regular deadline, but, before doing so, it had some immediate preliminary comments. It felt that the general guiding principles were very important and that objective (xiv) was also important. This should be a prerequisite for awarding patent rights and these should disclose the source of the said resources. Prior informed consent also needed to be provided and evidence of fair and equitable benefit-sharing in the countries of origin. In the event that the



mandate of the Committee should be extended, it believed that the Committee should continue to work on this point. It also thought that a particular principle should be included with regard to the needs of the holders of TK. It was important to look at who the beneficiaries of such a system were. The beneficiaries were the indigenous peoples, the native communities, the real holders of TK. This was reflected in principle (a) which went together with Article 5 on beneficiaries of protection. It furthermore considered principle (e) to be important, which was related to article 6 that dealt with equity and benefit-sharing when traditional resources were being used, particularly when the resources were being used for commercial ends. In the last paragraph the document stated that this protection should recognize the rights of TK holders and stressed in particular the need for prior informed consent, as mentioned in Article 7. It also felt that the first article on misappropriation was important although some work still remained to be done in terms of incorporating concrete measures in the IP system in order to use and to avoid misuse or misappropriation of such knowledge and one also still needed to define what misappropriation was. All this could serve as a starting point for future deliberations and would hopefully allow the Committee to reach a consensus about what should be included in this concept. Article 1 of item 3 had a definition, which was not an exhaustive list and perhaps the list could be lengthened. In addition, it welcomed that the title of Article 10 had been changed to ‘transitional measures’, including the wording ‘a reasonable timeframe’. On this point, it thought that maybe there was a problem in the translation and noted that the term in Spanish “regularizar” is the appropriate term and not the term “a reglamentario”, which was in the text at the moment. Article 13 was a basic element for an effective protection system to combat misuse. In conclusion, it expressed its thanks to the Secretariat for the work it had done. The Delegation thought that this document should help the Committee to create a legally binding international instrument which would allow indigenous peoples and local communities, who were the real holders of TK, to have a mechanism that would defend their rights.

140. The Delegation of Canada felt that the international dialogue on TK protection had been well assisted by the work of the Committee and the Secretariat and thanked the Secretariat for its hard work on Agenda Item 9. As the Committee moved forward, Canada strongly encouraged the Committee and the Secretariat to continue exploring the preliminary policy objectives and general guiding principles that were set out in parts 1 and 2 of Annex 1 to WIPO/GRTKF/IC/8/5. In Canada’s view, the continued development in the Committee of a non-exhaustive international list of options on the protection of TK would be beneficial to all. In particular, it would help inform and build upon domestic discussions on these same issues, while respecting the diversity of national approaches. Canada had some clear concerns with WIPO/GRTKF/IC/8/5, many of which were similar to those it had expressed earlier under the agenda item on folklore with regard to WIPO/GRTKF/IC/8/4. Therefore, the Delegation asked that its comments about the article format and content in Annex 1 to WIPO/GRTKF/IC/8/4 be also ascribed to its comments under Agenda Item 9. Canada saw significant value in having this Committee progress. The Delegation shared the concern of the Delegation of Zambia that the constructive and substantive policy work on WIPO/GRTKF/IC/8/5 should clearly not be abandoned. As pointed out by the Delegation of Australia, Member States were not far from consensus on the underlying foundation of draft objectives and guiding principles. As such, in Canada’s view, it was important that this work progressed in a measured manner. A reasonable pace would allow Member States to continue to conduct their necessary domestic analysis. It would also allow time for broader and more transparent dissemination of information gathered by the Committee. As had been noted by others, greater awareness of the complex issues associated with IP protection of TCEs and TK was needed among the creators, users, providers and IP rights holders. A more inclusive discussion on the draft objectives and general guiding principles would also ensure that the

work of the Committee did not prejudice or pre-empt discussions in other international fora. In the domestic context, Canada was committed to addressing matters relevant to the IP protection of TK. In the past, pertinent matters raised in the Committee had been incorporated into national discussions. The Delegation hoped to continue this practice in the future, but would note that knowledge of these complex issues at the local, community and government levels was still developing. The work of the Committee had definitely assisted in this area, but at times the technical nature of these issues had made it challenging for them to be fully understood by all Canadians. The effectiveness of any policy approaches on the protection of TK would be affected by the intended beneficiaries' acceptance. As part of the Government's effort to address this concern and encourage capacity-building, Canada had supported some representatives of Canadian Aboriginal national organizations to attend Committee sessions. The Delegation appreciated that they were taking this opportunity to share their views and experiences with Member States. Canada was currently undertaking some cross-country fact-finding work with Aboriginal peoples in Canada on indigenous knowledge. While these efforts were still at their preliminary stages, some important information was emerging. For example, it had been repeatedly raised that the protection, promotion and preservation of TCEs and TK was central to the identities of Aboriginal people in Canada. The relationship between language, the environment, spirituality and self-government was an important part of Aboriginal identities. In addition, Canada had heard that there was a need for flexibility in any possible policy approaches to the protection of TK to reflect Aboriginal realities and concerns. In support of continuing the Committee's work in this area, Canada would be providing detailed written comments on the draft objectives and general guiding principles contained in Annex 1 of WIPO/GRTKF/IC/8/5. The Delegation also encouraged accredited observers to do provide detailed written comments on the draft objectives and general guiding principles contained in Annex 1 of the document.

141. The Delegation of Mexico felt that the present document marked a major step forward in the Committee's discussions on TK and should be a starting point for negotiating a legally binding instrument in this area. It also felt that the Committee needed to make progress in identifying those things within the provisions which should be a part of an international legally binding framework and those which would be better left as guidelines for Member States in the interest of flexibility and recognizing the different national realities. Along these lines and in accordance with paragraph 16(iv), the Delegation announced that Mexico would submit relevant comments to the Annex of document WIPO/GRTKF/IC/8/5. The Delegation then introduced Mr. Angel Lara, an indigenous representative and member of the Delegation, who was an indigenous representative of an indigenous people of Mexico and was presently Counsellor of the National Commission for the Development of Indigenous Peoples in Mexico. Mr. Lara agree on consolidating a legally binding document which would guarantee the protection of TK and which would commit governments to complying with the relevance of provisions and ensuring that they were complied with. Nevertheless, in his view it was necessary to have greater participation from indigenous peoples in these events so that their voices could be heard and so that everything linked to TK at different levels, national and international, would be done through consultation with indigenous peoples, thus respecting their autonomy and self-determination. He felt that, as the legitimate owners and holders of such rich knowledge, indigenous peoples' voices should be heard and consultations should be recognized as an individual and collective human right.

142. The Delegation of Switzerland considered the revised policy objectives and the general guiding principles to take the work of the Committee on TK protection one important step forward. The Delegation supported the addition of policy objective (iv) regarding the promotion of the conservation and preservation of TK, as it considered this to be one crucial

aim of the protection of TK. In contrast, it did not support the revised wording of policy objective (xiv). Instead, the Delegation proposed to retain the wording contained in the previous version of the document, namely WIPO/GRTKF/IC/7/5. This Committee had been discussing the policy objectives and general guiding principles of the protection of TK. This work, however, was still ongoing. Agreement on the policy objectives and general guiding principles was one of the cornerstones of the further work of the Committee on the protection of TK. Accordingly, the Delegation considered it to be necessary that the Committee not only discussed in greater detail and agreed upon the policy objectives and general guiding principles, but also established a working definition of TK, before taking further steps. One such further step would be the drafting of substantive provisions on the protection of TK as are proposed in Part 3 of the Annex of WIPO/GRTKF/IC/8/5. Substantive provisions, however, were dependent on the policy objectives and the general guiding principles of the protection of TK. As just stated, these had not yet been agreed upon by the Committee. Accordingly, to commence work on substantive provisions would leave out one necessary step in discussions on the protection of TK. This approach was not a step back; on the contrary, only this approach would ensure that the work on the protection of TK would be effective and efficient. Furthermore, the proposed substantive provisions did not fully reflect the policy objectives as contained in Part I of the same document. This applied, for example, to policy objective (iv) concerning the promotion of the conservation and preservation of TK. And finally, the substantive provisions contained in Part 3 of the Annex of WIPO/GRTKF/IC/8/5 were in a treaty-like format. This format was premature and would unnecessarily prejudice further discussions on the policy objectives and the general guiding principles of the protection of TK. Accordingly, the Delegation preferred the format chosen in the previous version, that is WIPO/GRTKF/IC/7/5. This document referred to “specific substantive principles” and was not in a treaty-like format, while it enclosed at the same time much of the contents of the substantive provisions as proposed in WIPO/GRTKF/IC/8/5. In light of these considerations, Switzerland considered it to be crucial that the Committee continued its work on the policy objectives and the general guiding principles of the protection of TK. One important step in this process was the compilation of further views on these objectives and general guiding principles. In this regard, the Delegation supported further consultations at the national and sub-national levels and the call for further written comments as had been suggested in paragraph 16 of WIPO/GRTKF/IC/8/5.

143. The representative of the Biotechnology Industry Organization (BIO) noted that, in her view, the amended objectives and principles were not an appropriate basis for further discussions on appropriate protection of TK. In her view, they did not provide sound policy guidance, nor did they provide clear guidelines for instituting national protection, and she urged Committee Members to reconsider these objectives and principles. She was particularly disappointed to learn that one objective had changed to require “patent applicants for inventions involving TK and associated GR to disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit-sharing conditions have been complied with in the country of origin”. Referring to her interventions in the previous session of the Committee and on many other occasions, she stated that special disclosure requirements such as those proposed would not be effective and would be counterproductive to the interests of holders of TK and the public. Moreover, she had also opposed the introduction of special requirements to provide proof of prior informed consent and benefit-sharing in patent applications. These requirements could not be fulfilled because most countries did not have rules on prior informed consent and benefit-sharing. She was surprised to find that the definition of misappropriation had dramatically changed by imposing liability for “negligence” when using TK that had been improperly acquired (rather than the traditional standard of “gross negligence.”). In her view, this was an extremely

abrupt departure from the traditional concept of misappropriation that had purported to be the basis for protection of TK. Given the sweeping consequences of this change, she recommended that Committee Members might revert to the earlier original text. She was also very concerned about the new “transitional measures”, which appeared to impose liability for use of knowledge that was readily available to the general public, even if that knowledge was publicly available for centuries. She believed that this form of retroactive protection was unfair and impractical. In principle, imposing such a form of retroactivity was equivalent to restoring patents on the basic light bulb or penicillin. Any objective or principle should be limited to acts of acquisition of TK in the future and the use of the newly acquired TK. The provisions embodying transitional measures were just a few of the examples of the misplaced view that protection of TK should enjoy a superior status to other legislation. While she understood and applauded the contributions of those who had developed and maintained TK, she did not believe that a system for protecting TK should be considered superior to other legal systems. The objectives and principles embodied in systems for protecting inventions, plant varieties, and undisclosed information had valuable social and economic benefits for all, including those who developed TK. As a consequence, she believed that all of these systems should be mutually supportive to the extent practical. It was her understanding that these objectives and principles were drafted as voluntary guidelines at this point of the discussions. It appeared, however, that the principles or articles now included a mixture of voluntary guidelines characterized by words like “should” and mandatory commitments characterized by words like “shall”. In her view, the document should be amended to point out their voluntary nature clearly in all circumstances. Usually, there was more flexibility in the drafting and structure of guidelines than there was for treaty text. There appeared to be a movement toward promoting these guidelines to treaty status, as shown by the use and the substitution of the term “article” for “principle” in the latest draft. Unfortunately, there had not been an equivalent re-structuring of the text to provide a clear treaty text. If anything, the clarity of the text seemed to diminish with each additional amendment. For example, Article 1 provided for two categories of actions to protect TK. The first category was comprised of actions for misappropriation as provided in paragraph 1. The second category was comprised of other actions for unfair competition along the lines of Paris Article 10*bis* as provided in paragraph 4. Yet, other paragraphs and articles that clarified the level of protection often only referred to actions for misappropriation, leaving the nature of other actions unclear, which seemed illogical and unintended. Paragraph 1 of article 1 extended protection from misappropriation to any “TK” as defined in Article 3. While Article 4 appeared to limit the article 3 definition of TK further, Article 4 did not appear to be connected to actions for misappropriation set forth in Article 1. This was also true of other articles. Finally, the “round pegs” of “prior informed consent” and “equitable benefit-sharing” appeared to be force fitted into the “square holes” of actions for misappropriations in a number of instances.

144. The Delegation of Brazil expressed its view that WIPO/GRTKF/IC/8/5 was a useful document and an appropriate basis for the discussions of this session of the Committee and it was clear that the International Bureau had made an honest effort to incorporate suggestions made by the Committee members as well as concerns that had been raised in the course of the discussions in the past sessions of the Committee. The Delegation did see an improvement in respect of the draft materials that it had considered in the last meetings of the Committee. In fact, these materials were still being examined and there was an ongoing process of deliberation taking place in Brazil, involving many different government agencies. The Delegation stated that it was very much interested in continuing to contribute to the Committee’s discussions on this issue in a constructive spirit. In fact, it had some new suggestions to make on the document and Brazil would submit them in writing to the

International Bureau. The Delegation commended the International Bureau for the good job in preparing the present document. Nevertheless, it still thought that there was room for further improvements in the document. In fact, one area that would need to be examined more closely was that of the international dimension of protection. The document did refer to several measures that could be adopted at the national level. However, given the international nature of the problem of misappropriation of TK, addressing the international dimension of protection was key. In this regard it was not convinced that the approach suggested in Article 14 would in fact be sufficient and adequate in covering the international dimension of the issue. It nevertheless did notice that WIPO/GRTKF/IC/8/5 clarified that this was offered as very tentative language and that in fact this was certainly an area where the Delegation felt that the Committee would have to work a little harder. It noted that there was some new interesting language in the list of objectives of protection set forth in the document. It understood that, according to the explanations given in the document, that language could be incorporated into the preamble part of an instrument and it felt that, if this was indeed the approach that the Committee was following, then these objectives should be translated into the substantive part of the document. As the Delegation stepped back and looked at the document it had before itself, it would, in fact, have to assess that, even if the document was adopted today as a legally binding instrument with all the language contained in it, it did not seem clear that this would in fact provide fully effective protection over TK. This was so because it was clear that the document with all its substantive provisions, even if adopted as a legally binding instrument today, would not ensure the adoption in developed countries of effective measures to protect the TK of Brazilian indigenous peoples and the Delegation perceived that as a major gap in the document before the Committee. Developing countries were the victims of biopiracy and the misappropriation of TK. Not only Brazil but a number of other diverse developing countries had been victimized by this illegal and illegitimate activity and the Delegation felt that misappropriation had been greatly facilitated by the lack of adequate legal safeguards and measures in other parts of the world, in particular the developed countries. In this regard it found it very curious, if not ironic, to note that several countries that had been speaking in the course of the Committee's debate had pointed out that they would like to see a very flexible framework of protection for TK. They had placed considerable emphasis on the need for respect for diversity at the national level. It seemed to the Delegation that these Members were really after an instrument that would allow the parties to that instrument to do whatever they pleased at the international level. Interestingly, in other international fora the same countries were always keen to demand adherence by the developing countries to ever higher standards of protection in the areas of patent law, copyright law, and trade mark law. It had become evident that in the absence of clear, universal international minimum standards of protection against misappropriation one would simply never be in a position to effectively prevent that misappropriation from taking place. While these were very general comments in respect of the present document, Brazil would be submitting a number of suggestions for its improvement in writing and looked forward to the continuation of the Committee's debate on these materials, in case there was an agreement by the Committee, and subsequently with the General Assembly, to renew the mandate of the Committee. The Delegation felt that it would be appropriate for the Committee to focus on the conclusion of its discussions on this important issue and on the drafting of the very useful materials that the International Bureau had prepared for it. In respect of the way forward and the process that one could conceive of in order to take this work forward, if there was an agreement to renew the mandate of the Committee, the Delegation would merely refer to the remarks it had made earlier under the Agenda Item on the protection of TCEs.

145. The representative of the Saami Council expressed his appreciation for the preparation of WIPO/GRTKF/IC/8/5 and expressed his gratitude for the careful consideration of the

proposed amendments submitted by indigenous peoples and other participants. He believed that the document could serve us as a basis for future discussions of the Committee and agreed with a substantial number of the provisions contained therein. However, he wished to express strong opposition to the general guiding principle (f) on pages 10 and 11, in particular its final sentence referring to state sovereignty over natural resources. Provisions that claimed to be relevant to the protection of TK and in conformity with international law, could not solely refer to the principle of state sovereignty over natural resources without acknowledging that this principle was seriously curtailed by other subjects, such as indigenous peoples' rights to natural resources. He speculated that the proposed provision originated from the CBD, but the CBD was merely one instrument addressing these issues. There were other international instruments relevant to the question to who had the right to determine access to GR, many of them human rights instruments. As covenants underlying human rights, these instruments, in his view, had precedence over the CBD and, in case of conflict, the CBD had to give way. The same was true for any policy emerging out of the CBD. The principle of state sovereignty over natural resources needed for example to be balanced against the right of all peoples, including indigenous peoples, to self-determination as well as the right of indigenous peoples to their land, waters and natural resources. The right to self-determination included, for example, a right for all peoples to freely dispose over their natural resources, including GR, and the right not to be deprived of their means of subsistence. Moreover, it had to be recognized that the right to self-determination was normally regarded as a *jus cogens* norm. As such, it could only be replaced by an other norm of the same quality. State sovereignty over natural resources was not such a norm. It had further been well established under international law that indigenous peoples, due to their special attachment to their traditional lands, had particular rights to such lands, waters and natural resources, including GR. Also these rights had to be balanced against the principles expressed in the CBD of state sovereignty over natural resources. Indeed, in case of conflict these instruments, expressing fundamental human rights, normally had precedent over that principle. It might well be that one state could invoke the principles of state sovereignty over natural resources in a conflict with an other state, but it could not do so in the case of conflict with the interests of indigenous peoples within that state. Given this background, he felt it would be dishonest to quote one instrument outlining one principle relevant to rights over GR without even mentioning other relevant international legal rights or principles. He believed that there were only two choices for any policy of claims to be relevant for the regulation on TK. One could certainly refer to the principles stated in the CBD of state sovereignty over natural resources, but that policy had to be supplemented with other parts of international law that balanced and often took precedent over that principle. The alternative was to delete all references to state sovereignty over natural resources. Perhaps the second way was simpler, but if the Committee should decide to retain a reference to state sovereignty to natural resources, the Saami Council proposed the following alternative wording for the last sentence at the top of page 11 of the general guiding principle (f), which would remedy the inaccurate description of international law currently found in document WIPO/GRTKF/IC/8/5: "the principles acknowledge that the right of states over natural resources is conditioned by the right of indigenous peoples to freely dispose of the natural wealth and resources." This was merely one general and initial comment. Should the Committee support paragraph 16(iv), the Saami Council would resubmit detailed comments in writing. Finally, the representative of the Saami Council pleaded to the representative of BIO who had just spoken previously to allow TK holders the opportunity to determine themselves what was beneficial to them. Indigenous peoples were capable of making these assessments themselves without anyone making such judgments for them.

146. The Delegation of France expressed appreciation for the high quality of the documents before the Committee and for their circulation in the various working languages within the appropriate timeframes. Regarding agenda item 9, the Delegation supported the declaration made by Luxembourg on behalf of the European Communities and their Member States. It wished to clarify that it was surprised by the disappearance in article 12, which corresponds to the former principle of WIPO/GRTKF/IC/7/5 referring to the compatibility between the protection of TK and IP rights that already existed under Article B.12(2) and (3).

147. The Delegation of the United States of America expressed appreciation for the continued work on draft objectives and principles of protection, but was surprised and dismayed to discover the twelve draft articles contained in the Annex. It appeared that these draft articles attempted to define a single solution to a diverse set of concerns that had been expressed by Committee members and they did not reflect many of the core principles and policy objectives that had been supported by Committee members in previous sessions of the Committee. For these reasons, it could not support the approach that had been set forth in the decision paragraph. As stated in paragraph 15 of WIPO/GRTKF/IC/7/6, actual experience with TK protection had shown that it was unlikely that any single one-size-fits-all or universal international template would be found to protect TK comprehensively in a manner that suited all national priorities, legal and cultural environments and needs of traditional communities in all countries. Document WIPO/GRTKF/IC/7/6 also recognized the concerns that had been expressed that attempts to codify and institutionalize the protection of TK were undesirable and that a flexible and inclusive approach was preferable. It continued to express support for flexibility in national policy and legislative development, as reflected in the fourth guiding principle. However, it believed that it was premature to determine the form that such protection would take. For these reasons, its intervention would focus on the policy objectives and core principles, many of which would yet have to find consensus among TK holders and their national governments, let alone with the Committee. Once these objectives and principles were further refined, Committee members would be able to further proceed to a more meaningful discussion of next steps and possible mechanisms that may be used. The International Bureau should not preemptively make such decisions. At the outset it appeared that more work needed to be done on refining the definition of TK, as evidenced by the overly broad definition contained in the paper. The third policy objective and the first principle in this paper stressed the importance of meeting the actual needs of holders of TK. The Delegation supported this objective and principle and recognized that the needs of TK holders were diverse. For this reason, the Committee might wish to consider a range of options that would benefit rights holders. The Delegation supported the notion of preventing misappropriation as contained in the fifth policy objective and believed that it may be necessary to develop a meaningful definition of misappropriation in order to facilitate this objective. The seventh objective stresses the importance of the preservation of TK. The Delegation found this to be an important objective that deserved further consideration and elaboration. Contrary to this principle, the document focused on protection instead of preservation, conservation or promotion, goals that had been consistently supported in the Committee and might meet the needs of certain TK holders better than a strict protection model. The tenth objective highlighted the promotion of innovation and creativity. The Delegation believed that this objective should extend to all innovation and creativity, whether it be tradition-based or not. It noted that any mechanism that would protect knowledge for an indefinite period of time might be contrary to this objective. In reference to the twelfth objective, it would appear that any required compensation for use of TK in the public domain might stifle innovation. The Delegation supported the objective of curtailing the grant or exercise of improper IP rights over TK and associated GR as contained in the fourteenth objective, although it did not believe that a new disclosure requirement would be an objective

means of achieving this objective. It noted that, as reflected in previous Committee documents, the United States of America had established several legal protection measures that addressed issues which it had faced, but it was not clear to the Delegation whether the same problems had arisen elsewhere or whether there were other issues of concern. In summary, the Delegation believed that the Committee should reach a greater degree of convergence on policy objectives and core principles first, before it could enter into a meaningful discussion of the international dimension. In this light it felt it was premature to undertake the actions set out in decision paragraph 16 and could not support such action.

148. The Delegation of Bolivia wished for its TCE-related comments on WIPO/GRTKF/IC/8/4 to apply also to the present document and expressed its thanks to the Secretariat for the documents received. It agreed with the format of the documents and with the option of being able to submit comments in the future. It had the impression that all Committee participants were committed to moving forward and making progress in these issues which were of concern to all. It did not think that this was necessarily the case for all member countries and this came as a surprise to the Delegation. The Delegation expressed its willingness to be flexible at a national level so long as this was met with flexibility in other IP instruments. This was a document which it thought was a first step and, if this Committee's mandate was to be renewed or revised in another form, it hoped that this was going to lead to further progress.

149. The Delegation of Norway commended the Secretariat for the high-quality document WIPO/GRTKF/IC/8/5 and joined others in wanting to move this agenda a step forward. It valued the contributions to document WIPO/GRTKF/IC/8/5 from various delegations and NGOs. It recognized that it would not be possible to find consensus on WIPO/GRTKF/IC/8/5 in its present format. However, the Delegation found it extremely important to keep the momentum in the Committee and emphasized that at this moment in the Committee's work the main issue was not which form any principle at the international level should take but whether the Committee participants could find agreement for the inclusion of such a principle, combined with the necessary national and sectorial flexibility. The Delegation hoped that the Committee could continue its work in finding possible ways to provide the necessary recognition and protection of TK and TCEs and it fully supported the general approach of the document. It announced that Norway would provide its comments to the draft revised objectives and principles by October 25, 2005.

150. The Delegation of the Islamic Republic of Iran thanked the Secretariat for all its efforts in preparing the fruitful and informative documents on TK. Its general viewpoint had been presented under the previous agenda item (on TCEs/folklore) and, even though it would not repeat this viewpoint, it applied equally to WIPO/GRTKF/IC/8/4. The Delegation was well aware of the difficulty of preparing a neutral text that covered all the different views and concerns. It needed to be recognized that according to its mandate, the purpose of the Committee was the preparation of an international legally instrument with the materials contained in the present text. In paragraph 3, the provisions focusing on protection against misappropriation should be supportive of other international instruments with an IP nature. Regarding the policy objectives the Delegation proposed specific wording, which it requested should be included in the next revised draft at the next session of the Committee. In objective (i) at the end of the paragraph the words "the developing countries and their" should be added before "indigenous and local communities". In objective (viii) the concern of the Delegation was the repression of the misappropriation of TK internationally. The same concern applied to objective (x). In objective (xi) the nature of TK and its ownership in developing countries was different. While the approach of private law could therefore not be accorded to meet



such a problem, the existing IP and national regimes could play a complementary role. Whereas the Committee was discussing the objectives, objective (xii) could be categorized into the implementing mechanism. Furthermore the word “protection” should be replaced “compensation.” Regarding paragraph 2 of the background document, the Delegation questioned why there was still such a strong emphasis on the need for communities consultation, when it was assumed in paragraph 16 of the document that the text was final and the countries had been requested to provide the final wording. In relation to the General Guiding Principles, the Delegation made specific suggestions for wording, in particular that in item (b) the term “misappropriation” should be placed in the title as a major problem. In addition, the international approach of this principle should be reflected in the text. In guiding principle (c) there needed to be a balance between protection and accessibility. There also needed to be a focus on international enforcement mechanisms. In guiding principle (d), the flexibility of countries in the international context had been ignored. In paragraph 2 of guiding principle (e) the distribution of benefits should be supportive of the development approach of the CBD. In guiding principle (f), the idea of mutually agreed terms was arranged while the role of the government as a negotiator and partner in international discussions for developing a supportive international IP instrument should be taken into account. In interpreting guiding principle (g) the precedent of international treaties without national legislation like the Rome Convention should also be mentioned. In article 1 the issue of misappropriation was an important subject and the international aspects and dimension of these criteria should be highlighted. In subparagraph (iv) of article 1, the word “protection” should be replaced by the word “compensation”. In paragraph 4 of Article 6 the administrative, criminal and civil remedial tools should be introduced as a legal means. In Article 7 the principle of prior informed consent had been narrowly analysed and this issue should be developed in an IP context. In Article 12 the issues of access had been highlighted, however due to the nature of IP it needed to be balanced with protection. Regarding WIPO/GRTKF/IC/8/6, the General Assembly had at its 30<sup>th</sup> session clearly mandated the Committee to focus on the international dimension. In an intergovernmental organization with the participation of Member States, the international dimension of an instrument could not be analyzed with a private law approach. Genetic resources, traditional knowledge and folklore and the ownership of such resources, taking into account its complexity, had their own characteristics and could not simply be accorded with existing IP law. In this context, the presence of States and an international instrument made sense. The Delegation supported the continuation of the work of the Committee and expected all States to be mutually flexible to have a reasonable protection system. The Delegation announced that it would submit its other viewpoints before the date mentioned in paragraph 16(iv).

151. The representative of the Kaska Dena Council thanked the Secretariat for its laudable development of WIPO/GRTKF/IC/8/5 for this Committee’s consideration. From his perspective, it was apparent that the Secretariat had accommodated many of the concerns of indigenous peoples in the progress of this document. Indigenous peoples were supportive of the continuing advancement of these evolutionary objectives, guiding and substantive principles. As a general observation, he observed that it was clear from the discussion among Member States that there was substantial disagreement regarding the legal nature of the revised provisions, particularly whether the means of those provisions would be international legally binding or not. On the one hand, he could understand the position of developed countries, such as Canada, that agreeing to a legal binding agreement as an end without knowing the content was like signing a blank contract. On the other hand, the call for immediate action proposed by Member States within the developing world struck a positive chord with many indigenous peoples. From the Kaska Dena Council’s perspective, he had approached these discussions on a without prejudice basis. His position had been based upon

the principle of prior informed consent. In other words, prior to determining whether to consent to a local, regional, national or international instrument protecting TCEs and TK, indigenous peoples would have to be informed of its content and ramifications. Therefore, he had always supported the fuller development of the Committee's work without predetermining the outcome. Like all Member States, he had always taken the position that he would have the sovereign right to say no. With respect to the proposal made by Canada that had been opposed by many of developing countries, it did not on its face appear progressive. It appeared as though the discussion between the eighth and ninth sessions of the Committee would be strictly restricted to objectives and general guiding principles and that the substantive principles would be set aside. While it was appealing to simply oppose Canada's proposal, as it appeared to undermine the substantive work, in which all Committee participants had so heavily invested, he suggested a constructive way forward that may strike a balance to allow a "staged" process. He recalled that at the seventh session of the Committee, the draft decision contemplated an inter-sessional working group or experts groups that might further the two draft documents. He recalled that at the time the primary obstacle to the establishment of such a working group was a lack of funds within the WIPO budget. He sought clarity from the Secretariat whether this inability to fund a working group remained. If such a working group could occur perhaps a middle ground solution might be the following: (a) an open-ended inter-sessional working group could examine the objectives and guiding principles – its results being sent to the ninth session of the Committee for its consideration, and (b) paragraph 21 could remain intact, allowing the document in its entirety to be commented on by the prescribed date. The representative then made several specific textual comments for incorporation into the next draft of the present document. With respect to article 1, subparagraph 3(i), which included legal means to be considered as acts of misappropriation, he requested to add the terms "duress" and "acts of omission." These terms spoke to the inequitable balance of power that many Indigenous Peoples find themselves. With respect to Article 2, subparagraph 1, which spoke of a range of legal measures to protect against misappropriation, he submitted that to ensure consistency throughout the document a reference to "indigenous customary law and protocols" be added to the suite of legal instruments. He also submitted the addition of a reference to "applicable constitutional and treaty law related to Indigenous Peoples" and explained that in Canada, section 35 of the Constitution explicitly recognized and affirmed the existing rights of Aboriginal peoples, including the rights of First Nations, Inuit and Metis peoples. He believed there was a substantial role for Aboriginal and treaty law in the Canadian context in protecting the rights of Aboriginal peoples to their TK. Finally, with regard to the comments of the Delegation of Canada, respecting providing financial support for national Aboriginal organizations to this session and encouraging their submissions to the Secretariat on this document, he was appreciative of this supportive language. As he was a regional Aboriginal organization he had therefore been excluded from funding support. He appealed to Canada to provide funding to support both national and regional Aboriginal peoples organizations to enable their submissions on the draft provisions and attend the next Committee session. He also reminded the Government of Canada of its fiduciary duty to consult and accommodate Aboriginal peoples upon "knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it". This fiduciary duty had recently been affirmed by the Supreme Court of Canada. If Canada was truly in good faith with respect to its commitment to domestic consultations, it was necessary to commence these consultations immediately.

152. The Delegation of Indonesia expressed its appreciation for the draft principles contained in WIPO/GRTKF/IC/8/5 and reiterated Indonesia's position that it fully supported the implementation of the principle of flexibility in order to give more room for the respective

governments in drafting their national legislation on the protection of TK. The Delegation was of the view that these principles should not frail the Committee members' commitment to establish an internationally binding instrument. On specific suggestions for the wording of the draft principles, the Delegation suggested that, regarding Article 1.3(ii) somewhere it needed to be indicated that within each national system of legislation there should be a clear structure of parties that had the authority to give prior informed consent. This was also related to Article 7. Regarding Article 5 on the beneficiaries of protection it should be noted that they might consist of a large society and not just a small scale ethnic community. Moreover, population mobility might end up in the establishment of a whole colony of an ethnic group so it meant that there were different dimensions and different scopes of the related traditional communities or societies. Regarding Article 6.5, stating that customary law in local community might play an important role in sharing benefits that may arise from the use of TK. However, the right of the community should not undermine and should be done according to local and national law. Regarding Article 7.2 the document stated that "holder of traditional knowledge shall be entitled to grant prior informed consent for access to TK, or to approve the grant of such consent by an appropriate national authority". The Delegation proposed that instead of "or" the wording used should be "and to approve the grant of such consent". Regarding Article 9 on duration of protection, it proposed not to oblige a specific duration of protection in case of more extensive protection of TK. Rather, it should be an option of the respective State.

153. The Delegation of India noted that the documentation for the current session, in particular WIPO/GRTKF/IC/8/5, was a considerable advance on the documentation that had been made available at earlier sessions. In terms both of the format and of the content, the change was welcome. The Delegation felt the Committee should be working towards something that was more binding and the treaty format was appropriate to that circumstance. However, some elements in the document had been carried over from earlier documents with which the Delegation had not been comfortable. For example, the Delegation had not supported on an earlier occasion the options that were still available that included private law contract arrangements. The arrangement that would be eventually agreed upon must be based on something other than contract law. Concerning the protection of TK, there was a welcome inclusion in the policy objectives in paragraph 14, which, read with the chapeau, effectively said that the protection of TK should aim to contain the grant or exercise of improper intellectual property rights over TK and associated GR by requiring in particular, as a condition for the granting of patent rights a patents applications convention involving TK and associated GR, the disclosure of the source and country of origin of those resources as well as evidence of prior informed consent and benefit-sharing conditions have been complied with in the country of origin. The Delegation welcomed this reference and expressed the view that this provision should be mandatory. If it were optional, it would add little value because the international law on this subject already entitled countries to have such an arrangement. Added value would come only if this were a mandatory requirement on all countries; the two words "by requiring" created a mandatory emphasis. The Delegation was uncomfortable with the corresponding section on the international dimension because the corresponding article spoke essentially of national treatment, which was only one aspect of the international dimension, and a less important aspect of the international dimension that developing countries had referred to at earlier sessions. When developing countries spoke of the international dimension, they referred more to obligations of the users of TK rather than the rights of those users. The national treatment approach really referred to the rights of the users of TK. Developing countries felt that there should certain obligations upon the users of TK, for example in respect of disclosure. The article on the international dimension was weak and should therefore be complemented by a mandatory disclosure obligation applied to users of

TK, especially the TK that is associated with GR. The Delegation was disappointed to hear a discordant note from some delegations who had spoken of their unhappiness with the format of these documents and spoke of them as 'premature'. The Delegation recalled that both the SPLT process in the SCP and the genetic resources question in the Committee were commenced around the same time, namely the second half of 2000, following the conclusion of the diplomatic conference for the Patent Law Treaty. The Delegation had been repeatedly been told that that the SPLT process was not moving fast enough and had become unmanageable, and that different processes should accordingly be developed. The same delegations seem to have a diametrically opposite position regarding the pace of progress in the present Committee. The Delegation called for greater consistency in the approach of various delegations when considering issues of primary concern to them as against those of primary concern to developing countries. By flagging these issues, the Delegation aimed to work towards an approach that would be more likely to produce a consensus. This would include a binding document with a special focus on the international dimension, the importance of which developing countries in particular had consistently stressed.

154. The Delegation of Nigeria thanked the Secretariat for the revised objectives and principles on the protection of TK contained in WIPO/GRTKF/IC/8/5. In addressing the present agenda item, Nigeria wished to adopt its earlier comments on WIPO/GRTKF/IC/8/4 and wanted them to be also noted in the context of the present agenda item. The Delegation had taken a close look at WIPO/GRTKF/IC/7/5 upon which the present document was built and did indeed see some departure in matters of style and structure, but it was the Delegation's view that although these differences might be perceived as pointing the future work of the Committee in a particular direction they were in fact not a radical departure from the general trend of the work of the Committee as understood by the African Group, at least not in content and substance. The Delegation was therefore hoping that all Delegations would find it possible to continue to make their comments available, accepting that this should not necessarily be understood as an acceptance of a particular form or forms. The Delegation supported the suggestion that the work of the Committee continued towards evolving an international legally binding instrument, since, even more than expressions of folklore, the protection of TK was of great economic importance to Nigeria. Subject to the extension of this Committee's mandate, Nigeria welcomed the possibility of submitting more detailed comments on the draft substantive provisions by October 28, 2005.

155. The Delegation of Morocco, speaking on behalf of the African Group, thanked the Secretariat for preparing this detailed document on the revised objectives and principles, which was able to define the legal ideas behind protecting TK. The African Group especially welcomed the fact that several of its proposals had been taken into account in this document. These proposals, the Delegation recalled, had been the object of wide support in previous sessions of the Committee. The African Group welcomed in particular the place given to article 1 as a priority goal in protecting TK. The African Group was convinced that this draft provision was a solid foundation for developing a legal instrument that was binding and that took into account existing international instruments. It noted that this instrument could only become more concrete through the General Assembly of WIPO and the approach proposed by the African Group. If the Committee were to reach a frustrating point, that could be problematic and harmful to the analysis of the present document. The African Group would contribute to the process in order to achieve a result that lived up to the expectations of the Member States. The African Group would submit written proposals later in order to improve the provisions found in the present document.

156. The Delegation of Kenya associated itself with the statement made by the Delegation of Morocco on behalf of the African Group. It welcomed the invitation to provide more detailed comments within the deadline of October 2005. The Delegation acknowledged with appreciation the effort of the Secretariat in the preparation of the revised draft policy objectives and principles for the protection of TK. It believed that this document formed an important milestone in the work of the Committee, for it had traveled a long way to come to the present position. The Delegation fully supported this document and it was the Delegation's desire to see further development of this document through wider dissemination. This would enable consultations and expert review by the wider group of stakeholders, which may include the indigenous and local communities as well. It appreciated that the current document was based entirely on the comments and specific suggestions that were made at the Committee's seventh session. The Delegation felt that this document formed an important basis for constructive pragmatic debate on the issue of the protection of TK. It believed that without an international instrument to protect TK, the national effort of Committee members would be a futility. The absence of such protection allowed the continued misappropriation and misuse of TK to the detriment of Kenya's local communities who continued to live in abject poverty while this debate continued. For all of these reasons, the Delegation believed that the Committee members should give the Committee the mandate to carry forward this process, while allowing for further debate on issues that required more detail. The mandate to carry this process forward to its logical conclusion would be the formulation of a legally binding instrument to protect TK at the international level.

157. The representative of the International Institute for Environment and Development (IIED) explained that IIED was working with a group of indigenous and research organizations undertaking research on TK systems and the role of customary law in the protection of TK, in Panama, Peru, Kenya, China and India. On behalf of this group of researchers, she submitted a few key comments with respect to WIPO/GRTKF/IC/8/5 and announced that IIED would submit further detailed comments in writing. The revised Policy Objectives contained a number of positive elements: for example objective (iii) on 'Meeting the needs of holders of TK', and objective (iv) on 'Promoting the conservation and preservation of TK and TK systems'. These objectives were critical for any mechanism of TK protection. However, they required further elaboration in order to provide a more practical orientation. In particular, there was a need for recognition of the links between TK and the components of knowledge systems – i.e., biological and genetic resources, landscapes, cultural values and customary laws – which formed an integral and inseparable part of many knowledge systems and which were vital for the preservation of TK. In particular, safeguarding rights to traditional resources and territories was critical for maintaining and strengthening the internal transmission of knowledge. The need to 'recognise the holistic nature of TK' was included as part of objective (i). Given the fundamental importance of this for safeguarding TK, she felt that this should be elevated to a separate Policy Objective additional to "Recognise value." She proposed the following wording for incorporation into the next draft: "Recognise the holistic nature of traditional knowledge, innovations and practices of indigenous peoples and local communities, which are often collectively held and inextricably linked to traditional resources and territories, including biological and genetic resources, cultural and spiritual values, and customary laws shaped within the particular socio-ecological context of communities." Similarly, she felt that the holistic character of TK should be reflected in the definition of TK in Article 3 of the substantive provisions. The definition as currently worded focused on the intellectual component of knowledge systems and did not reflect the distinct collective and holistic nature of TK systems. She proposed that the following definition be used instead: "Knowledge, innovations and practices of indigenous peoples and local communities which are often held collectively and inextricably

linked to traditional resources and territories; including the diversity of genes, varieties, species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities.” She supported the comments made by the representative of the Saami Council on the requirement to “operate consistently with” other international instruments and processes, in particular regimes that regulate access to and benefit-sharing from GR. This requirement created a direct tension with the protection of rights of TK holders, because such regimes recognized the sovereign rights of States over natural resources without also recognizing the rights of communities over biological resources and traditional varieties. Specific reference should also be made to the need for consistency with human rights covenants and indigenous rights instruments and processes, such as ILO Convention 169. Without this, the objective did not amount to protection of rights over TK. Finally, in relation to the substantive provisions, Article 13 essentially gave national authorities the authority to decide over the use of TK of indigenous and local communities, including determining whether misappropriation had occurred, whether PIC had been granted, fair and equitable benefit-sharing, and whether a right had been infringed. She felt that the emphasis should be on the role of national authorities to empower and assist TK holders to decide over access to and use of their knowledge, as per policy objective (v). Otherwise the objective and principles risked becoming another means by which traditional forms of governance would be eroded, and hence by which TK itself might be eroded.

158. The representative of the United Nations Permanent Forum on Indigenous Issues (UNPF) advised that in January 2005 the UNPF had hosted a UN expert seminar on free, prior and informed consent and indigenous peoples. Several interventions had been made referring to the principle of prior and informed consent in the WIPO documents. This included the WIPO/GRTKF/IC/8/5 which was before the Committee now and the report of the UN Expert Seminar might thus be helpful for the Committee’s future discussions. The seminar had reviewed the concept of free, prior and informed consent from the perspective of an emerging consensus on the definition and its methodology. It had looked carefully at the elements of free, prior and informed consent, when it should occur, and how it could be expressed. Also in July 2005, the Working Group on Indigenous Peoples would have before it a legal commentary which might also be valuable for future work. She suggested that perhaps the Report could be made available to the Delegations present.

159. The representative of the International Plant Genetic Resources Institute (IPGRI) explained that she was speaking as an observer for the fifteen International Agricultural Research Centers (IARCs) of the Consultative Group of International Agricultural Research. She assured that IPGRI supported the Committee’s working efforts in reaching a comprehensive and effective protection of TK. She recalled that two years ago WIPO and IPGRI, on behalf of the System-wide Genetic Resources Program (SGRP) of the CGIAR, had agreed to link the System-Wide Information Network on Genetic Resources database (SINGER) to the WIPO On-line Portal of Databases and Registries Concerning Genetic Resources, to be potentially included in patent offices’ prior art searches. Details concerning SINGER and this link to the WIPO Portal were provided in paragraphs 2.2, 2.3 and the Annex of WIPO/GRTKF/IC/5/6. SINGER provided access to passport, characterization and evaluation data on over 600,000 accessions of crop, forage and agro-forestry plants that were currently held in the *ex-situ* collections of the CGIAR Centers. She reminded the Committee that most of those accessions, since 1994, were placed “in trust” for the International community through an agreement between the IARCs of the CGIAR and FAO. It was important to stress that the cooperation between WIPO and the CGIAR Centres contributed to encourage national patent offices to include SINGER in their prior art searches. This might be a very useful strategy that aimed to ensure that no one took out IP rights on material held

in trust by the CGIAR Centres, following the 1994 agreement. The CGIAR Centres were pleased to observe that a lot of progress had been achieved in the Committee since the last meeting, regarding building a consensus on the protection of TK through the concept of “misappropriation”. IPGRI generally endorsed the ideas expressed in WIPO/GRTKF/IC/8/5, including Article 3 of Part III entitled “Substantive principles and commentary”, dealing with the “General scope and subject matter” of the protection of TK. In particular, IPGRI agreed with the recognition of “the dynamic and evolving nature of TK and the nature of TK systems as frameworks of ongoing innovations”. For many years now, the CGIAR Centers had worked with local farming communities and others to understand the subtleties of GR for food and agriculture and how they are used and managed. One result had been the understanding of the role of farmers in creating, maintaining and enhancing almost all the plant genetic resources for food and agriculture in the world. The CGIAR Centres had also gathered insights into the history of crop genetic resources and the links between TK and GR. The CGIAR Centres were persuaded that any efforts to assign rights to knowledge or GR would have to take into account existing informal systems of exchange and innovation. Any changes should complement farmers’ activities, encouraging them to continue and deepen their current activities, and should guard against efforts that would even inadvertently persuade farmers to behave differently. She stressed the importance of reaching a comprehensive understanding and a global appreciation of the Committee’s mandate. Therefore, in considering its future possible program of work regarding IP options associated with GR, the Committee should always recall decisions that had been made, and priorities that had been set, in other fora, such as the CBD’s Conference of the Parties, and, especially the International Treaty on Plant Genetic resources for Food and Agriculture’s Governing Body and the FAO’s Commission on Genetic Resources for Food and Agriculture. In conclusion she emphasized that the 15 Future Harvest Centres of the CGIAR stood ready to assist in any way they can in the Committee’s deliberations.

160. The Delegation of Trinidad and Tobago hoped that as the Committee’s debate progressed, it would find more and more common ground upon which to continue building. It recalled that the Caribbean region consisted of a number of small states. Trinidad and Tobago had a population of just over 1.3 million people and cultural manifestations were derived from African and Indian ancestry and various European influences. Trinidad and Tobago was still a very young society, being independent only since 1962. The TK and customs that it had developed were very important to its identity and nationhood. They were critical to its social and economic well being. The Delegation therefore felt strongly that TK ought to be protected against unfair exploitation. National, regional and importantly, international measures for the protection of TK were going to be vital to the efforts at home. In this regard, the Delegation looked forward to all Committee members’ cooperation. It recognized the tremendous amount of work that had gone into the documents, and while it valued the contribution of all Delegations, and it understood a need for caution, it did see the need to move forward. It agreed that consensus for the documents in their present form might be elusive, but it saw a commitment on the part of Members to find solutions, and this it felt was happening. It therefore wished to give an undertaking to make written comments on the documents by the deadlines given at paragraphs 21 and 16 of WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 respectively. In closing, it thanked the Secretariat of WIPO for the extraordinary quality of documents that had been made available to the Committee, and it pledged its continued support for the work of the Committee.

161. The representative of the World Conservation Union (IUCN) recalled that IUCN had followed the work of the Committee and over the past five years had taken note of the technical information that had come out of the Committee. She had been particularly

interested in the discussions on biodiversity and its various forms, particularly at the international, national and regional levels. She had analyzed the various elements of the work of the Committee and had participated in e-forums with ninety participants from various regions to stimulate discussions on the topics that the Committee was now considering. She stated that the Committee participants needed to take an integrative approach regarding IP protection. Agreement on the goals and scope needed to have the goal of protecting indigenous peoples and cultures, also the Committee needed to highlight TK globally, particularly conservation and the defense of biodiversity and sustainable development. This was key since the Committee was in the process of establishing fair criteria for justice. She also felt the need for harmonization and synergies among all discussion fora, particularly regarding access to biological resources taking into account the TRIPS Agreement and the WTO and its discussions to protect TK. The Committee needed to bring this together in one document and have an integrative approach to define standards at the international and regional levels. She also needed to establish clearly the scopes and areas of competence in the various fields and it should decide whether this should be binding or not. Everyone needed to be very critical and careful during the Committee discussions when it discussed the role and the mandate. This role could only take place with the full participation of indigenous peoples and she truly hoped that the voluntary contribution fund would be set up for this goal. The IUCN was convinced that alternatives defined by the Committee would contribute to biodiversity and sustainable development as well as the respect of indigenous peoples and the revitalization of TK. Thus the IUCN, as in the past, would do everything it could to help the Committee in considering and analyzing relevant issues.

*Decision on Agenda Items 8 and 9: Folklore/Traditional cultural expressions and Traditional knowledge.*

162. The Committee agreed that there was broad support for the process and work being undertaken within the Committee on TCEs and TK.

163. The Committee discussed documents WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 and noted the diverse views expressed on these issues.

164. The Committee took note of the contents of document WIPO/GRTKF/IC/8/10 ('Update on Legal-technical Assistance and Capacity Building Activities').

165. The Committee took note of documents WIPO/GRTKF/IC/8/7 and WIPO/GRTKF/IC/8/8.

*Décision en ce qui concerne les points 8 et 9 de l'ordre du jour : expressions culturelles traditionnelles/folklore et savoirs traditionnels*

162. Le comité est convenu que le processus et les travaux menés dans le cadre du comité au sujet des expressions culturelles traditionnelles et des savoirs traditionnels ont recueilli un large soutien.

163. Le comité a examiné les documents WIPO/GRTKF/IC/8/4 et WIPO/GRTKF/IC/8/5 et a pris note des divers points de vue exprimés sur ces questions.



164. Le comité a pris note du contenu du document WIPO/GRTKF/IC/8/10 (“Actualités concernant les activités d’assistance juridique et technique et de renforcement des capacités”).

165. Le comité a pris note des documents WIPO/GRTKF/IC/8/7 et WIPO/GRTKF/IC/8/8.

*Decisión sobre el punto 8 y el punto 9 del orden del día: Expresiones culturales tradicionales/folclore y conocimientos tradicionales*

162. El Comité convino en que se ha manifestado un amplio apoyo al proceso y a la labor emprendidos por el Comité en lo relativo a las ECT y a los CC.TT.

163. El Comité examinó los documentos WIPO/GRTKF/IC/8/4 y WIPO/GRTKF/IC/8/5, y tomó nota de las distintas opiniones expresadas sobre esas cuestiones.

164. El Comité tomó nota del contenido del documento WIPO/GRTKF/IC/8/10 (“Informe actualizado sobre las actividades de asistencia jurídica y técnica y de creación de capacidad”).

165. El Comité tomó nota de los documentos WIPO/GRTKF/IC/8/7 y WIPO/GRTKF/IC/8/8.

AGENDA ITEM 10: GENETIC RESOURCES

166. At the request of the chair, the Secretariat introduced document WIPO/GRTKF/IC/8/9.

167. The Delegation of Peru introduced document WIPO/GRTKF/IC/8/12 and described the newly formed National Commission for the Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples (National Anti-Biopiracy Commission). The Delegation explained that National Anti-Biopiracy Commission reported in the subject document potential cases of biopiracy involving Peruvian resources and TK of Peru’s indigenous peoples. The Delegation reflected on the need to organize and systematically identify potential misappropriations of GR and TK in order to prevent improper patent grants. The need for a mandatory requirement for disclosure of origin implemented through amendment of the TRIPS agreement was emphasized.

168. The Delegation of Luxembourg on behalf of the European Community and its Member States supported ongoing work on defensive protection and disclosure requirements. The Delegation welcomed in particular suggestion in paragraph 49 of WIPO/GRTKF/IC/8/9 that the activities completed for TK could be translated. The Delegation invited continued collection or drafting of guide principles. In connection with disclosure requirements, the Delegation supported development of regime as proposed in WIPO/GRTKF/IC/8/11 and invited future discussions in line with the proposals in that document. The Delegation pointed out that the European Community and its Member States were committed to development of a system to track inventions or patent applications involving GR that would be universal and binding. The Delegation proceeded to summarize substantive proposals made in WIPO/GRTKF/IC/8/11.

169. The Delegation of Japan observed that disclosure of origin of GR had been discussed in several forums and expressed its strong view that such a disclosure requirement could not be justified in the patent system. The Delegation urged that future discussions of this disclosure issue should occur here in this Committee because of its expertise. The Delegation expressed continued interest in participating in such discussions from the technical point of view and to deepen understanding of the issue. The Delegation also noted WIPO/GRTKF/IC/8/12 submitted by Peru and reported its present understanding that none of the listed Japanese applications or patents involved instances of biopiracy. The Delegation further pointed out that many of the GR referred to in the subject document were well known around the world and many were cultivated in Japan and in Indonesia.

170. The Delegation of Switzerland commented that WIPO/GRTKF/IC/8/9 provided a useful overview of ongoing work in the WIPO and in other forums. With reference to Annex 2, the Delegation supported tasks identified in sections A.1 and A.2. In connection with section A.3, the Delegation noted that not all patent offices conduct full searches. The Delegation stated that there was no need for additional measures on access and benefit sharing issues other than disclosure of origin or source. The Delegation expressed support for the suggestions in sections C.1 and C.2 but not those in section C.3. The Delegation recalled proposals it presented on disclosure of source in May 2003 and in May and October 2004 and noted that its proposals had also been submitted to the TRIPS Counsel and to the Convention on Biological Diversity. The Delegation summarized the four policy objectives and eight features contained in its previously submitted documents.

171. The Delegation of Bolivia asked the Secretariat to more clearly identify in the Committee's mandate a basis for preparation of WIPO/GRTKF/IC/8/9.

172. The Secretariat responded to the inquiry from the Delegation of Bolivia with reference to the mandate of the Committee and noted that the document was historical in nature and not a presentation of new or additional proposals.

173. The Delegation of New Zealand expressed appreciation for WIPO/GRTKF/IC/8/9 as a useful reminder of work done to date and noted that it was careful not to support one approach over the other. The Delegation further stated that it was supportive of possible tasks identified in section A/3 of the subject document but not necessarily of tasks in section A/2 as additional resources would appear to be required. The Delegation indicated support for work on benefit sharing terms and particularly development of a guide useful to those with little experience in access and benefit sharing agreements. In connection with disclosure, the Delegation suggested that the Committee could consider technical issues contained in the study prepared for the CBD without inhibiting discussion or action on disclosure in other forums including other committees at the WIPO.

174. The Delegation of Brazil emphasized that preventing misappropriation of GR and TK was a crucial national issue and that it is a global problem requiring international cooperation and safeguards. The Delegation identified as crucial measure establishing within the patent system a requirement of disclosure of origin or source of GR and TK. The Delegation of Brazil explained that establishing minimum international standards of protection and prevention of misappropriation was a legacy of multilateral negotiations that resulted in the TRIPS agreement and that the Delegation had proposed amending TRIPS to include a disclosure of origin requirement in the current round of Doha negotiations. The Delegation indicated that amendments to WIPO treaties should be addressed in a manner consistent with

the changes proposed to the TRIPS agreement. Amendment of TRIPS was described as essential because it contains a framework for enforceable minimum standards of protection with teeth. The Delegation stated that Brazil and other countries were owed such an amendment by the international community in order to rebalance the international system in a way that accounts for the interests of developing countries. The Delegation of Brazil emphasized that these are technical, moral and political issues and that nothing less than mandatory disclosure obligations through amended treaties would be acceptable.

175. The Delegation of Venezuela emphasized that prior informed consent of indigenous peoples should always be obtained before access is permitted to their GR and TK and explained that Venezuela's Constitution safeguards those rights. As a result, supranational regulation of those resources may violate the Constitution. It was explained that global databases should receive consent of indigenous peoples.

176. The Delegation of Peru expressed support for amending TRIPS to include disclosure of origin obligations as urged by Brazil. The Delegation also responded to the Delegation of Japan by explaining that it had not asserted that all patents and applications listed in the document submitted by Peru were illegal or inappropriate; only that they are potential instances of biopiracy and noted that an English definition of biopiracy may be located at [www.biopiracy.org](http://www.biopiracy.org).

177. The Delegation of the Islamic Republic of Iran repeated its view that a mandatory disclosure obligation was needed, not simply additional exchanges of technical information or experience.

178. The Delegation of Bolivia questioned whether the basis for the creation of WIPO/GRTKF/IC/8/9.

179. The Secretariat recalled the evolution of the genetic resource and disclosure issue with quotation from the First Session of the Committee and from Conclusions of the Chair in subsequent sessions of the Committee which led to the item being maintained on the Agenda for the present meeting.

180. The Delegation of Bolivia emphasized that WIPO was a Member-driven organization in which all voices were to be heard.

181. The Delegation of India noted that the Secretariat had not been mandated to prepare the subject document explicitly but its preparation may have implied that all of the issues in the paper may be pertinent to this agenda item. It added that India had in place a Biological Diversity Act, which prevented misappropriation through the patent system and explained that it wanted similar mandatory international obligations with penalties. The Delegation was of the view that the Committee needed to address these issues meaningfully. Unless that was done, developing countries, keen to protect their GR from misappropriation, would begin to question whether these discussions in the Committee would lead to any benefits for them.

182. The Delegation of the United States of America noted its written proposal on disclosure contained in WIPO/GRTKF/IC/8/14 and the complexities of this issue. The Delegation expressed appreciation for WIPO/GRTKF/IC/8/14 on the Peruvian experience and suggested Peru might use additional databases useful in identifying synonyms for technical names of plant species and indicated that it would review the United States of America patents identified in the subject document. The Delegation expressed concern that CBD definitions

should not be expanded and with the notion of retroactivity raised in this and other forums. The Delegation also noted that many of the species listed in the paper were planted and were available outside Peru. The Delegation expressed its view that the proposal by Luxembourg on behalf of the European Community and its Member States may have the effect of discouraging investment. The Delegation also emphasized that many policy objectives were shared such as the need for prior informed consent, the need for equitable sharing of benefits, and the need to prevent issuance of erroneous patents. Creating a new disclosure obligation however, was not needed to accomplish these objectives. As a megadiverse country the United States of America was committed to preventing pirating of intellectual property and other resources and remained interested in what members are seeking to achieve and finding tailored solutions. The Delegation also indicated that WIPO/GRTKF/IC/8/9 was a useful compilation and it did not agree with those who had said this Committee's work on GR was going nowhere.

183. The representative of the FAO observed that as WIPO/GRTKF/IC/8/9 showed, the FAO and its International Treaty played very specific roles in relation to food and agriculture. Genetic resources for food and agriculture were categorically different from wild GR. In a nutshell, bioprospection with wild resources was usually looking for a single bioactive chemical for pharmaceutical purposes, which was then synthesised and covered by a patent. Plant and animal breeding cross and recross a very wide range of materials which were themselves crosses made by farmers over up to 10,000 years of agriculture. For that reason, all countries shared in the use and management of the overall portfolio of GR upon which food security depended. All were therefore interdependent, so that all countries depended largely on resources that were from outside their region. On average, countries depended for about 70 per cent (for some countries, nearly 100 per cent) on materials coming from other regions. Agricultural genetic policy had to address the question of how to establish multilateral systems of conservation and sustainable use, and to promote food security and economic development throughout the world. It was clear that agricultural genetic resource policy and intellectual property policy were separate things, and that there were separate national and international bodies dealing with them. What was necessary was that they should be synergy between sectors, with mutual respect for mandates. The International Treaty on Plant Genetic Resources for Food and Agriculture provided specifically for access and benefit sharing for its multilateral system. It was one of the only two legally binding international agreements relating to access and benefit sharing for GR, the other than being the CBD with which it is in harmony. Any arrangement that was finally agreed for the disclosure of origin of genetic material in the context of patent applications should therefore fully take into account the International Treaty. Any materials from its multilateral system should therefore be declared specifically as coming from that system. In a previous meeting of the Committee, the representative had suggested that when the origin of genetic material of a crop covered by the Treaty's multilateral system was unknown, a solution that would ensure benefit sharing would be to treat it as coming under the Treaty. Finally, the representative noted with interest that Luxembourg had proposed that the CBD Clearing House Mechanism should be informed of declarations of origin. When materials from the Treaty's multilateral system were involved, any such arrangement should relate directly to the International Treaty, and the information would need to go to the International Treaty.

184. The representative for the Consumer Project on Technology (CPTech) recalled that a statement adopted in Casablanca on February 16, 2005 included a recommendation that the Committee address issues of "sufficiency of disclosure and GR" with a "view to progressive development and codification of international intellectual property law". The WIPO General Assembly had tasked the Director General in 2004 with a mandate to determine the date of a

Standing Committee on the Law of Patents. The representative expressed concern that the Casablanca recommendations may have exceeded the remit provided by the WIPO General Assembly with respect to matters of substance, specifically, the SPLT negotiations and the formulation of a program for future work for the SCP and the Committee. The representative acknowledged and shared the concern that benefit sharing was inadequate when products that rely on GR and TK are commercialized and noted that misappropriation of GR, TK and TCEs was an important issue. In general, however, CPTech opposed new *sui generis* IP regimes that create private monopolies on knowledge. The representative noted that Article 2 of WIPO/GRTKF/IC/8/5 stated that the legal form of protection for TK “need not be through exclusive property rights” and may be implemented through a “range of legal measures” including “laws governing unfair competition.” The representative stated that in the 6th session of the Committee CPTech had noted the compensatory liability model as a possible approach for addressing benefit sharing when a product is patented based upon TK or GR. The representative further urged consideration of an approach similar to that taken by Directive 98/44/EC of the European Parliament and of the Council (July 6, 1998) on the legal protection of biotechnological inventions, which includes an Article 12 requiring mandatory compulsory licensing of biotechnological inventions and plant varieties. This directive provided for a mandatory cross license between patents and *sui generis* plant breeder rights, when both the patent and *sui generis* rights apply to the same product. If such a regime were designed so that the *sui generis* TK/GR regime was only enforced against the commercialization of a patented product, it would address one of the most important areas of misappropriation, without increasing the problems of monopolies on knowledge. The representative also urged the Committee to consider the medical R&D treaty outlined in the February 24, 2005, letter to the WHO, which proposed a system of credits to reward priority R&D projects, that could be traded for money between countries, to meet their R&D obligations. The representative also explained that the licensing strategy for software, developed by Richard Stallman and others, had led to an important and effective legal strategy for protecting community knowledge. The representative recommended preparation of a paper by the International Bureau that described the foregoing model, and report on its success in protecting the interests of the global community of software programmers.

185. The representative for the Third World Network (TWN) explained that a fundamental principle of patent law was that life forms that are discovered are not inventions and thus are not patentable. However, due to pressures from large corporations, particularly the biotechnology industry, developed countries moved from prohibiting patenting of life forms to allowing the patenting of life forms. The extension of patentability to selected life forms and processes was “globalized” through TRIPS. In the field of agriculture, many developed countries allowed broad patents on plant varieties in an attempt to control the world’s staple food crops. There were patents on varieties of soybeans, maize, wheat, potato and even on rice. The representative recalled that in 1998 farmers in India and Thailand protested against patenting basmati and jasmine rice by a company in the US. The representative explained that allowing patents on life forms is no doubt the primary cause of an increase in the cases of biopiracy today which is the second challenge faced. Most of the GR patented are from the developing countries particularly the megadiverse countries. The value of germplasm from developing countries to the pharmaceutical industry in the early 1990s was estimated to be at least 32 billion US dollars per year. In agriculture according to one estimate by RAFI, genes from the fields of developing countries for only 15 major crops contribute more than 50 billion dollars in annual sales. The use of these GR from developing countries by corporations in developed countries is frequently based on TK of the indigenous peoples and local communities. The representative explained that these figures and examples provided strong evidence of “reverse transfer of technology” in which it is the poorer developing

countries that are transferring their knowledge, and thus technology to the rich developed world. This knowledge contributed enormously to the economies and social development of the developed countries while the developing countries have gotten little reward for their contribution and could likely end up paying large corporations a high price for the use of a product from their own genetic resource. The representative of TWN narrated several additional examples to show that unfair trade terms existed and needed to be addressed. The representative urged that patents on life forms be banned and that this action be given consideration by the Committee and in the Standing Committee of Patents. The representative also urged requiring patent applicants to disclose the country of origin of the genetic resource, to show that prior informed consent of those countries has been obtained, and to provide evidence of benefit sharing at the level demanded by the holders of the knowledge or genetic resource. In addition stringent sanctions for failure to disclose including revocation of patent granted were recommended. The representative emphasized that for this purpose a mandatory legally binding international regime is necessary. The representative complained that developed countries repeatedly sidelined any discussion on these matters and used the Committee as an excuse not to discuss these issues in other more relevant forums such as in the Standing Committee of Patents. The representative reminded developed countries that when the TRIPS regime was imposed on developing countries it was done on the pretext that innovators need to be rewarded for their creative works. The only innovators that have benefited from the TRIPS regime are from the developed countries. The developing countries were victims.

*Decision on agenda Item 10: Genetic Resources*

186. The Committee took note of documents WIPO/GRTKF/IC/8/9, WIPO/GRTKF/IC/8/10, WIPO/GRTKF/IC/8/11, WIPO/GRTKF/IC/8/12, WIPO/GRTKF/IC/8/13 and WIPO/GRTKF/IC/8/14, and further took note of the diverse views expressed on this issue.

*Décision en ce qui concerne le point 10 de l'ordre du jour : ressources génétiques*

186. Le comité a pris note des documents WIPO/GRTKF/IC/8/9, WIPO/GRTKF/IC/8/10, WIPO/GRTKF/IC/8/11, WIPO/GRTKF/IC/8/12, WIPO/GRTKF/IC/8/13 et WIPO/GRTKF/IC/8/14, ainsi que des divers points de vue exprimés sur ce point.

*Decisión sobre el punto 10 del orden del día: Recursos genéticos*

186. El Comité tomó nota de los documentos WIPO/GRTKF/IC/8/9, WIPO/GRTKF/IC/8/10, WIPO/GRTKF/IC/8/11, WIPO/GRTKF/IC/8/12, WIPO/GRTKF/IC/8/13 y WIPO/GRTKF/IC/8/14, y de las distintas opiniones expresadas sobre esa cuestión.

**AGENDA ITEM 11: FUTURE WORK**

187. The Delegation of Luxembourg, on behalf of the European Community and its Member States noted with satisfaction the progress that this Committee had made. The Delegation expressed its belief that further discussion could bring important benefits, in particular through increased participation in and contributions to the Committee's work. In this respect the Delegation continued to support and welcomed the participation of indigenous and local

communities, and expressed its continued commitment to the establishment of a voluntary contribution fund for this purpose. The Delegation supported calls for wider stakeholder consultation in the area of TCEs and further development of international non-binding *sui generis* models for the legal protection of TK. Future work could further refine draft objectives and principles and bring greater clarity and legal certainty to proposed provisions and definitions. In the area of GR, the Delegation recalled the submission by the European Community and its Member states of a proposal on disclosure requirements for source/origin of GR and associated TK in patent applications. The Delegation believed that consideration of this issue should be an important task for the Committee and that such a serious proposal, falling clearly within the existing mandate, was entitled to proper discussion within the body where the proposal was made. The Delegation urged that any renewal of the mandate should cover all three issues which the mandate has covered up to now.

188. The Delegation of the Republic of Korea noted that the Committee had made valuable contributions to the areas of focus, that the work of the Committee has thus far been of great importance. It welcomed and supported future work of the Committee. The Delegation also pointed out, however, that in spite of the efforts made over the past few years, the Committee has been unable to produce any substantial outcomes for protecting GRTKF. In this context, the Delegation urged all members to remain open-minded so that a consensus could be reached in order to realize an effective protection system of GRTKF. The Delegation commented on two areas of future work for the committee. It stated that to protect TK effectively, it is important to standardize the data fields for databases of TK. Construction of an international standard would help accelerate the discussions for protecting TK. The second area was development of suitable tools for access and benefit sharing. The Delegation urged member countries to share their experiences in relation to contracts on GR and benefit sharing and encouraged the Committee to continue collecting and distributing any relevant information from the experiences of the Member States as they would be helpful in developing model contracts. In addition the Delegation stated that before explicitly discussing access and benefit sharing, it would be desirable to develop suitable tools for evaluating the contribution of GR to inventions.

189. The Delegation of Nigeria supported the statement made by South Africa on the future work of the Committee and noted in particular that the Committee has done immense and appreciable work, given the limited obvious constraints and the very delicate nature of the issues. The delegation welcomed the call for an extension of the mandate of the Committee and hoped that the international bureau would continue to support indigenous and local communities as well as support the continued participation of delegates and representatives.

190. The Delegation of Norway supported further work in the Committee with regard to TCEs and TK. In this regard, the entire contents of WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 should form an integral part of the extended work program. The Delegation emphasized that it had an open mind with regard to the final outcome of the Committee's work. The delegation noted that it had on several occasions, asked vital questions about the relationship between positive and defensive TK protection, about the balance between what is needed at the international level vs the national level, about how to achieve the necessary flexibility to encompass sectorial needs, but no responses had been provided. The Delegation emphasized that there is still a need to discuss TK and TCE protection further. The Delegation disagreed with suggestions to eliminate the topic of genetic resources from the agenda. As with TK, there were many unanswered questions of fundamental importance and technical issues that this Committee is well suited to discuss. The Delegation joined representatives of indigenous organisations who expressed

disappointment that a funding mechanism was not agreed upon for the participation of indigenous and local communities.

191. The Delegation of India indicated that over the prior sessions, some convergence had occurred concerning TK and TCEs/folklore. Unfortunately, there was little progress in relation to GR. If issues relating to GR that were important to developing countries were not addressed meaningfully in the Committee, the question that would arise is whether the subject might be better addressed in other forums. The Delegation observed that over eight sessions the Committee had failed to make progress on GR.

192. The Delegation of Brazil indicated that in the areas of TK and TCEs, interesting materials were present. If a continued mandate were agreed to, conclusion of that work could be expected within the coming biennium. The agenda of the Committee was at times seen as overloaded. Focusing the Committee's work more than has been done in the past would help credibility. Any renewed mandate would need to emphasize the international dimension of protection, and conclusion of work on protection of TK and TCEs. The Delegation noted convergence on these issues and urged the Committee to provide concrete guidance to the General Assembly. Regret was expressed that in connection with GR, no real substantive work had taken place and an unfortunate reluctance was noted on the part of some countries to effectively consider measures that some developing countries considered necessary to address the problem. The Delegation expressed support for the approach on future work suggested by the Delegation of India.

193. The Delegation of Peru expressed support for the concerns of indigenous representatives and hoped agreement could be reached. The views of India and Brazil on future work were shared by the Delegation of Peru. The theme of GR was previously isolated and it had not been possible to pursue it in a concrete fashion.

194. The Delegation of Bolivia associated itself with the statement of India.

195. The Delegation of South Africa expressed frustration that after eight sessions no consensus had been reached on substantive protection for TCE and TK. The delegation supported suggestions that the mandate of the Committee should be extended so that work towards an international binding instrument could be continued. The Delegation further supported creation of a fund for supporting participation of indigenous peoples at the Committee. It emphasized that all future meetings be held in Geneva with all members present and indigenous people invited. The Delegation supported the suggestion that the issue of GR be addressed in other forums so that an international binding legal instrument could be reached.

196. The Delegation of Norway supported further work in the Committee with regard to TCE and TK. In this regard, the contents of WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 would form an integral part of the extended work program. The agenda was not exhausted on these issues. The Delegation emphasized that it had an open mind with regard to the final outcome of the Committee's work, and stated that the agenda is not exhausted on these issues. The Delegation had on several occasions, asked vital questions about the relationship between positive and defensive TK protection, about the balance between what is needed at the intentional level vs. the national level, about how to achieve the necessary flexibility to encompass sectorial needs but no responses had been provided. The Delegation emphasized that there was still a need to discuss TK and TCE protection further, but disagreed with suggestions to eliminate the topic of GR from the agenda. As with TK, there were numerous



unanswered questions of fundamental importance and technical issues that the Committee was well suited to discuss. The Delegation joined representatives of indigenous organizations who expressed disappointment that a funding mechanism was not agreed upon for the participation of indigenous and local communities; failure to progress this would be a serious failure on the part of the Committee.

197. The Delegation of the Islamic Republic of Iran noted that it was time for the Member States to decide on future directions of the work, and urged that, taking into consideration all the views expressed, the Committee's future work should be clearly directed to creation of a legally binding instrument.

198. The Delegation of China noted that preliminary results have been reached on certain issues and expressed hope that more substantive discussions could take place in the future.

199. The Delegation of Trinidad and Tobago supported renewing the mandate of the Committee. Yet the call to renew the mandate seemed to be made with a sense of gloom, a kind of sense that the Committee had not done much. The Delegation expressed disagreement with this sense of gloom, recalling the very thorny nature of the issues before the Committee, the need for people to consider new concepts and new ways of thinking, concepts that were very different from the concepts that people had worked with for many decades. The Committee had done its work, and that work had been extremely good. In reviewing the documents for the meeting, the Delegation had been amazed by the distance that had been covered since the Committee began working. The Committee had arrived at very good notions about the matters before it. At the domestic level, the fact that the Committee was grappling with issues concerning TK, TCEs and GR had spurred national governments, particularly those in small states, to review their own internal perspectives on their own TK and TCEs. The work of the committee had spurred some countries to examine their own approach to these issues. The sense of gloom that the Committee had somehow failed in its work was not a sense that the Delegation could share - the Committee had done well, should say so and be proud of it, and should call for more time to achieve further great things, rather than suggesting the Committee had failed in some way, even though it had not done as much as it would have like to do. On the issue of GR, the Delegation acknowledged the concerns that led some delegations to question the need for addressing that issue in the Committee, but noted that the way in which GRs are used, they are often integrally linked with TK. While it may be easy or convenient to separate one from the other, it may be necessary to take up the difficult burden of working with them together, since serious TK issues were very often integral to the way GR are used: the way in which GRs are used was as important as the GRs in themselves. The Delegation expressed satisfaction with what had been achieved, noting that nonetheless more work had to be done, and the request for a renewed mandate should be against a backdrop of the great work that had already been done.

200. The Delegation of Japan noted that discussion of TK and TCEs was important, but that discussion of GR was also important and urged that issue to remain part of the agenda of the Committee. Changing the scope of the mandate at this time would be premature.

201. The Delegation of the United States urged that the issues of TK, TCEs/EoF and GR are integrally related and should be addressed in the future work of the Committee. The Delegation explained that it could not agree to proposals that would separate these issues. The Delegation also urged that future work emphasizes national experiences and builds on those experiences in a step by step approach. Caution was recommended relative to any acceleration of the mandate.

202. The Delegation of Luxembourg, on behalf of the European Community and its Member States noted with satisfaction the progress that this Committee had made. The Delegation expressed its belief that further discussion could bring important benefits, in particular through increased participation in and contributions to the Committee's work. In this respect the Delegation continued to support and welcomed the participation of indigenous and local communities, and expressed its continued commitment to the establishment of a voluntary contribution fund for this purpose. The Delegation supported calls for wider stakeholder consultation in the area of TCEs and further development of international non-binding sui generis models for the legal protection of TK. Future work could further refine draft objectives and principles and bring greater clarity and legal certainty to proposed provisions and definitions. In the area of GR, the Delegation recalled the submission by the European Community and its Member states of a proposal on disclosure requirements for source/origin of GR and associated TK in patent applications. The Delegation believed that consideration of this issue should be an important task for the Committee and that such a serious proposal, falling clearly within the existing mandate, was entitled to proper discussion within the body where the proposal was made. The Delegation urged that any renewal of the mandate should cover all three issues, which the mandate has covered up to now.

203. The Delegation of the Republic of Korea noted that the Committee had made valuable contributions to the areas of focus, that the work of the Committee has thus far been of great importance, and that it welcomed and supported its future work. The Delegation also pointed out, however, that in spite of the efforts made over the past few years, the Committee has been unable to produce any substantial outcomes for protecting GRTKF. In this context, the Delegation urged all members to remain open-minded so that a consensus could be reached in order to realize an effective protection system of GRTKF. The Delegation commented on two areas of future work for the committee. It stated that to protect TK effectively, it is important to standardize the data fields for databases of TK. Construction of an international standard would help accelerate the discussions for protecting TK. The second area was development of suitable tools for access and benefit sharing. The Delegation urged member countries to share their experiences in relation to contracts on GR and benefit sharing and encouraged the Committee to continue collecting and distributing any relevant information from the experiences of the Member States, as they would be helpful in developing model contracts. In addition the Delegation stated that before explicitly discussing access and benefit sharing, it would be desirable to develop suitable tools for evaluating the contribution of GR to inventions.

204. The Delegation of Nigeria supported the statement made by South Africa on the future work of this Committee and noted in particular that the Committee had done immense and appreciable work, given the limited obvious constraints and the very delicate nature of the issues. The Delegation welcomed the call for an extension of the mandate of the Committee and hoped that the international bureau would continue to support indigenous and local communities as well as support the continued participation of delegates and representatives.

205. The representative of the Foundation for Aboriginal Research Action (FAIRA), speaking on behalf of FAIRA, the Saami Counsel, the Kascadena Counsel, the Tulalip Tribes, the Call of the Earth and the Creators' Rights Alliance, expressed disappointment that the Committee had not recommended an arrangement for improved participation of indigenous peoples. Indigenous peoples must play an important part in WIPO's efforts to address the issues of TK, TCEs and GR. The right of indigenous peoples to self-determination and the application of the principle of free and prior informed consent were tantamount. The exercise

of this right and principle should not be thwarted by indecision within the ranks of the Committee. The representative noted that the WIPO General Assembly estimated originally completion of this work within four sessions of the Committee, yet upon completion of its eighth session the Committee remained unable to complete the prerequisite task of recommending a process to arrange reasonable participation for indigenous peoples. Lacking this fundamental capacity of taking this fundamental step to ensuring equality in its process jeopardized the work of the Committee and confronted the preparedness of some members to fulfil the tasks set by the WIPO General Assembly. It was unacceptable that the WIPO General Assembly was apparently to be asked to resolve this issue without the responsible contribution of the Committee, which had considered the request for eight sessions. Further, the intention of those states which sought to refer this matter to private discussions during the General Assembly was regarded as an attempt to use a non-transparent and non-accountable discussion regarding indigenous peoples' participation. Continued participation in any future sessions of the Committee would be dependant upon resolution of the way by which indigenous peoples can participate equally with the state and private sector interests in its deliberations. Additionally, the WIPO Member States were called upon when taking future discussions on these issues within WIPO or its committees and in a commitment to ensure openness, transparency and accountability to disclose how they have consulted with relevant indigenous peoples how the consultations comply with the principle of free prior informed consent and how the positions of indigenous peoples compare with the positions taken by those members.

*Decision on Agenda Item 11: Future Work*

206. The Committee noted the broad support from Committee participants on the future work of the Committee and agreed to recommend to the General Assembly that the mandate of the Committee be extended to the next budgetary biennium to continue its work on traditional knowledge, traditional cultural expressions/folklore and genetic resources.

*Décision en ce qui concerne le point 11 de l'ordre du jour : travaux futurs*

206. Le comité a pris note du fait que les travaux futurs du comité recueillent l'assentiment général des participants et est convenu de recommander à l'Assemblée générale de prolonger son mandat jusqu'au prochain exercice biennal afin de lui permettre de poursuivre ses travaux relatifs aux savoirs traditionnels, aux expressions culturelles traditionnelles/folklore et aux ressources génétiques.

*Decisión sobre el punto 11 del orden del día: Labor futura*

206. El Comité tomó nota del amplio apoyo otorgado por los participantes a su labor futura y acordó recomendar a la Asamblea General que se extienda su mandato al próximo bienio presupuestario para continuar con su labor sobre los conocimientos tradicionales, las expresiones culturales tradicionales/folklore y los recursos genéticos.

AGENDA ITEM 12: CLOSING OF THE SESSION

207. The Committee adopted its decisions on agenda items 4, 5, 7, 8, 9, 10 and 11 on June 10, 2005. 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 before the end of June. Committee participants should submit written corrections to their interventions as included in the draft report before July 31, 2004. A final version of the draft report will then be circulated to Committee participants for subsequent adoption.

*Décision en ce qui concerne le point 12 de l'ordre du jour : projet de rapport*

207. Le comité a adopté ses décisions relatives aux points 4, 5, 7, 8, 9, 10 et 11 de l'ordre du jour le 10 juin 2005. Il est convenu qu'un projet de rapport écrit contenant le texte de ces décisions, qui a fait l'objet d'un accord, et toutes les interventions prononcées devant le comité sera établi et distribué aux participants du comité avant la fin du mois de juin. Les participants du comité devront soumettre par écrit avant le 31 juillet 2004 les corrections à apporter à leurs interventions figurant dans le projet de rapport. Une version finale du projet de rapport sera ensuite distribuée aux participants du comité pour adoption ultérieure.

*Decisión sobre el punto 12 del orden del día*

207. El 10 de junio de 2005 el Comité aprobó sus decisiones sobre los puntos 4, 5, 7, 8, 9, 10 y 11 del orden del día. Acordó que se redactará un proyecto de informe en el que figuren el texto acordado de esas decisiones y todas las intervenciones hechas en el Comité, informe que se distribuirá a los participantes en el Comité antes de fines de junio. A más tardar el 31 de julio de 2005, los participantes deberán presentar por escrito las eventuales correcciones de las intervenciones incluidas en el proyecto de informe. La versión final del proyecto de informe será entonces distribuida a los participantes para su aprobación posterior.

208. The Chair closed the Eighth Session of the Committee on June 10, 2005.

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

I. ÉTATS/STATES

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

AFRIQUE DU SUD/SOUTH AFRICA

Mogege MOSIMEGE, Manager, Indigenous Knowledge Systems, Department of Science and Technology, Pretoria

ALBANIE/ALBANIA

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## III. ORGANISATIONS INTERNATIONALES INTERGOUVERNEMENTALES/ INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

### ORGANISATION DES NATIONS UNIES (ONU)/UNITED NATIONS (UN)

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### AFRICAN, CARIBBEAN AND PACIFIC GROUP (ACP)

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### ARAB LEAGUE EDUCATIONAL CULTURAL AND SCIENTIFIC ORGANIZATION (ALECSO)

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### BUREAU BENELUX DES MARQUES (BBM)/BENELUX TRADEMARK OFFICE (BBM)

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

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OFFICE EUROPEEN DES BREVETS (OEB)/EUROPEAN PATENT OFFICE (EPO)

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

Hassane Yacouba KAFFA, chef du Service, Yaoundé

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

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ORGANISATION DES NATIONS UNIES POUR L'ÉDUCATION, LA SCIENCE ET LA  
CULTURE (UNESCO)/UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND  
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Association littéraire et artistique internationale (ALAI)/International Literary and Artistic Association (ALAI):

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Biotechnology Industry Organization (BIO):

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Call of the Earth (COE):

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Centre d'échanges et de coopération pour l'Amérique latine (CECAL):

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Centre d'études internationales de la propriété industrielle (CEIPI)/Centre for International Industrial Property Studies (CEIPI):

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Center for International Environmental Law (CIEL):

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

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