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

**Ninth Session
Geneva, April 24 to 28, 2006**

DRAFT REPORT (SECOND DRAFT)

Document prepared by the Secretariat

TABLE OF CONTENTS

	Paragraphs
INTRODUCTION.....	1 to 7
AGENDA ITEMS	
(see document WIPO/GRTKF/IC/9/1 Prov.)	
Item 1: OPENING OF THE SESSION	8
Item 2: ELECTION OF THE OFFICERS	9
Item 3: ADOPTION OF THE AGENDA	10
Item 4: ADOPTION OF THE REPORT OF THE EIGHTH SESSION.....	11
Item 5: ACCREDITATION OF CERTAIN ORGANIZATIONS	12 to 13
Item 6: OPENING STATEMENTS	14 to 58
Item 7: PARTICIPATION OF LOCAL AND INDIGENOUS COMMUNITIES	59 to 77
Item 8: TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE....	78 to 202
Item 9: TRADITIONAL KNOWLEDGE	203 to 247
Item 10: GENETIC RESOURCES	248 to 286
Item 11: FUTURE WORK.....	287 to 381
Item 12: CLOSING OF THE SESSION	382 to 384

INTRODUCTION

1. Convened by the Director General of WIPO in accordance with the decision of the WIPO General Assembly at its thirtieth-second session further to extend a revised mandate, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) held its ninth session in Geneva, from April 24 to 28, 2006.

2. The following States were represented: Algeria, Argentina, Australia, Austria, Bangladesh, Barbados, Belgium, Bolivia, Botswana, Brazil, Burkina Faso, Cambodia, Cameroon, Canada, Chile, China, Colombia, Congo, Costa Rica, Côte d’Ivoire, Croatia, Czech Republic, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Fiji, Finland, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Kyrgyzstan, Latvia, Lesotho, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Malaysia, Mali, Malta, Mauritius, Mexico, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, Senegal, Serbia and Montenegro, Seychelles, Singapore, South Africa, Spain, Sri Lanka, Sudan, Sweden, Syrian Arab Republic, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Vanuatu, Venezuela, Yemen and Zambia (113). The European Commission was also represented as a member of the Committee, and Palestine participated as an observer.

3. The following intergovernmental organizations (‘IGOs’) took part as observers: United Nations (UN), African Regional Industrial Property Organization (ARIPO), African Intellectual Property Organization (OAPI), African Union (AU), Arab League Educational Cultural and Scientific Organization (ALECSO), European Patent Office (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), *Organisation Internationale de la Francophonie (OIF)*, Organisation of the Islamic Conference (OIC), South Centre, United Nations Conference on Trade and Development (UNCTAD), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Environment Programme (UNEP), United Nations Permanent Forum on Indigenous Issues, United Nations University Institute of Advanced Studies (UNU-IAS), the World Bank, and the World Trade Organization (WTO) (21).

4. Representatives of the following non-governmental organizations (‘NGOs’) took part as observers: Ainu Association; American Folklore Society (AFS); Asia/Pacific Cultural Centre for UNESCO (ACCU); *Asociacion de Conjuntos Folkloricos de la Paz*; Assembly of First Nations; American Folklore Society (AFS); Assembly of First Nations; *Association Tamaynut/Amazigh* People; Berne Declaration; Call of the Earth (COE); Canadian Indigenous Biodiversity Network (CIBN); Centre for International Industrial Property Studies (CEIPI); Centre for Documentation, Research and Information of Indigenous Peoples (DoCip); Centre for Folklore/Indigenous Studies; Center for International Environmental Law (CIEL); Civil Society Coalition (CSC); Friends World Committee for Consultation (FWCC); Consumer Project on Technology (CPTech); *Coordination des ONG africaines*

des droits de l'homme (CONGAF); Council of the Otomi Nation; European Federation of Pharmaceutical Industries and Associations (EFPIA); Ibero-Latin-American Federation of Performers (FILAIE); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Seed Federation (ISF); *Fondation africaine pour le renouveau moral, l'apprentissage professionnel, universitaire international et le commerce électronique, et la coordination des trades points aux Rwanda, R.D.C et Grands Lacs/African Foundation* (FARMAPU –INTER & CECOTRAP –RCOGL); Graduate Institute for Development Studies (GREG); India Confederation of Indigenous and Tribal Peoples North-East Zone (ICITP NEZ); Indian Council of South America (CISA); Indian Movement Tupaj Amaru; Indigenous Peoples Council on Biocolonialism (IPCB); Innu Council of Nitassinan (ICN); *Institut du développement durable et des relations internationales (IDDRI)*; International Association for the Protection of Intellectual Property (AIPPI); International Centre for Trade and Sustainable Development (ICTSD); International Chamber of Commerce (ICC); International Federation of Industrial Property Attorneys (FICPI); International Literary and Artistic Association (ALAI); International Trademark Association (INTA); Jigyansu Tribal Research Centre (JTRC); Kaska Dena Council; Creator's Rights Alliance (CRA); League for Pastoral Peoples (LPP); Maasai Cultural Heritage Foundation (MCHF); Max Planck-Institute for Intellectual Property, Competition and Tax Law; Métis National Council (MNC); Music in Common; Netherlands Centre for Indigenous Peoples (NCIV); New Zealand Institute of Patent Attorneys; International Organization for Standardization (ISO); Russian Association of Indigenous Peoples of the North (RAIPON); Saami Council; Sámi kopijja; International Society for Ethnology and Folklore Studies (SIEF); The Chartered Institute of Patent Agents (CIPA); Third World Network (TWN); Tulalip Tribes; World Conservation Union (IUCN); World Self Medication Industry (WSMI); World Trade Institute (59).

5. A list of participants was circulated as WIPO/GRTKF/IC/9/INF/1, and is annexed to this report.

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

- WIPO/GRTKF/IC/9/1 Prov.: Draft Agenda for the ninth session;
- WIPO/GRTKF/IC/9/2 and WIPO/GRTKF/IC/9/2 Add.: Accreditation of certain Non-Governmental Organizations;
- WIPO/GRTKF/IC/9/3: Participation of Indigenous and Local Communities: Establishment of a Voluntary Contribution Fund;
- WIPO/GRTKF/IC/9/4: The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles;
- WIPO/GRTKF/IC/9/5: The Protection of Traditional Knowledge: Revised Objectives and Principles;
- WIPO/GRTKF/IC/9/6: Practical Means of Giving Effect to the International Dimension of the Committee's Work;
- WIPO/GRTKF/IC/9/8: Recognition of Traditional Knowledge within the Patent System;
- WIPO/GRTKF/IC/9/9: Genetic Resources;
- WIPO/GRTKF/IC/9/10: Peru: Analysis of Potential Cases of Biopiracy;
- WIPO/GRTKF/IC/9/11: Republic of South Africa: Indigenous Knowledge Systems Policy;
- WIPO/GRTKF/IC/9/12: Norway: Memorandum on Documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5;

- WIPO/GRTKF/IC/9/13: Japan: The Patent System and Genetic Resources
- WIPO/GRTKF/IC/9/INF/1: List of Participants;
- WIPO/GRTKF/IC/9/INF/3: Brief Summary of working documents;
- WIPO/GRTKF/IC/9/INF/4: The Protection of Traditional Cultural Expressions/Expressions of Folklore: Updated Draft Outline of Policy Options and Legal Mechanisms;
- WIPO/GRTKF/IC/9/INF/5: The Protection of Traditional Knowledge: Updated Draft Outline of Policy Options and Legal Mechanisms;
- WIPO/GRTKF/IC/9/INF/6: Information Note for the Panel of Indigenous and Local Communities;
- WIPO/GRTKF/IC/8/9: Overview of the Committee’s Work on Genetic Resources; and
- WIPO/GRTKF/IC/8/11: Disclosure of Origin or Source of Genetic Resources and Associated Traditional Knowledge in Patent Applications.

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 Thailand on behalf of the Asian Group, supported by the Delegations of South Africa, on behalf of the African Group, and the Delegation of Switzerland on behalf of Group B, the Committee elected as its Chair Ambassador I Gusti Agung Wesaka Puja of Indonesia, and as its two Vice Chairs, Mr. Lu Guoliang of China and Mr. Abdellah Ouadrhiri of Morocco, in each case for the current and following two sessions of the Committee, and in each case by acclamation. Mr. Antony Taubman (WIPO) acted as Secretary to the ninth session of the Committee.

AGENDA ITEM 3: ADOPTION OF THE AGENDA

10. A draft agenda (WIPO/GRTKF/IC/9/1 Prov.) was submitted for consideration by the Chair, and was adopted by the Committee.

AGENDA ITEM 4: ADOPTION OF THE REPORT OF THE EIGHTH SESSION

11. The Chair submitted, and the Committee adopted, the report of its Eighth Session (WIPO/GRTKF/IC/8/15 Prov 2.).

AGENDA ITEM 5: ACCREDITATION OF CERTAIN ORGANIZATIONS

12. At the invitation of the Chair, the Secretariat introduced WIPO/GRTKF/IC/9/2 and WIPO/GRTKF/IC/9/2 Add, which gave details of the following twelve organizations that had requested *ad hoc* observer status for the sessions of the Committee since its eighth session: intergovernmental organization: Agency for International Trade Information and Cooperation (AITIC); non-governmental organizations: *Actions genre et développement économique et social*/Gender and Economic and Social Development Actions (AGEDES); the Asia/Pacific Cultural Centre for UNESCO (ACCU); the European Network of Traditional Music and Dance (ENTMD); Indigenous Fisher Peoples Network (IFP); League for Pastoral Peoples and Endogenous Livestock Development (LPP); Maasai Cultural Heritage Foundation (MCHF); *Maya To'Onik* Association; Music In Common; New Zealand Institute of Patent Attorneys Inc (NZIPA); *Red de Cooperación Amazonica/Amazon Cooperation Network* (REDCAM); the Sudanese Association for Archiving Knowledge (SUDAAK); *Traditions pour Demain/Traditions for Tomorrow*; and *Coordination des ONG africaines des droits de l'homme (CONGAF)/Coordination of African Human Rights NGOs*.

Decision on Agenda Item 5: Accreditation of Certain Organizations

13. The Committee unanimously approved accreditation of all the organizations listed in the Annexes to documents WIPO/GRTKF/IC/9/2 and WIPO/GRTKF/IC/9/2 Add. as *ad hoc* observers.

AGENDA ITEM 6: OPENING STATEMENTS

14. The Delegation of Thailand, on behalf of the Asian Group, asserted that it was essential to protect the rich cultural diversity in genetic resources (GR), traditional knowledge (TK) and expressions of folklore (EoF) possessed by Member States for the benefit of their people and cultural identity. The Delegation expressed concerns about the phenomenon of biopiracy cases as well as the misappropriation of TK and folklore. In this regard, the Committee should, within its mandate, take a comprehensive and holistic approach to facilitate constructive discussion in order to make progress on the issues related to GR, prior informed consent (PIC) and benefit-sharing, which remain important for developed, developing and least developed countries. The Asian Group welcomed the fruitful exchange of ideas and experiences, beneficial in refining their own national IP protection laws and regulations. Several members of the group were currently in the midst of drafting legislation on the national protection of their TK and EoF. In this connection, the Group called for further assistance and capacity-building from WIPO to assist developing countries build their national capacity and develop policies to protect their GR, TK and folklore. The Group noted that the WIPO General Assembly had agreed to renew the mandate of the Committee and looked forward to make progress on the international dimension of its work. The establishment of a balanced and equitable international protection system that reflected the interests of all Member States was essential to engage all parties involved and to bring about better social and economic welfare. The Delegation supported the establishment of the voluntary fund and requested that financing the participation of indigenous people and local communities in the Committee to be undertaken without discrimination. The composition of the Advisory Board to consider candidates for funding should be based on geographical distribution.

15. The Delegation of Austria, on behalf of the European Communities (EC) and their Member States and the Acceding States Bulgaria and Romania, welcomed the Committee's entry to a third biennium with a renewed mandate and appreciated the progress the Committee had made in the first four years of its work. Especially in the areas of TK and traditional cultural expressions (TCEs), the Committee had conducted extensive technical work on complex questions, which would serve as a good basis for its work in the third biennium. The Delegation observed with satisfaction a progression in the work of the Committee from one biennium to another. In the first biennium the Committee had focused on conceptual groundwork, surveys of relevant existing intellectual property mechanisms, and a systematic assessment of where additional protection was needed. Based on that assessment, in the second biennium the Committee had developed possible solutions which could meet unaddressed IP needs in these areas. During these past stages, the EC and their Member States had always made clear their readiness to support possible outcomes of this work. At the eighth session, they had supported calls for wider stakeholder consultation in the area of TCEs and further development of international *sui generis* models for the legal protection of TK. Entering its third biennium, the Committee should focus on finalizing outcomes of this work, with a view to their adoption. This goal for the third phase was well reflected in the working documents for that session. Paragraphs 9 and 10 respectively of two working documents of that session, WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, invited guidance on three aspects of the Committee's work: The content or substance of any outcome; the form or legal status of any outcome; and the working procedures necessary to achieve the outcomes. On content or legal substance, the EC would like to see certain specific substantive criteria reflected in the content of any outcome of this biennium's work in the Committee. These substantive points included that any outcome concerning GR and TK should be focused on preventing misappropriation and misuse of the subject matter in order to keep an IP focus for the work of the Committee, rather than focusing on other acts or objectives, such as conservation, sustainable use, cultural heritage, biodiversity, human rights or other matters, which were best left to other bodies such as UNESCO, the CBD, the FAO or the Human Rights Commission. Noting the renewed mandate from the General Assembly, the work should continue to focus on the international dimension of TK and TCE protection. The outcome should promote development, in particular rural development, in all countries by valorizing traditional creativity and innovation and goodwill in traditional products, which has often developed over generations. The substantive outcomes should take into account, where appropriate, the existing draft provisions, noting the extensive work, which had been undertaken. The outcome should as far as appropriate include the three substantive parts of the working documents, objectives, guiding and substantive principles, even though it was necessary to work through the content of these drafts step by step in a systematic manner with a view to identifying which parts thereof were ready to be agreed by the end of this biennium. On form and legal status of any outcome, the Delegation took note of the useful background information contained in WIPO/GRTKF/IC/9/6. Paragraph 7 of that document listed several options for the format and legal status of possible outcomes, including a binding international instrument; a non-binding statement or recommendation; guidelines or model provisions, or authoritative interpretations of existing legal instruments. While the Delegation had supported, at the eighth session, the development of international *sui generis* models for the legal protection of TK such as recommendations or guidelines, it continued to have strong concerns regarding a binding international instrument or instruments concerning TK as an outcome for the Committee's work in this biennium. The Delegation preferred to follow established models for non-binding legal outcomes which had already been successfully used in WIPO in the past, such as, for example, the joint recommendations developed by the Standing Committee on Trademarks, and which had been proven to be practical, feasible and realistically achievable within WIPO working procedures. The Delegation stated its

continuing support of the work and outcomes of the Committee and the outcome of other Committees in WIPO, such as the Standing Committee on the Law of Patents and the Standing Committee on the Copyright and Related Rights, which were doing equally important work on advancing on further developing international IP law. On working procedures, the work should be inclusive, systematic, focused on the draft texts, and based on existing working procedures of the Committee. The Delegation therefore supported the suggestion (WIPO/GRTKF/IC/9/4, paragraph 20(ii) and WIPO/GRTKF/IC/9/5, paragraph 21(ii)) to continue the commenting process on the draft provisions with the same procedure that had been used between previous sessions. Besides the finalization of outcomes on TCEs and TK, which was grounded in the extensive technical work that had already been done by the Committee, the Committee should make equal progress in the field of GR. The EC had already tabled several proposals in this regard under Agenda Item 10 on GR, which were contained in WIPO/GRTKF/IC/8/11. The Delegation invited future discussions in line with those proposals.

16. The Delegation of Peru, speaking on behalf of GRULAC, considered that it was essential to assess the possibility of having greater funding so that States were duly represented in the Committee. GRULAC had expressed greater intrinsic interest in participating in the Committee. States had begun work intended to establish, within GRULAC itself, the States which should be financed for each of the committees or negotiating groups based within WIPO and, when the priorities had been determined, most of the countries in GRULAC had expressed interest in having resources available for representatives from national capitals, experts and indigenous peoples to be able to participate in the Committee. Owing to the increasing importance of the subject, the interest it generated in national capitals and the need for groups to be heard in the current forum, it was necessary to see how WIPO could help to finance more than the five representatives who were funded in each of the groups and, specifically, in the Intergovernmental Committee. The Delegation highlighted the importance for GRULAC of the fund set up for the participation of indigenous peoples. It thanked the Government of Sweden for the first contribution it had made to the implementation of the fund, which it was hoped would be repeated by other countries. It considered that it was important already to appoint the representatives for the evaluation of candidates, in order to ensure equal representation of the indigenous peoples that would participate in the meeting. GRULAC viewed with interest the possibility of a joint evaluation, by the Secretariat and the members of GRULAC, of the performance of activities at the regional level. Since 2000, only two representatives had visited the region, despite the fact that it was one of the most active and the subjects discussed by the Committee had been developed more widely at the national and regional levels.

17. The Delegation of South Africa, on behalf of the African Group, confirmed that the African Group would fully engage in working towards achieving the objectives set by the Group on this important issue. On the content and substance to be discussed the African Group took the view that a holistic and all-inclusive approach that recognized the complex interconnectedness of TK, TCEs and GR be pursued as stated in the Committee's mandate. In line with the consensus reached by the Member States to agree on recommending to the General Assembly to renew the Committee's Mandate for 2006-2007, the African Group urged Member States to focus and accelerate discussions with the view to achieving the Group's aim, which was the establishment of a legally binding instrument. In this regard, the Committee's work should achieve outcomes that would be supportive of the sustainable development of African countries. The ongoing negotiations in WIPO and other fora including the CBD must address the issues of concern to Africa in a holistic manner. Furthermore, the African Group called for inclusive approach and without any a priori

exclusion of any issues, so that members participate and grapple with the intricate interconnectedness of IP and various issues related to TK, TCEs and GR. The African Group also welcomed and appreciated the decision by the General Assembly on setting up the Voluntary Fund that facilitated the participation of the NGOs. The African Group supported the principle of the geographical representation on the advisory board of the Voluntary Fund. From an African Group position the following issues were among the core elements of the work to be done in the Committee: protection; beneficiaries; acts of misappropriation; management of rights; terms of protection; exceptions and limitation; PIC; and technical assistance and capacity building (including the issue of registries). The Committee's work sought to bring about practical improvements to the current IP system. To date, it was recognized that it had greatly informed the debate both at the international and national levels and in civil society generally, around issues of the protection of TCEs and TK. The African Group noted with interest the notable and positive development in the work of the Committee, one of the fundamental aspects of which was the international dimension, which did not exclude the elaboration of one or several international instruments. The Group thanked the Secretariat for the quality of the documentation prepared for the meeting. The African Group looked forward to ensuring that the general policy objectives and core principles concerning the protection of TK and TCEs would be fully embedded in the instrument. It encouraged Member States to focus and accelerate discussions with the view to achieving the aim of establishing a legally binding instrument. In this regard, the Delegation added that the work of the Committee should achieve outcomes supportive of sustainable development, including through the ongoing negotiations in other fora including the CBD. The African Group underscored the importance of ensuring that the developmental dimension was well captured in the outcomes of the Committee's work. While considering issues of general policy objectives and core principles the African Group affirmed that the Committee's work should lead to the elaboration of a legally binding international instrument. However, the overarching needs of developing countries should be fully taken on board.

18. The Delegation of China recalled that since the Committee's first session in April 2001, WIPO had made unremitting efforts on the protection of GR, TK and folklore. This process had involved, and had actually been driven by, its Member States. As testimony of such a process, the working documents reflected preliminary results of the Committee's research and deliberations, which helped to give a clearer perception and understanding of the mandates and objectives of the Committee, while providing Member States with a useful basis for more in-depth exploration on related issues. The Delegation highly appreciated the efforts by WIPO and the international community in promoting discussions in this respect, including the Seminar organized in February by the Fridtjof Nansen Institute (FNI) in Norway and the Asian-Pacific Policy Forum on TK and TCEs in India in April, with the Cochin Declaration adopted at the Forum. The Delegation regretted that compared with the first step some five years ago, these preliminary results were undeniably not very impressive, and even unsatisfactory. GR, TK and folklore were not only related to various fields such as environment, natural resources, human rights and cultural heritage, but also of vital importance to the development and improvement of the international IP system. On the basis of the preliminary results so far, the current session should be able to achieve further substantial results as soon as possible. The Delegation pledged its continuous support to the Committee by actively involving itself in its discussions as in past sessions. A reasonable solution acceptable to all had to be found eventually for the protection of GR, TK and folklore, under the aegis of WIPO and with common efforts by all Member States, thus better addressing the concerns and needs of all countries, especially developing countries.

19. The Delegation of Norway explained how the Norwegian government had supported a small, informal meeting on the Committee process. Norway considered the Committee process a very constructive one. However, lately progress had been slow, due to real difficulties but perhaps also due to a lack of focus in discussions. That process overlapped with interrelated processes in organizations like the WTO, CBD and FAO and complicated matters even further. Consequently, Norway had decided to support a small meeting of resource persons to discuss the Committee agenda. They tried to get a regionally balanced representation. Everyone had been there in his/her personal capacity. The idea had been to see if in an informal setting, it was easier to start focussing on where there was possible common ground. In the Committee, the trend had been lately to focus on where one disagreed. The search for common ground could focus on the substance as well as on process. The decision had been to focus on TK and TCE protection and leave aside GR. That did not reflect any lower priority of GR, but a few weeks before the COP to the CBD – where ABS related to GR was a major issue – it had not been considered appropriate to discuss GR in depth. The discussions took place in the Fridtjof Nansen Institute in Lysaker in February. With a diverse group of participants a great variety of voices had been heard. Broad agreement seemed to exist on the following points: The Committee process had been slowing down and it was crucial to have real progress at the following session. The international dimension had to be addressed; though opinions differed as to where the dividing line was between the national and international level. There was disagreement on the form of any outcome of the Committee process, but that did not prevent possible further progress on the contents of such an outcome. The Committee should focus on core issues and try to shorten the list of objectives and principles. With regard to TCE/folklore, a major issue was where international guidance was needed and where the challenges were best left to the national level. The need for flexibility at national level had to be balanced against the indigenous peoples' and local communities' need for internationally agreed standards. Many participants felt that objectives (i), (ii), (iii) and (v) in WIPO/GRTKF/IC/9/4 were the basic elements of TCE protection. However, the prevention of misappropriation of TCEs in objective (iv) should be at the heart of any TCE protection instrument. With regard to TK, the starting point was of course the very recognition of rights as such. Again, a major issue was to sort out elements that needed solutions at the international level versus what could be dealt with nationally. As with TCEs/folklore, the need for flexibility at the national level had to be balanced against the indigenous peoples' and local communities' need for internationally agreed standards. Some elements of TK clearly had to be dealt with by WIPO as a natural core activity. These would mainly be the IP-related issues. Other elements were equally important, but since WIPO should not deal with issues like land rights, frameworks for decision making etc such issues had to be dealt with elsewhere and taken into account in the WIPO process. The need to identify core activities and have a more focused discussion seemed to find approval by participants in the meeting. Obvious core objectives would be IP-related, examples being to avoid misappropriation, repress unfair use, preclude grants of improper IP rights to unauthorized parties, and ensure equitable benefit-sharing and PIC. Other key issues had been objectives relating to meeting the actual needs of TK holders and empower such TK holders, including promoting innovation and creativity, community development and legitimate trading activities, and promoting conservation and preservation of TK and respect for and cooperation with relevant agreements and processes. The Delegation referred to the Norwegian proposed in WIPO/GRTKF/IC/9/12.

20. The Delegation of Indonesia expressed its appreciation to the Secretariat for the quality of the documentation prepared for the discussion and for the sterling work accomplished by the Committee in its efforts to address the issue of the protection and recognition of GR, TK and TCEs. Some common ground had been identified with regard to the various ways in

which better protection systems for TCEs and TK could be established. Therefore, the Delegation was keen to work further toward concrete results. The two drafts on the Protection of TCEs/EoF: Revised Objectives and Principles and the Protection of TK: Revised Objectives and Principles were of great importance. The two documents that constituted the basis for the Committee's work had been improved. Therefore, the constructive discussion of the two documents could be continued with a view to reaching specific conclusions on a possible outcome of the work by the end of the current biennium. On the issue of GR, the Committee's work should be given a specific direction. In this regard, the Delegation appreciated the Analysis of Potential Cases of Bio-Piracy prepared by Peru (WIPO/GRTKF/IC/9/10). The Delegation hoped that this document on Peru's experience in fighting bio-piracy would help focus on specific efforts to find effective measures designed to protect GR from misappropriation and misuse. The participation of indigenous and local communities should be enhanced, as this would certainly enrich the Committee's work by providing a broader spectrum on the complexities and challenges involved. For this reason, indigenous and local communities should be given adequate opportunities to play an active role. In light of that, the General Assembly had established a voluntary fund to support the participation of indigenous and local representatives of accredited NGOs. The Delegation stated its hope that that particular practical measure would effectively enhance the participation of indigenous and local communities. In this connection, the participation of indigenous people and local communities should be free from any discrimination. As for the Advisory Board entrusted with making recommendations on a list of eligible applicants for the Fund, its membership should be composed of persons appointed from among representatives of States and NGOs, based on geographical distribution. The document on Indigenous Knowledge Systems Policy presented by the Republic of South Africa (WIPO/GRTKF/IC/9/11) would be a useful reference for the debate on the protection of the GR, TK and folklore of indigenous people or local communities. With regard to the future work of the Committee, the General Assembly expected the Committee to accelerate its work. To this end, the Delegation wished to underscore the importance of exploring the possibilities of making progress with the renewed mandate period of the Committee. Maximum creativity and flexibility should be devoted toward finding common ground on the various concrete steps that could give effect to the international dimension of the Committee's work. That would undoubtedly accelerate the work of the Committee and culminate in step-by-step practical measures toward a legally binding instrument protecting TCE/folklore and TK from misappropriation and misuse and creating a fair and equitable mechanism for ABS. The Delegation was fully aware of the divergence of views among delegations on certain issues but was also of the opinion that this situation should not prevent the Member States from taking concrete steps to enable the Committee to move forward. Perhaps it was possible to speed up the pace of work by having more focused and structured discussions on the substantive issues. In spite of some differences among the participants/members on the nature and/or the format of the outcome of the Committee's work, the draft provisions on TK and TCEs/EoF constituted an acceptable basis for future substantive work on protection in these areas. In other words, the best way to proceed was to have discussions and reach agreement on the content in the first place, and then discuss the nature and format at a later stage.

21. The Delegation of Kyrgyzstan stated that the work of the Committee established material standards, but was more or less at a deadlock. The discrepancies particularly with regard to TK had to be reduced. The work of the Committee would enable the Member States to make headway. Many delegations had expressed the desire that the Committee took more specific measures and made more tangible recommendations. What was done within the Standing Committee on the Law of Patents (SCP) should be taken into account. Everyone

should be reminded of the important role that was incumbent upon the Committee. People were expecting results, specific recommendations that could lead to the Substantive Patent Law Treaty (SPLT).

22. The Delegation of Mexico said that it felt special satisfaction that the Committee was meeting again, since the WIPO General Assembly had decided, at its previous September-October 2005 session, to extend the Committee's mandate to continue the work that had been entrusted to it, a fact that would demonstrate the interest and willingness of the Member States to further the discussion of the protection of genetic resources, traditional cultural expressions/expressions of folklore and traditional knowledge, in an atmosphere of cooperation and mutual understanding within WIPO. In that connection, the Delegation considered that the Committee should not squander the opportunity to make progress with the work and achieve a result which offered appropriate protection to traditional cultural expressions/expressions of folklore, traditional knowledge and genetic resources. During the week, minimum provisions would be discussed for protection in the international sphere, within the framework of the revised draft policy objectives and core principles, documents which had been consolidated and should not be underestimated, if those results were to be achieved. Furthermore, the Delegation also expressed satisfaction at the adoption of the Voluntary Contribution Fund to stimulate the participation of representatives of indigenous and local communities, as well as traditional custodians and owners who were the main players and beneficiaries in the discussion process within the Committee. Mexico had continually supported the participation of those players and, at various sessions, representatives of Mexican indigenous communities had formed part of the Mexican Delegation, thereby enabling them to express their points of view, concerns and interests, as would continue to be the practice in the future.

23. The Delegation of Japan attached importance to the ongoing discussions in the Committee and recognized that the Committee, due to its expertise, was playing a central role in the important and complex issues of IP in GR, TK and folklore. As the CBD-COP 8 in March had taken note of the work at the WIPO Committee, that Committee had been acknowledged as a body with high expertise. The Delegation expressed its hope that the Committee would live up to such expectations, by recognizing its role as a body with expertise in IP. With regard to TK and folklore, given that many things remained to be clarified and that differences of views among member countries remained large, the Committee should focus its discussion items and concentrate on deepening technical discussions for a fruitful outcome before going into detailed format discussion of this outcome. The situation being the same regarding GR, where numerous basic and technical discussions were needed, such as the sharing of national experiences, Japan had submitted a document titled "Patent System and Genetic Resources" (WIPO/GRTKF/IC/9/13). It elaborated thoughts to positions and activities such as the Japanese guidelines for companies and research institutes regarding access to GR and fair and equitable benefit sharing, Japan's proposal to improve a database to prevent the granting of improper patents, which were exemplified as so called biopiracy and analysis that information of origin was unlikely to affect examination on novelty or inventive step and therefore disclosure requirement itself was not an effective tool against so called "bad patents". The Delegation expressed its hope that that document would contribute to further discussion at the Committee.

24. The Delegation of Australia stated that the Committee had already achieved significant practical outcomes such as amendments to the International Patent Classification to take into account TK-related material and the inclusion of TK-related journals as part of the minimum searching documentation under the PCT. More practical outcomes could be achieved, for

example, through the continuing work on the electronic database of contractual practices and clauses related to IP, access to GR and benefit sharing. Australia was supportive of the 2005 General Assembly decision to extend the mandate of the Committee for the next budgetary biennium thereby allowing the Committee to continue its important and valuable work. The renewed mandate provided a real opportunity for the Committee to progress discussion of the complex issues surrounding IP and GR, TK and folklore, to learn from the experiences of other countries, and to achieve some concrete outcomes. The current meeting should focus on identifying a work program for this mandate that would allow clear achievements to be reported to the General Assembly in 2007. The discussion concerning the issues within the Committee's mandate had been ongoing for many years. On many key issues there was still no consensus. For example, while some members of the Committee had indicated their support for an internationally binding instrument or regime, to date no consensus had been reached within the Committee on substantive outcomes, including the form of such outcomes. While an internationally binding instrument was indeed one of a number of potential outcomes of the work of the Committee, to focus now on consideration of such an outcome was premature in the Committee's deliberations on the issues and would prevent other useful outcomes from being achieved in the meantime. There were appropriate ways to progress work within the renewed mandate. The Committee should focus on substantive matters where there was already a convergence of views. Australia was pleased to hear the Ambassador of Norway outlining the outcomes of the seminar his country hosted and to see the discussion and proposals in the paper put forward by the Delegation of Norway (WIPO/GRTKF/IC/9/12) especially the discussion at paragraphs 14, 15 and 16. The paragraphs suggested that the Committee should focus on the common ground it had already identified as core principles and policy objectives in relation to TK and TCE and reach agreement on them. This agreement could be taken to the General Assembly in 2007 for noting and adoption. Such an outcome would both send clear signals to governments and civil society on the issues that had been discussed and also provide an important basis to take policy development further. This sort of approach had been used successfully in progressing the development of international law and the Norwegian paper cited some recent successful use of this approach in trademark law. The key element in this suggestion was that the Committee should focus on where there was agreement and not on the areas that divided its members. At the eighth meeting of the Committee, Australia expressed its concern with the presentation of the Substantive Provisions in 'treaty-like' text in the drafts of the Policy Objectives and Core Principles paper. Since these had been reproduced without amendment in this year's papers, the Delegation reiterated concern that the basic elements for any form of proposed protection as contained in the Policy Objectives and General Guiding Principles, needed to be discussed fully before the Committee could begin detailed consideration of the Substantive Principles. The Delegation therefore looked forward to further constructive discussion about the Objectives and Principles in WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. That discussion would form the basis for reaching agreement on these Policy Objectives and Principles and, if the suggestion put forward by Norway in paragraphs 14, 15 & 16 in WIPO/GRTKF/IC/9/12 was adopted, would form the basis for taking an agreement to the General Assembly in 2007. Under this renewed mandate the Committee could achieve real and concrete outcomes. Australia sought the cooperation of other Committee members to fully explore and discuss the issues before it and to help ensure that these very important issues could be advanced and that real progress could be made.

25. The Delegation of the Republic of Korea thanked the Secretariat for preparing excellent documents for the meeting. They were substantive and worthy of continued development and consideration. But despite the efforts that had been taken over the past few years, there was an insufficient consensus on the matter, especially on the substantial aspects. A wide gap

remained among members on major issues such as the nature, scope and elements of the international dimension related to the protection of TCEs, TK and GR. The Delegation welcomed the proposal by Japan and some other Member States, which would hopefully help accelerate and make the discussions more efficient and productive. The Delegation encouraged Member States to remain open minded and adopt a balanced point of view that would enable all Member States to benefit from GR, TK and TCEs. The work of the Committee should move forward while still respecting the diverse nature of Member States' interests.

26. The Delegation of Peru expressed its thanks to the Ambassador of Norway. Peru had had the opportunity to participate in the dialogs and consultations which had been held in Norway. The Delegation thanked the Ambassador not only for his hospitality but also for the opportunity to share its opinions and experiences on subjects of such importance. The dialog had been quite productive and Peru considered that such an informal meeting had helped to clarify some of the subjects. It hoped that the meeting would serve as a kind of stimulus for countries to be able to reach a consensus on the matter. The Delegation considered that owing to the emergence of majority opinions on a possible consensus, work should begin on subjects that had been developed and on which basic documents existed. It thanked the Secretariat for providing those documents which were quite well developed and which could already serve as a basis for the possible drafting of a legal instrument. The Committee had been set up five years previously in order to find an immediate solution to a problem related to patents. Regrettably, it had not been possible to reach a consensus although, after five years, in two areas of equal importance represented by traditional knowledge and folklore, there were documents which gave a better idea of what work could be done during the current mandate. The Delegation had been able to approve the mandate with the vision that in the two years remaining until the 2007 General Assembly, specific results could be achieved. It was not only the delegations or States but also the indigenous peoples that were present and participated actively which believed that a positive result could be achieved and saw the need to arrive at such a result. That was a subject which should not be developed in the same way as, for example, the declaration by indigenous peoples which had been negotiated for almost 20 years or more as part of the negotiations on human rights. They were specific and technical subjects, on which a majority opinion already existed regarding the positive step that could be taken by adopting legal instruments that provided security for indigenous peoples that their traditional knowledge could be protected. WIPO had a major responsibility not only to States but also to national indigenous peoples. The Delegation appealed to the delegations that considered it was still too early to discuss the matter to reconsider their position. The texts that had been produced by the Secretariat could rightly serve as a basis for future negotiations at a diplomatic conference or within the mechanism to be established, but with the final aim of adopting a relevant binding legal text.

27. The Delegation of Colombia thanked and congratulated the Secretariat on the quality of the documents provided for the current Committee session. The Government of Colombia considered the work done by the Committee to be of great worth and, for that reason, the extension of the mandate by the previous Assemblies was an opportunity to accelerate the work and achieve specific results in each of the Committee's spheres during the current biennium. The Delegation viewed with concern the fact that the Committee was becoming a compiler without reaching agreements or producing specific proposals on the subjects that were being discussed and developed. The Committee should make rapid progress with the aim of producing model intellectual property standards applicable within the framework of protection for traditional knowledge and genetic resources. It should also move ahead with the preparation of a binding international instrument for the protection of expressions of

folklore. The Committee's fundamental aim at that stage should be to devise and reach agreement quickly on appropriate international legal mechanisms for achieving effective protection by means of the following specific instruments: model intellectual property standards or clauses for the protection and preservation of traditional knowledge, model standards or clauses to be incorporated in contracts for access to genetic resources and protection standards contained in a binding international instrument for the protection of expressions of folklore. The Delegation highlighted the successes achieved by the international community as part of the Convention on Biological Diversity (CBD), within which the decision had recently been adopted to make rapid progress on negotiating international rules on access and benefit-sharing. In that context, it was of fundamental importance for WIPO and the Committee to strengthen cooperation in order to contribute more effectively to the work of the CBD, in particular in relation to the aspects of intellectual property to be incorporated in future international rules on access and benefit-sharing.

28. The Delegation of Pakistan considered that the issues discussed in the Committee were of great importance to Pakistan, since it was uniquely rich in TK and folklore. Very extensive and exhaustive measures had been undertaken in preserving and protecting TK and folklore, but Pakistan was confronting major limitation in that work, namely that Pakistani GR, TK and folklore were being rapidly and ongoingly misappropriated, an experience shared with other developing countries. Pakistani TK and folklore were commercially exploited mostly beyond the national territory and therefore urgently required international protection for TK and folklore, in order to ensure benefit-sharing before being exhausted. Pakistan tried to use conventional IP rights for that purpose, such as copyright, trademarks, industrial designs and even patents, but had found that they did not cover the TK or folklore adequately, because they required novelty and originality. It was difficult for communities to access these systems and exercise rights. Communities were not able to enforce their rights, even if they were able to acquire any. Therefore, the Delegation called for a *sui generis* form of protection. For the many reasons and national experiences outlined above, the outcome of the Committee work had eventually to be a set of binding legal instruments or a single instrument on GR, TK and folklore. At the same time the Delegation recognized the complexity of the Committee's work and stated its willingness to consider a step by step approach to this matter, as long as it remained clear that the outcome was a binding international instrument or instruments on GR, TK and folklore. This organization had the prime responsibility to discuss these issues and it was at that forum that from that these issues should be given a concrete shape in the interest of the balance system. Pakistan intended to develop such *sui generis* protection in any case - both nationally and internationally - because its TK and folklore deserved it. The Delegation welcomed recent work and progress, such as in UNESCO, the CBD, the WTO and UNCTAD. The Delegation appreciated the work that Committee had done, even though had been too slow and had spent too much time in discussion. Furthermore, Pakistan was in the process of development of a TK Digital Library for the protection of TK and needed the exclusive technical and financial support of WIPO and other countries.

29. The Delegation of Brazil stated that this exercise should be framed, not as some delegations may have mentioned it in the sense of solving an issue which was an issue of patent quality as such, but of how the IP system could become an instrument to assist members in implementing the objectives of the CBD. It was not exclusively a question of patent quality, but a response from the patent system that would provide Members with an adequate instrument for attaining the objectives of the CBD, which was another multilateral system equally legally binding that should also be enforceable including with the assistance of the patent system. The patent system should not undermine fulfilling the objectives of the CBD by its members. The renewed mandate proved to be quite adequate because it was very

broad and indicated that the work of the Committee should focus on the consideration of the international dimension of the issues of GR, TK and folklore without prejudice to work pursued in other fora. Another element in the mandate was that no outcome was excluded including the possibility of developing an international instrument or instruments that were legally binding. There was no international instrument developed in the field of IP at WIPO that was not legally binding. If the instrument was not legally binding it would not solve the problem of the international dimension which was the center of concerns according to the mandate. On that basis Brazil had supported extending the mandate of the Committee for yet another two years in spite of the fact that in many respects work had been slow to progress. Progress had been critically low in regard to GR, to the point that this subject matter was practicably not discussed any more in the Committee. Discussions on GR in its relationship to IP had broadened and become more in depth in other fora. For example, in the Doha round of trade negotiations, discussions on the issue of the relationship between TRIPS and CBD had gained more momentum and become more substantial in a way that the discussions have progressed there. Prospects for an outcome in the WTO looked more promising than in WIPO if the analysis was based on what happened in the last two or three years in the Committee. There were other elements on the agenda, TK and folklore. The documents prepared by the Secretariat for which the Delegation was very grateful were basically the same texts as before. For work to progress and achieve any meaningful outcome the Committee had to proceed with the examination of these documents in their integrity. The Delegation did not support picking and choosing segments of these documents as a basis for carrying forward the mandate. It was a mandate of a general nature. It did not preclude any outcome and it did not shortlist any possible elements that members may wish to put forth for a multilaterally agreed solution to the issue of misappropriation of TK and folklore. Work had to go on an inclusive basis, and take into account the entirety of documents prepared by the Secretariat, not only the policy objectives and commentary, not only the guiding principles and commentary, but also the substantive provisions and commentary. Without the third part, the other two would be of very little relevance to the problem at hand. The Delegation did not favor *a priori* limiting the scope of work to e.g. sharing/considering national experiences as this was not enough. The international dimension could not be discussed by addressing oneself only to specific national experiences. This work was without prejudice to other fora. The TRIPS Council and the CBD were both discussing the issue of the relationship between IP and biodiversity. The negotiations for the international regime on ABS in the framework of the CBD in which for example provisions regarding disclosure were being negotiated were ongoing and the Committee should follow the same line. Work in other fora was progressing and the Committee was a little bit left behind. This was a pity because it was a committee of WIPO and the disclosure requirement for GR was an issue related with IP. It was a pity that the body that dealt with the issue was not capable of demonstrating an equivalent amount of work both substantially and in terms of progress compared to other bodies that did not have IP as a main subject matter. Refocussing the work simply on national solutions had been attempted before. The Bonn Guidelines, which had been produced by the sixth COP of the CBD, encouraged parties to adopt in their national legislation among other provisions the disclosure of origin. After some time following the adoption of these guidelines, very little had resulted from this encouragement or best endeavor type clause. Flexible, non-binding elements had proven not to be enough to address the international dimension of the problem of misappropriation of elements of biodiversity through the granting of IP rights. The Committee should adequately deal with the subject through an international mechanism, a treaty that was legally binding that would address not only policy objectives, guidelines, principles, but also substantive provisions. Regarding the SCP and the patent harmonization discussions, Brazil was in favor of proceeding on the basis of an inclusive process that would include not only issues of interest to some parties, but

issues of interest to all parties. The possibility of success would lie in the capacity to proceed without prejudging the outcome, before actually beginning with discussions.

30. The Delegation of the United States of America recalled that it had consistently supported the Committee, as it was the most appropriate forum for discussing IP as it related to GR, TK and folklore. The expertise of the Committee allowed it to address those difficult issues in a meaningful way. The Committee had made significant accomplishments since its inception, on projects that included PCT minimum documentation, amendments to the International Patent Classification, an agreed international data standard for TK databases, and a collection of standard contracts that may be used to regulate access to GR and TK. The Committee continued to clarify misconceptions related to its subject matter. Furthermore, the continued elaboration of the policy objectives and guiding principles related to TK and TCEs in WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 was an accomplishment in and of itself. The Delegation expressed its willingness to continue the positive momentum of the Committee. In order to maximize the productivity of the Committee, it had to focus on areas of convergence, continue to draw from the rich body of successful national practices and move forward in a meaningful, incremental fashion. South Africa had tabled a very constructive policy document (WIPO/GRTKF/IC/9/11) that was intended to affirm, recognize, protect, promote and develop indigenous knowledge for the purpose of economic growth and development. The Delegation expressed its hope to contribute to South Africa's work by sharing some of the work that the United States of America had been doing to protect TK and TCEs against disappearance. Constructive proposals had been tabled by Japan on TK databases (WIPO/GRTKF/IC/9/13), and Norway on further elaborating and narrowing the draft policy objectives and guiding principles related to TK and TCEs (WIPO/GRTKF/IC/9/12). These proposals deserved full consideration. The Delegation was impressed by the diversity and complexity of the concerns that were presented to the Committee by indigenous representatives at the panel presentation, but believed that there would be no single solution to all of these concerns. After gaining greater convergence on policy objectives and guiding principles, the Committee would be in a position to collectively decide upon the most appropriate way forward.

31. The Delegation of Canada looked forward to working cooperatively and constructively with all other Member States and observers over the following two years to realize the terms of the mandate. There was a real opportunity for the Committee to do useful work during the renewed mandate. The Delegation encouraged the Committee to explore it more fully during the course of the Ninth Session. For some time, many Member States, developing and developed countries, had stated that the WIPO Committee was the pre-eminent multilateral forum to discuss and work upon issues relating to the IP protection of TCEs, TK and GR. Canada based its own statements supporting the work of the Committee on the unique technical expertise that rested in the entire Committee, in its Members States, observers, and the excellent Secretariat. This expert-based knowledge made the Committee particularly capable of contributing to, and raising, the level of international understanding in that area. At the Eighth Session, Member States had collectively recommended to the WIPO General Assembly that there was broad support in the Committee for its future work. Based upon that recommendation, the 2005 General Assembly had renewed the Committee's mandate. It was the obligation of the Members of the Committee to give deeper meaning to that renewal, recognizing that the form and legal nature of any possible outcomes from the Committee still required considerable discussion. One way would be to begin a dialogue at the ninth session on the process forward in all three Committee areas, TCEs, TK as well as GR. A discussion early on in the new mandate on how the Committee could reasonably and collectively proceed on points of convergence on all three pillars could only help structure future dialogues on

matters of substance. It could also assist the Committee in ensuring that the many issues and concerns on the table were addressed in a time-efficient and balanced manner. In terms of considering particular ways forward on the issues of TCEs and TK, the Delegation welcomed all of the comments made that day, in particular by the Delegations of Norway, Australia and Japan. These three suggestions were a good basis for starting the kind of process discussion useful at the Ninth Session. There were elements in the Norwegian, Australian and Japanese proposals which had merit and deserved the Committee's further consideration. The Delegation encouraged the exploration of those aspects of the Norwegian and Australian proposals which would deepen the dialogue on the international dimension of the Committee's work in a way that was consistent with the Committee's mandate. Paragraph 14 of the Norwegian proposal (WIPO/GRTKF/IC/9/12) was particularly helpful in this regard. It would be a more fruitful and efficient use of the Committee's time to focus on those areas where there was potential for agreement and shared understandings, rather than getting dragged into discussions where there was significant divergence. The Delegation agreed with the Norwegian comment that the future work of the Committee on TCEs and TK could reasonably draw from some of the existing draft policy objectives and guidelines, particularly those where Member States had already indicated that there was common ground. The Delegation further supported the notion of Paragraph 19 of the Norwegian proposal that the Committee should, when analyzing the draft policy objectives and guidelines, consider how they related to the current international IP framework, while acknowledging its existing limitations. The IP-focussed type of analysis was not only consistent with the Committee's mandate, but would also make greater use of the specific expertise and capacity of Member States, observers and the Secretariat in this area. With regard to elements of the Norwegian proposal which dealt with the possible development of an international norm based on Article 10 *bis* of the Paris Convention, Canada was still in the early stages of analyzing this suggestion. Nonetheless, the Delegation expressed that it would welcome hearing more from Norway and other Member States, who may have implemented this approach to protecting TK domestically about their national experiences. As this was a complex issue and required further consideration, a more informed discussion could help Member States analysis of this proposal and its possible implications. The Delegation welcomed the suggestion for the Committee to do practical and technically focussed work that could help prevent the misappropriation and misuse of TK. Enhancing the quality and interoperability of existing TK databases may be helpful in this regard, particularly in ensuring patent examiners have useful and reliable info at hand when examining prior art. While the Committee's work on TCEs and TK was more advanced than its efforts on GR issues, the Committee's continued analysis in all three areas was important. To that end, Member States should take the opportunity at this Ninth Session to also consider developing a structured and technical work plan on GR. That kind of road map would help answer those who claim that the Committee was not fulfilling its mandate on GR. Very practically it could also help Members get a better understanding of the issues in this area that needed to be addressed during this mandate, the objectives Member States considered desirable and possibly achievable by the end of this renewed mandate, and the timelines and deliverables which would be reasonable in this context.

32. The Delegation of India associated itself with the statement made by the Delegation of Thailand on behalf of the Asian Group. The Committee had now been meeting regularly for a long time. While there was no doubt on the progress that had been made in these deliberations, it was time for the Committee to move into a more substantive phase. The Delegation thanked the Secretariat for the excellent background documents circulated in the preparation for that meeting. A large amount of detailed research and analytical work had already been undertaken, but it had not been possible to achieve substantially what the

Committee had set out to move towards, namely, to create a set of internationally binding instruments to provide protection to TCEs which formed the subject matter of the Committee.

33. The Delegation of Honduras expressed gratitude for the work done by the Secretariat in preparing the different documents which it had provided for discussion by the Committee. It thanked various delegations for their contributions which had enriched the Committee's discussions, and in particular the Delegation of Norway which, in the document submitted to the current meeting, had produced some positive aspects which could be considered and discussed, although it considered that those aspects were positive in general terms. The Delegation acknowledged that that could be achieved only if a number of other aspects, as referred to below, were taken into account. That was a subject of the utmost importance for Honduras, as it had made clear in different previous meetings of the Committee, as well as in the statement that it had made to the previous WIPO General Assembly in 2005. On that subject, the Delegation wished to share its opinions, as had already been mentioned by other delegations, and mainly to refer briefly and clearly to four aspects which the Committee should consider: the focus of the Committee's work, the nature of an outcome to be considered, the aspects to be considered in a different forum and the final result. With respect to the focus of work, a number of advanced projects already existed, mainly areas existed in which the Committee could reach a consensus regarding traditional knowledge and traditional cultural expressions. However, although it held that position with respect to focussing the work on aspects which had potential for understanding, it also recognized that both traditional knowledge and traditional cultural expressions had aspects directly related to genetic resources and which should be considered for their inclusive treatment. As to the nature of an intermediate result, it was important to consider such a result, irrespective of its nature or status, and it was necessary to reach some kind of understanding between the Member States. That would give some kind of basis to be able to continue subsequently into the second stage. As for the aspects that should be dealt with in a different forum, the Delegation considered that it was important to point out that the nature of the issues to be examined should retain their relationship with access and benefit-sharing, which were matters that had recently been discussed within the Convention on Biological Diversity (CBD). As for the final result, it considered that if, owing to the nature of the issues, they were within the remit of other fora, then as proposed by a number of countries, it would be appropriate to study the future establishment of an international legal instrument to tackle the issues relating to traditional knowledge, traditional cultural expressions and genetic resources. On that basis, the Delegation made clear its cooperation so that, at the end of the session, the Committee could achieve a specific result.

34. The Delegation of Thailand endorsed the statement made on behalf of the Asian Group. It considered the prepared Policy Objectives, Guiding Principles, and Substantive Provisions on TCEs/EoF and on TK to be useful, and believed they would serve as a firm basis for further development. The discussions of the Committee should eventually progress towards a legally binding international instrument in the future. The Committee had a strong role to play in realizing the issues of disclosure of origins related to GR, TK and TCEs/EoF, with PIC and benefit sharing. The Delegation expressed hope that the Committee would continue to move towards further attaining such objectives in due course. The Delegation stated that Thailand has benefited greatly from technical cooperation with the Secretariat, both in the exchange of views and knowledge sharing, and from expert assistance in various areas, ranging from legal development to capacity building. In particular, the support from the Secretariat given to the Asia-Pacific seminar held in Bangkok last December had contributed to the significant progress of work in the area of inventory making of intangible cultural heritage. The Delegation called for the continuation of such cooperation, especially in further

capacity building, to help developing countries protect their TK, TCEs/folklore, and cultural heritage in general.

35. The Delegation of the Islamic Republic of Iran associated itself with the statement made by the Delegation of Thailand on behalf of the Asian Group. The Committee, with its slow progress, had had considerable achievements during the eight past sessions. At this stage, there was enough material as a base for discussion. Therefore it was time for the Committee to accelerate its work, with a tangible and concrete result. The interrelation between GR, TK and folklore should be considered in addressing the objectives, principles and substances of articles. The norm-setting nature of the Committee and six years of discussion and exchange of views required moving towards simplification and a defined framework, in particular with regard to the international dimension as repeated concerns of developing countries. To meet this goal, different alternatives had been suggested, including the current proposal made by the Delegation of Norway (WIPO/GRTKF/IC/9/12). The Delegation welcomed the positive endeavors and initiative of the Norwegian Delegation for presenting the current proposal and looked forward to their proposal on GR, as indicated in the document, to evaluate the process as a package. The Delegation expressed readiness to discuss the proposals, constantly with a view of concluding a legally binding instrument. Within that framework substance and format should be discussed together and procedure should complement the process.

36. The Delegation of Switzerland maintained that the issues GR, TK and folklore should be addressed with by the competent international forum, that was, in particular, WIPO. The Delegation welcomed the decision of WIPO's General Assembly to extend the mandate of the Committee for a further two years. This would allow the Committee to continue the important work carried out in its first eight sessions, and to possibly take up new tasks. The Committee should focus its work on areas where there was potential for agreement. This applied in particular with regard to WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, the documents containing the revised policy objectives and principles of the protection of TCE and TK. The Delegation considered it to be important that the Committee continued to collaborate with other relevant international fora, including in particular the CBD, FAO, UNCTAD and UPOV, and to provide substantive and substantial input to the work of these fora.

37. The Delegation of Egypt thanked the Secretariat for the important documents it had produced. The Delegation attached great interest to the subject under discussion and hoped that the Committee would continue to work in a more productive way so that an international and legal binding instrument could be produced to protect TK and TCEs. These issues had been discussed in Egypt and had been included in the law on IP, which stipulated that if an applicant asked for registration of a patent the applicant had to prove the origin of his invention. Egypt was practically at the concluding stage of preparing this bill. The issues that were dealt with in other fora should not prevent the Committee from continuing its work in order to devise a binding legal instrument to protect all these subjects. In the statements during the eighth session the Delegation had justified the reasons why there should be a sui generis system for the treatment and protection of these three issues.

38. The Delegation of the Syrian Arab Republic thanked WIPO for the preparation and distribution of the working documents of the meeting. The absence of translation into Arabic of the presentations was contrary to WIPO's Rules of Procedure. The Delegation referred to the region, and, in particular, the Syrian Arab Republic, as not only a land of war, but also a region rich with TK, GR, medicinal plants and folklore. Such wars could be justified by the fact that the party that had lost its land was seeking to restore it from those who had stolen it.

The Delegation emphasized its wish to avoid war and seek, as part of its strategy, a fair and comprehensive peace based on international resolutions. The Delegation described the Middle East region as the home and starting point of all monotheistic religions, the land that witnessed the rise of the first human civilizations that established science and law, the land of culture, the alphabet and the Ougarit scriptures found near the present coastal city of Latakia. In view of the wealth of the country in GR, TK, handicraft industries, medicinal plants and national folklore, the Delegation attached importance to the meeting, which was entrusted with task of exploring material faced with the risk of erosion and piracy. Particular mention was made of the variety of needle crafts, normal and color glass making, ceramics, mosaics and other arts which were less and less used by enterprises due to lack of craftsmen in the relevant art and a break in the chain of generations. There was a need for international assistance to establish specialized training institutes for young people that would ensure the sustainability of such crafts under the exclusive supervision of the Ministry of Culture. Reference was also made to the famous damask fabrics, a craft that was still actively attractive to tourists. As far as medicinal plants were concerned, such existing plants had not been identified, indexed or classified and were little known; international assistance was therefore needed for the maintenance and safeguard of such TK. In that regard, the Delegation underlined the role of WIPO and a possible fact-finding mission that could help in ensuring sustainability for such TK in the interest of its custodians, while other nations could make use of that knowledge, with the prior consent of the legitimate custodians; that was how justice and equality could prevail among nations by benefiting from, rather than infringing the rights of, one another. The Delegation requested that the fact-find mission adopt an integrated approach that included (i) participation of indigenous custodians of TK and international organizations concerned with human rights, UNESCO, FAO as well as other interested international organizations; (ii) field visit tours to identify needs for international assistance under the local supervision of the Ministry of Culture; (iii) identification and classification of medicinal plants and handicrafts to be preserved; (iv) the right of indigenous peoples to defend their TK, as part of their identity that was constituted by ancestors, should be preserved and protected, with the help of WIPO, from infringements. The Delegation called for international legal protection, to be provided for such TK, GR, medicinal plants and folklore from any use without prior consent of the indigenous custodians.

39. The representative of UNU-IAS stated that the mandate of the UNU, as an official part of the UN, was to provide research and training on emerging issues for the UN system. UNU aimed to provide policy relevant information and analysis in a neutral and impartial manner. As an official part of the UN, it provided a unique bridge between the academic community and the workings of the UN processes. It was based in Japan and with centres in thirteen countries. An important focus for UNU's work related to indigenous and local communities. The Committee was of interest as the UNU had been working on several initiatives that aligned well to its work. It contributed to the work on TK registries and had supported the Call of the Earth. A new initiative was a project to explore the feasibility of establishing an UNU research centre on TK with the aim to provide international leadership and a focal point for promoting research, training and capacity-building on issues regarding the retention, maintenance and promotion of TK. Such a centre could support and strengthen research in TK, work on practical ways to address the threats to TK and provide an additional platform for indigenous people to provide their views to UN processes such as WIPO. Preliminary scoping work had been undertaken on establishing a centre similar in size to other UNU Research and Training Centres, which typically consisted of a small core team of around ten academics, ran a PhD and post-doctoral fellowship program and had close links with relevant local academic institutions. Preliminary investigations concluded that: there was wide-spread support for the idea; it was timely and feasible; and an UNU Research Centre could make a

constructive contribution on this topic. In December 2005 the Council of UNU (the governing body) considered the results of this preliminary investigation and concluded that there were sufficient reasons, interest and support for an UNU initiative on TK. The Council therefore requested the Rector to carry on working on this initiative. In February 2006, UNU had invited a range of stake holders, including the Secretariat and indigenous peoples, to provide their views about the mandate, structure and location of the TK centre. In order to structure these comments, UNU prepared a background document on these topics, which outlined the range of activities and topics that UNU could make a contribution on, such as: medicine and health; access to GR, benefit sharing and IP; science: options for connecting TK and “western science” and its application to development and conservation; and agriculture, forests, plant GR. An open invitation to comment on the initiative was available at www.ias.unu.edu in English and Spanish.

40. The representative of ARIPO thanked the Secretariat for the excellent documentation prepared for the session. A number of delegations had expressed concerns about the manner in which the Committee had conducted its business, particularly regarding the slowing down of the process and avoiding discussions on substantive issues that were critical for international norm setting. One again, the General Assembly had extended the Committee’s mandate for another two year period within which the Assembly expected concrete outcomes and deliverables by 2007. During the course of the Committee’s work, a number of delegations present in the room that day 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. ARIPO noted with satisfaction the number of national and regional systems that had been developed and were being enforced in the various jurisdictions. Furthermore, a number of steps had been taken on matters relating to defensive protection including the inclusion of codified TK in the PCT minimum documentation, the IPC and development of guidelines and toolkits on initiatives for TK registers and databases. Extensive revisions had also been carried out with respect to the policy objectives and core principles contained in WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 through consensus building and consultative processes. All these efforts were aimed at ensuring that an appropriate and effective instrument was put in place to prohibit and repress the misappropriation of TK and curtail the alarming rate of biopiracy. The adverse impact that the lack of a comprehensive international normative framework was having on biodiversity, TK and folklore was that communities were losing control over their own bio-resources and were being increasingly exploited for their knowledge. While ARIPO shared the view that careful consideration and clarification would be needed to chart the way forward in determining the nature and form of international framework that would be needed for the protection of these resources, ARIPO believed the Committee should equally take a bold step towards elaborating an international instrument, which was one of the expected key outcomes of the Committee. The inability to achieve this noble task within the shortest possible time would deprive the majority of the people in the so-called developing world the areas where they had comparative and competitive advantage. ARIPO therefore called on the Committee to discuss the revised objectives, guiding principles and substantive provisions contained in WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 in an holistic manner and in tandem without limiting discussions to areas where there was potential for agreement and convergence. After all, these objectives, principles and substantive provisions had been distilled from the existing legal mechanisms and experiences at the national and regional levels, and had also been drafted in a manner that leaved open and facilitated future decisions and considerations concerning the international dimension of the work of the Committee. The representative requested that a win-win approach in determining the deliverables of the work of this

Committee be adopted. Over the past three years, ARIPO had redoubled its efforts in establishing mechanisms aimed at the development of appropriate legal framework for the protection of GR, TK and folklore. Two years ago, ARIPO had prepared an integrated policy framework for the protection of these resources. 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 elaborate regional strategies for the prevention of misappropriation and bio-piracy and promote utilization and exploitation of the resources for the benefit of the right holders. ARIPO and its 16 Member states had moved a step further to come up with a draft legislative framework for elaborating African instruments for the protection of TK and folklore. Its sister Organization, OAPI, had also developed similar framework and the two organizations had held consultations to produce one harmonized framework which would form the basis for regional processes for the development of African instruments. In the case of ARIPO, the harmonized framework had been adopted by the Council of Ministers of the organization at its Tenth Session held in Kampala, Uganda from November 17 to 18, 2005. It was therefore 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. ARIPO associated itself with the statement made by the delegation of South Africa on behalf of the African Group.

41. The representative of ALECSO expressed interest in the subject matter of the Committee which reflected the interest of the 22 member states of the League of Arab States in the preservation of GR, TK and folklore, mostly recently by Ministers of Culture during the meeting held in December in Yemen which adopted a decision addressing all Arab countries to establish a database for TK and TCEs and to prepare a draft convention for the protection of TK and folklore. This was no recent development as it was part of the Arab cultural strategy which ALECSO had been advocating ever since the 1980s and which had been approved by the Council of Ministers of Culture in 1989. The strategy emphasized that “the Arab heritage is old, cumulative, leaving which reflects the national conscience and therefore is not only a cultural factor but owed to be viewed as an element of unity and creativity at the same time. Folklore should also be regarded with all its spiritual and material manifestations as one unit based on common pillars in terms of style and content.” In this context and in the implementation of the recent conference of the Ministers of Culture, ALECSO had organized a meeting of experts in December 2005 in Cairo in order to prepare for the establishment of a database and to collect TK and folklore in the Arab States. It had commissioned a number of folklore and legal experts to prepare a draft Arab convention and a model law for the protection of TK in the Arab states. This convention would be ready for discussion later in the month and would be sent to the various Arab states for comments. ALECSO would also be organizing next year a training course on the database and on folklore data compilation in order to update and coordinate the work amongst the Arab states and would also continue the work on the preparation of the proposed convention. ALECSO looked forward to the deliberations of the Committee and the leading role played by WIPO and hoped to consolidate relations with WIPO. The representative hoped the work that was being done at a regional level to draw up a convention for the protection of folklore in the Arab states would constitute a step towards a legally binding international instrument that the Committee would lead to.

42. The representative of FAO recalled that FAO’s prime concern was to work for a world free from hunger. This was a moral imperative for our times, without which there could not be development and peace. Millennium Goal 1, “Combating poverty and hunger”, reaffirmed that World Food Summit Goal of reducing by half by 2015 the some 800 million people who currently go hungry. Hunger was both a cause and an effect of extreme poverty. It prevented the poor from taking advantage of development opportunities. Agricultural biodiversity was

the basis of food production. Since the 1970s, FAO, in partnership with other relevant organizations, had led international efforts to conserve and sustainably use plant and animal GR for food and agriculture. The important questions of access and benefit-sharing were of crucial interest for the food and agriculture sector. For FAO, the over-riding objective — including in relation to access and benefit-sharing — must be to achieve Millennium Development Goal 1. The sustainable utilization of GR for food and agriculture was the *sine qua non* of food security and poverty eradication, especially in rural areas. In the food and agriculture sector, access and benefit-sharing was not an abstract thing, but could impact directly on life and death, and on national development in the poorest countries. This was why FAO's member countries gave such importance to the work of the intergovernmental Commission on Genetic Resources for Food and Agriculture, and subsequently negotiated and adopted the International Treaty on Plant Genetic Resources for Food and Agriculture. The International Treaty was a key instrument, which recognized the crucial importance of plant GR for food and agriculture in the fight against hunger. The Treaty covered all plant GR for food and agriculture. However, the core of the Treaty was its multilateral system of ABS, which countries, in exercise of their sovereign rights, had decided to establish. He gave a brief update on the status of the International Treaty, which was adopted by the FAO Conference in November 2001 and came into force in June 2004, after the deposit of the 40th instrument of ratification, acceptance, approval or accession. As of that day, 99 countries had deposited the relevant instrument and became parties to the Treaty. A number of other countries were preparing to do so in the very near future. This unusually rapid ratification process showed the importance that governments were giving to the Treaty, as a legally binding instrument addressing plant GR for food and agriculture. The first meeting of the Governing Body (GB) of the Treaty would be convened in June in Madrid and would take a number of very important decisions, including on the Standard Material Transfer Agreement (SMTA). The Second Meeting of the Contact Group for the drafting of the SMTA was being concurrently held in Alnarp, Sweden, and the draft SMTA would be presented to the GB for its consideration at its first meeting. The FAO was pleased to note that WIPO had given its full support throughout the work of the FAO on the conservation and sustainable use of agricultural GR, and associated benefit-sharing. It had recognized the specificity of the problems in agriculture and livestock production, and the need for specific solutions. FAO wished to further strengthen and deepen this cooperation, in mutual respect for the respective mandates. FAO would continue to explore with the Secretariat ways in which this could be achieved, because they believed that this was necessary for the effective management of agricultural biodiversity. The work of WIPO in the context of GR and, more specifically, in the context of this meeting, in the area of ABS, was of particular interest to the FAO. This was why FAO had consistently participated in the meetings of the Committee. FAO would continue to offer its help with the objective of seeking continued complementarity and synergy between the respective activities, including through mutual reporting and in the atmosphere of mutual support. FAO looked forward to the participation of WIPO at the first session of the GB.

43. The Delegation of Morocco expressed its appreciation to the Secretariat for having prepared excellent documents which served as a good basis for the discussions and work of the Committee. It also strongly supported the statement made by South Africa on behalf of the African Group. The Delegation attached special importance to the protection of TK and TCEs as Morocco had, since 1979, been working to provide protection for TK and TCEs, expressions which were rooted in a tremendous cultural diversity that was the characteristic of Morocco. Last February, a law had been promulgated against all abuses or commercial exploitations of TK and any use whether by cable or by any other forms, protecting them even against adaptations. The new law made it compulsory that certain references be made to

sources and that there be documentation of equitable use with good faith and with indication of the geographical areas from which the sources were derived. This should serve as a deterrent against any abuse of TK or misappropriation of TCEs. It attached great importance to this tremendous cultural wealth. It expressed satisfaction with the efforts that had been made so far within the framework of the Committee. Such efforts would not go wasted but would actually lead to fruitful results that would be based on the basic guidelines leading to the adoption of a legally binding international instrument that would protect GR, TK and folklore. The Delegation had participated in the Committee's work in the General Assembly's decision to extend the Committee's mandate. The extension of the mandate reflected the desire of all Member States for the Committee to carry on its work. The Delegation continued to be ready to support the Committee's work for the realization of the desired results. The acceleration of the work would require that the Committee looked more deeply into the questions that had already been discussed and that it tried to reach common views. It noted that representatives of indigenous peoples were participating and that the Voluntary Fund had been established. The Delegation would submit its comments on the various documents at a later stage.

44. The Delegation of Nigeria expressed its appreciation to the Secretariat for the immense work with the documents. It was particularly pleased with the manner in which WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 were progressively improving. The texts had shown a sustained commitment to finding proper mechanisms to address the concerns of delegations and the diverse interests represented in the Committee. This was testimony, not only to the willingness of delegations to ensure that the Committee succeeded in its mandate but also the importance of having concrete and measurable indices of the Committee's success. It supported the statement made by the Delegation of South Africa on behalf of the African Group. It wished to however reiterate its belief that WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 should form the basis of the Committee's discussions. This approach would assist the Committee in keeping its original mandate in focus and help members to harness the immense gains from the previous work. Nevertheless, the Delegation welcomed the diverse interventions on the way forward but wished to express its concerns that some of the suggested approaches, if not properly aligned with the primary mandate and previous work of the Committee may send the Committee on a false tangent. The Delegation expressed its appreciation to the General Assembly for graciously extending the life of the Committee under its present mandate which did not exclude the possibility of developing a legally binding instrument. While it was aware that the renewed mandate did not exclude any particular outcome it was concerned with any suggestion that the international dimension of its work should not contemplate the formulation of an international binding instrument. While national and regional experiences were very enriching, the mere sharing of experiences alone could not fulfill the goals of the Committee nor would it sufficiently address the expectations and concerns of communities that were suffering from abuses and misappropriation of their GR, TK and expressions of folklore. Convinced on the need for progressive work in this field for the benefit of the different beneficiaries, it was developing a policy document on IP and the protection of traditional medicine practitioners. This was a first step in the formulation of a comprehensive regime for the protection of TK and the regulation of access to biological resources. This initiative would further complement the existing regime in the field of copyright for the protection of expressions of folklore. While the Delegation had no doubt that every country had the sovereign prerogative to determine how its laws should be administered and enforced, experience had shown that the issues confronting the Committee were best addressed in an international context. It was for this reason, amongst others, that the Delegation reaffirmed its commitment to the development of an international binding instrument. While the Committee could make do with extensions of

mandate, the formulation of appropriate legal framework for the protection of GR, TK and expressions of folklore was, for many communities a matter of increasing urgency. This was more so as there were no sufficient safeguards to guarantee that these communities did not continue to suffer from the on-going plundering of their resources. At this point in the Committee's work, it was necessary to begin to identify and improve on those aspects of the substantive provisions where delegations had real concerns beyond the final character of the instrument. The Delegation wished to see further discussions of the issues in both formal and informal sessions. While it was open to further dialogue and would continue to engage constructively in finding the most appropriate way of ensuring adequate protection for GR, TK and expressions of folklore, within the context of IP, it was aware that the communities it represented did not have all the time to wait and the resources were fragile and exhaustible. It acknowledged the relevance of other parallel and complementary processes looking at these issues but would urge that issues of preservation and conservation should, as much as possible, be de-linked from the on-going work. The list of general objectives and core principles could be made more concise. These statements, however laudable or useful should never displace emphasis on the substantive issues. While it was clear that this Committee had not evolved a clear consensus on format and procedure, it was the understanding of the delegation that there was little divergence on the need to provide a protective legal regime at the international level for GR, TK and expressions of folklore. This was the self-defined goal of the Committee. Even if for the sake of the on-going dialogue the Committee was to agree on other mechanisms of protection, the substantive issues would still have to be addressed and the earlier this was done, the better for the Committee and the communities whose resources were at stake. The Delegation would continue to support the work of the Committee in the most constructive manner to move the work of the Committee forward.

45. The Delegation of Ghana congratulated the Secretariat for the excellent documents it had assembled for the meeting. The documents had made it possible for those who were participating in this meeting for the first time to be thoroughly informed about previous proceedings. The subject matter and the discussion in this forum were very urgent. It was of utmost cultural and economic importance for Ghana. Over many years, efforts had been made through domestic legislation, preservation programs and the collection of oral traditions to protect GR, TK and Folklore from adulteration, illicit exploitation and extinction. Domestic efforts had not been enough to keep the GR, TK and folklore from being pilfered by illicit commerce. WIPO's initiative to constitute the Committee to create a durable international protection regime for IP, GR, TK and folklore was a step in the right direction. Through the efforts of the National Commission of Culture and the Ministry of Justice of Ghana, a new Copyright Act had been passed by Parliament in December 2004. The Act received Presidential assent in May 2005. One of the most important provisions introduced by the new Copyright Act was the protection of expressions of folklore. Folklore was provided for as intellectual property. Those aspects of folklore which related to corporate works were protected under the Copyright Act. Works of folklore, like any assets or heritage of the Republic, were now vested in perpetuity in the President, as if folkloric works were created by the Republic. The Act provided for the setting up of a folklore board by the President. The board was mandated to take responsibility for the protection and administration of expressions of folklore. The incidence of permitted use of copyright was applicable to the use of expressions of folklore. Ghana's law would be directly strengthened if the Committee's efforts bore fruit. In this connection, WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 provided sound and balanced basis for discussion and for movement forward. The discussion should be holistic so that there could be proper harmonization and internal consistency between policy objectives, guiding principles and substantive provisions. In respect of the substantive provisions, much progress could be made in the discussions if the

articles were taken as comprising core substantive issues and more formal ones. Articles 1 to 6 and 8 represented the core issues, namely: subject matter, beneficiaries, acts of misappropriation, management of rights, exceptions, terms of protection and sanctions. These should engage the Committee's attention immediately. Article 7, 9, 10 and 11 might be treated as mere formal issues. They could be left to the lawyers to discuss. African States wished to see agreement and consensus on the core substantive issues and not next year or the year after that, but then. It fully supported the African Group's official paper and pledged to support the effort of the Committee.

46. The Delegation of Kenya reiterated its concern for the need to advance the dialogue on the international dimension of the work of this Committee. It associated itself with the statement made by the distinguished representative of South Africa on behalf of the African Group, as it had been their desire that the work of this Committee would lead to an internationally legally binding instrument. This was an important milestone on the road towards addressing the needs, desires and exception of its local and indigenous communities. More so there was a need to address the inequity and inadequacy permeating in existing IP regimes. It had continued to observe illicit appropriation and misuse of TK and TCEs or folklore while the indigenous communities and local communities continued to be marginalized and impoverished. There was need therefore to advance the work of this Committee with even greater commitment and vigor. The Delegation recognized the efforts made by the Secretariat in availing the revised draft of Provisions on Policy Objectives and Core Principle for the Protection of TK and TCEs. Having been drawn on the basis of information provided by various members of this Committee, case studies and comments by members of the Committee, they formed an important basis for the development of the international dimension of this Committee's work. It hoped it would eventually form an important part of the internationally binding norm. The Delegation welcomed with appreciation the decision of the WIPO General Assembly in 2005 to establish the Voluntary Contribution Fund to facilitate the participation of representatives of local and indigenous communities in the work of this Committee and looked forward to the Committee discussing the practical steps needed in implementing this proposal. In Kenya measures to come up with a policy to protect TCEs, TK and folklore had been undertaken which would include mechanisms to deal with biopiracy, misappropriation and illicit use of TK and folklore. It realized that the protection of TK and TCEs would require multiple instruments and measures including sui generis protection in some instances. The Committee working on this policy document had already submitted its report and policy recommendations to the Attorney General for approval by the cabinet.

47. The Delegation of South Africa supported the statement of the African Group. The primary reason for South Africa's commitment to this process was to develop internationally legally binding instruments so as to give their national legislations international credibility. In this regard the Delegation thanked the Director-General of WIPO for providing them with the opportunity to present their Indigenous Knowledge System (IKS) Policy Paper as part of the working documents for this session. The overarching principles of the IKS Policy Paper, presented in WIPO/GRTKF/IC/9/11, were the affirmation, recognition, protection, promotion and development of Indigenous Knowledge Systems. The IKS Policy recognized the principle that indigenous and local communities must be fairly and adequately compensated for their contribution to, protection and conservation of biodiversity, to research activities and outcomes involving their knowledge. The IKS Policy recognized indigenous knowledge as a resource for the poor and that sustainable development programs aimed at poverty alleviation should utilize IK/TK and IK/TK-based technologies, so that the poor who had such knowledge and technologies could actively participate in such programs. This debate was not

a new one. Past WIPO activities in the field of IP and TCEs had over a 30-year period sought to address shortcomings due to the lack of legal protection of TCEs. Additional questions raised by this debate were whether the IP system was compatible with the values and interests of traditional communities or whether it privileged individual rights over the collective interests over the community. South Africa was of the view that it was compatible. The Delegation questioned whether IP protection could bolster the cultural identity of indigenous and local communities. Its answer was yes. What could be done legally to ensure that the IP system functioned better to serve the interests of the traditional communities? The answer undoubtedly was an international legally binding instrument. In the interim, other international fora had made great strides in developing protection. In this regard, WIPO had to honor previous recommendations arising out of regional consultations to ensure that future work of the Committee should include the development of an effective international regime for the protection of TK. Regarding the creation of the Voluntary Fund as stated in WIPO/GRTKF/IC/9/3, the Delegation supported the mechanism that would make it possible for indigenous and local community representatives to fully and effectively participate in the WIPO process. Such developments at the Committee were truly progressive and respectful of the crucial and cogent role that Indigenous and local communities played in the development of the Committee's work. Two South African NGOs were currently accredited, the Indigenous Knowledge Systems of South Africa Trust (iiKSSA Trust) and the Working Group of Indigenous Minorities in Southern Africa (WIMSA). It was envisaged to encourage enhanced participation by South African NGOs in this process. South Africa was at the forefront with new Patent Legislation that combined the CBD with TK protection. The new Patent Regulations would require that a patent applicant first disclosed whether or not the invention for which protection was claimed, was derived from a genetic resource or indigenous biological resource or TK. If so, the applicant may be required to show either all or one of the following, namely, proof of PIC, a material transfer agreement, evidence of a benefit sharing agreement, and co-ownership of the invention for which protection was claimed. South Africa's Department of Environment and Tourism Affairs would administer the issuance of these permits as envisaged by the National Environment Management Biodiversity Act of 2004. The Biodiversity Act gave concrete expression to articles of the International Treaty on Plant Genetic Resources for food and agriculture specifically, the access and benefit-sharing regimes and regulating access to those resources falling outside the multilateral system of the treaty. The Delegation stated that the Patent legislation as well as the Biodiversity Regulations were currently in the final stages of their parliamentary process and would be promulgated this year. The importance of elaborating a rights-based international instrument for the protection of indigenous heritage and knowledge and acknowledging the urgency of addressing misappropriation with a clearer focus on intellectual property was crucial and remained the biggest challenge for this meeting.

48. The representative of the World Trade Institute thanked the Secretariat for the excellent documents prepared for the Committee. She referred to work on TK in some indigenous communities in China. The field surveys had been initiated in 2004 and completed recently. About 500 indigenous community peoples including traditional practitioners, pharmaceutical companies, research institutes and other stakeholders had been interviewed. Concerning ownership, in the majority of indigenous communities, TK, especially medicinal knowledge was transmitted within the family. The beneficiaries of TK could be defined and TK recognized as private effect in indigenous communities. It seemed to contradict the general understanding that TK was community-owned knowledge and already put into the public domain. Such a finding had shown policy implications that without appropriate protection of TK, there was no incentive for TK holders to disclose their TK and, in consequence, it was unlikely for either TK holders or TK users to benefit from that amount of precious TK. She

added that this finding complied with the WIPO fact-finding missions in South-Asia (1998 to 1999). In terms of needs and expectations, TK holders were positive to the TK utilization on the condition of fair and equitable benefit sharing. In their views, to introduce some legislation that simply prevented TK from outside access did not meet a TK holder expectation. It was clear if there was no benefit generated in the first place, it was unlikely to have any benefit-sharing. In addition, due to their capacity constraints, it was unlikely for TK holders to conduct further innovations on the basis of their own TK. It implied that the collaboration between the TK holders and the TK users, especially the pharmaceutical companies and the research institutes, was a win-win strategy. Existing provisions especially the TRIPS was not accurate to protect TK. China had been the first country to introduce patenting of TK in 1993. Through twelve years of patent examination experience on TK, she found that the major inadequacy of patent protection on TK was not an issue of novelty but an issue of inventiveness. It implied that a sui generis regime on TK protection, apart from the existing IP regime, was necessary. Secondly, TK protection should not use only defensive measures to prevent misappropriation but equally, and maybe more importantly, should refer to positive entitlement of sui generis rights to TK holders, for instance traditional intellectual property rights. This concept of the positive entitlement had been reflected in WIPO/GRTKF/IC/9/12. This concept had also been defined in Article 1 of Part 3 of WIPO/GRTKF/IC/9/5. Misappropriation by such parties in this Part included both defensive and positive measures. She suggested, for further clarification, not only propositions like preventing patents granted wrongfully but also stretch the concept of misappropriation of any commercial use without benefit-sharing. She appreciated the appeals from the Delegations of Ghana and Nigeria, especially, as she believed it went towards the right direction that the Committee work should focus on the Substantive Provisions, especially the Core Provisions of Articles 1, 2, 4, 6 and 7 of WIPO/GRTKF/IC/9/5. On the basis of the fact-findings in the Chinese country study, she suggested textual changes in WIPO/GRTKF/IC/9/5: In (xii) of Objectives, Part 1 (promote equitable benefit-sharing), it may be added “collaboration and a revised context” could be read as “promote collaboration and fair and equitable sharing”. In Article 6, it could be added a paragraph in the end that the further invention of TK and sharing of benefits should be developed collaboratively among the TK holders and the TK users. In terms of paragraph 2 of Article 11 of Part III, it could be added that such a register may be both public and confidential depending on ownership form of TK. Such a sentence could be inserted after “relevant national authorities may maintain registers or other records of TK”. In practice, Peru had already put into place two databases; both a public and a confidential database were implemented. She considered that the TK and TCEs work should be ongoing in parallel.

49. The representative of Tupaj Amaru stated that after over 500 years of irrational exploitation and appropriation of TCEs and TK belonging to the ancestral civilizations, today, the indigenous peoples and local aboriginal communities had the moral duty to protect, develop and preserve the past, present and future manifestations of their cultural values, traditional customs, languages and expressions of folklore, which constituted an integral part of the cultural and intellectual heritage of humanity. As to protection and preservation of cultural property owned by indigenous peoples, in particular the creations of folklore, handicrafts, human remains and so on, national legislation and international instruments had developed without taking into account the ancestral heritage and age-old traditions, philosophical conceptions and customary laws that govern the social relations of the Aboriginal world. IP was a western concept which had been changed only within market economy and without regards to the traditional practices and collective rights protecting and ensuring the cultural identity of indigenous peoples and not recognizing the holders of traditional expressions as subject of laws. Since the conquest and colonization of indigenous

territories, traditional expressions had been exposed to the voracity of markets laws and had not been protected by IP rights. By its very nature and the sphere of its application, IP law had proved to be insufficient to protect the traditional creations of folklore handed down from generation to generation. This would have seemed to demonstrate that intellectual property and other instruments, specifically the Berne Convention and its Article 15, were neither sufficient nor effective in protecting TCE and TK that had their source in ancestral civilizations. Regarding the concept of value, the representative added that not for the first time, the intrinsic value of the traditional cultures of the indigenous world had often been invoked in international forums, in particular in WIPO. In the view of aboriginal and local communities, the category of value was not necessarily one generating commercial, monetary and financial interests, but TCE and TK incarnated spiritual value, the soul and the memory of historical communities. In terms of promoting respect, the market economy was driven by profitability and the most important gain from capital was not the respect for human dignity. By contrast with western world, in the indigenous vision, such expressions had spiritual value, reflected the identity and were the living memory of indigenous peoples. In 1984, in meetings of the Group of Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore, representatives of Latin American countries had considered that the term “folklore” was archaic and had the pejorative connotation of being associated with the “creations of inferior and obsolete civilizations”. In accordance with WIPO experts on IP and the protection of folklore, the traditional creations of indigenous peoples such as popular traditions like legends, songs, tunes, musical instruments, dances, and designs or models were the product of a slow process of creative development and, owing to their presence in a particular community, were much older than the duration of copyright protection granted by States with respect to the authors. Under the globalization, the bio-piracy at the national and international level and bio-exploration companies gained fabulous wealth from TK and folklore, while the indigenous peoples were condemned to extreme poverty. The aboriginal and local communities — victims of their wealth — stated that there would be no legal protection for the cultural heritage in terms of their spiritual values, religious beliefs, indigenous identities and living memories, nor would there be respect for their holders, as long as States failed to establish a binding international instrument or instruments in view to put a stop to national and international piracy. Today more than before, artistic property, including symbolic manuscripts and even the human remains of ancestors, continued to be subject to piracy and formed part of private and public collections in Europe and America, that were frequently the subject of speculation of the world’s antiquities markets. Cultural assets and material and spiritual treasures continued to leave indigenous territories and were being transported, in their precarious state, through airports, customs storehouses and international public auction center, according to C. Bubba, a Bolivian Hisbol researcher. In its historical and social dimension, art was constituted by humanity, its memory and its image of the past, present and future. Owing to the destruction of the cultural and intellectual heritage, in particular TCEs and TK that incarnated the view of social, political and religious life, indigenous peoples, who were natives of and originated from the Inca and Aymara, Maya and Aztec empires had lost their memory, soul and identity. The cultural property owned by indigenous peoples was considered one of the invaluable contributions made to past and present civilizations, and was, as it had always been, exposed to the attacks of time and the white man of the technological era, as well as running the risk of total extinction unless the international community took steps to preserve them. The process of globalization of markets, capital and enterprises had an impact which was fatal to the survival of indigenous peoples. The integrity of artistic creations and the expressions of indigenous folklore as a living tradition were seriously threatened by the laws of markets. The accelerated introduction of high technology was even more sophisticated in all spheres of social and cultural life, in particular the Technology of information and communication (TIC), tending to

distort and even destroy the cultural and intellectual heritage of indigenous peoples. It was not sufficient that States declared such creations and expressions to be national property, the cultural heritage of humanity or the universal heritage, if the elements of the diversity of cultural property were not identified in time and space, and if each indigenous group was not recognized as the collective owner of its own creations. In light of the revelations and complaints made by indigenous peoples, it was known that in 1976 a number of aboriginal tribes in Australia had protested that certain photographs that had appeared in a book on anthropological studies represented objects which had a secret and sacred significance for those communities. The tribes argued that appropriate permission had not been granted to publish the photographs. Another example was that of the traditional ceremonies of North American Indians filmed in secret and in violation of their spiritual beliefs, by foreign ethnologists for commercial purposes. In addition to such harmful trade with cultural and spiritual property, there were an infinite number of varieties of medicinal plants, discovered by indigenous peoples, that were being exploited by large multinational companies without the authorization or consent of their true owners. As regards secrecy, a great deal of cultural expressions and indigenous wisdom were secret and confidential in nature. Many traffickers disguised as anthropologists had violated illegally spiritual and religious principles of indigenous societies. In terms of their commercial value, the plundering undertaken with impunity and the unlawful trafficking of cultural and artistic property, of which the original owners had been deprived, represented an irreparable loss to their cultural and spiritual heritage. It was indeed sad to observe that many indigenous communities remained with no evidence of the civilizations of their ancestors and were deprived of the privilege of passing on to their children and grandchildren the history of their peoples. The elaboration of norms and Rules relating to cultural heritage had begun more than twenty years ago (1982) by UNESCO and WIPO. The Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, had not been implemented by States and had been forgotten. The UNESCO Convention for the Protection of the World Cultural and Natural Heritage (1972) contained larger amounts of good sense. In Article 1 of the Convention, the cultural heritage was considered to include architectural works, monumental sculptures or paintings, and elements or structures of an archaeological nature. Contrary to other instruments, the Convention was extended to the works of humanity or joint works of humanity and nature as well as to the areas including archaeological sites that had an exceptional universal value from a historical, aesthetic, etiological or anthropological point of view. But the concept of creations had a much broader legal scope, insofar as it involved many artistic creations and cultural values that expressed elements characteristic of the indigenous heritage that was in a constant state of development. Despite the progress made in the field of protection of cultural property, the definition formulated by States did not include religious beliefs, scientific and philosophical intuition, dialectic conception, the content of ancestral legends or verses, purely practical traditions, human remains, sacred and mythological places, and so on. Taking into account these violations of secret sacred values there was an urgent need to adopt the appropriate legal instruments in order to preserve and protect effectively the ancestral intellectual creations of indigenous communities and nations in the world. The States and the whole international community had the responsibility to ensure that all TCEs, TK and GR were safeguarded so as to produce a common heritage for humanity. The Committee had received a mandate to elaborate and present an outline international legal framework. Why was a binding instrument a matter of urgency? In the global world where trans-national corporations constituted super States within national States, in a world where wars crushed humanity in terms of the appropriation of natural resources in violation of the principle of national sovereignty, a global response was required to the plundering use and unlawful appropriation of cultural expressions and GR. As far as the legal protection of cultural heritage in various

regions and different countries was concerned, a multitude of relevant definitions existed, different legal systems had different definitions on the subject and material to be protected, and this followed from economic and political interests of each country. However there was an increasing need for an international framework that would harmonize domestic legislation and provide a coherent and universal definition acceptable to the international community of mechanisms for application designed to give legal protection, especially for the tangible and intangible TK that was sacred and secret for aboriginal peoples. Since they were voluntary, the guidelines were not effective. Only an international framework would be able to harmonize laws, regulations and legal systems in the protection of cultural and intellectual heritage of indigenous peoples. It was urgent that the Committee include aboriginal communities and indigenous peoples as legal subjects with full powers for the negotiation or rejection of contracts concerning access to the genetic and biological resources which they owned. The representative added that within the scope of the terms stipulated in international law referring to restitution, compensation and rehabilitation, indigenous peoples and nations claimed compensation for their cultural heritage which had suffered countless losses as a result of colonial invasion and occupation, genocide, slavery, systematic discrimination, the mutilation of entire civilizations and the unlawful plundering of their artistic and spiritual property. In terms of its nature and importance, the complex issue of restitution, compensation and rehabilitation — or particular aspects of compensation — had not been given sufficient attention by United Nations bodies. The indigenous peoples urged the international community to examine and adopt as a matter of urgency effective legal standards and instruments so as to guarantee the protection, preservation, possession and restitution of cultural property, as an inexhaustible source of the creative expression of indigenous and local peoples and aboriginal communities. He stated the draft Declaration on rights of the indigenous peoples which stipulated “under the procedures laid down in international agreements, indigenous peoples have a right to the restitution and restoration of cultural, intellectual, religious and spiritual values. This included the remains of their ancestors taken from them without their full consent and in breach of their customary laws and traditions”.

50. The representative of RAIPON on behalf of the Autochthonous People of North Russia and Siberia informed the Committee that they leaved over much of the Northern territory of Russia. They had 41 autochthonous people represented in that region and carried out traditional activities, such as hunting, gathering and trapping. In many statements, there had been some disappointment due to the slow pace of the Committee’s work. He hoped it could be speeded up so that tangible results could be reached. Perhaps, there should be another look at the methods of work in order to improve the effectiveness of the work and suggested the pace of preparing documents should be speeded up. The previous day, one of their representatives made a presentation stating how important it was to preserve the TK of the peoples of their region. They had been one of the first organizations that had been given accreditation to the Committee but their representative had only been able to participate twice before this session. This was the third time they were participating whereas the Committee’s work was of the greatest interest for them. They had very scarce resources and it was absolutely vital for them to participate in the discussions. They therefore appreciated the Committee for having set up a Voluntary Fund and hoped that this Fund would place resources at the disposal of indigenous communities who wished to participate. They also greatly appreciated the information that had been supplied by the Delegation of the Russian Federation which gave a detailed report of the work done by the Committee which allowed them to keep abreast of the evolution of the situation. They worked with the Russian Federation Parliament and Government in order to bring about legislative modifications and amendments which were extremely important for them. This legislation should be in keeping with international law and rules which would enable them to set up national legislation. They

voiced their interest in the Committee's work and hoped it would produce a legally binding instrument because soft documents were difficult to bring into national legislation. They greatly appreciated the work of the Secretariat that had prepared the documentation. He however asked how they could work with these documents as there was no Russian version. For all the years, they had been cooperating with WIPO and always had to cope with the major difficulty of the language barrier. He understood these working documents represented very important burden and were costly, but they had cooperated with UNHCR and other organizations, such as the CBD, and they had always got the documents in Russian. Here, they only got the documents in English, French and Spanish. They understood these were very important languages but he suggested more documentation be translated into Arabic, Chinese and Russian. As there was no documentation in Russian, he questioned how they could participate actively in the work of the Committee. They wanted to follow the discussions and had always drawn attention to the lack of working documents in languages other than English, French and Spanish. This was not just a matter of budget and cost. He added that booklets were available in five languages except in Russian which was in a different format. As they would get Russian translations of these documents, they could organize seminars in the various regions of Russia where indigenous peoples lived, which would enable them to develop the work that was being done. What was important was that the Committee took account of the processes going on in other organizations, the CBD and the Working Group on Indigenous Peoples that was devising a number of international principles. He added that there was a Permanent Forum on Indigenous Peoples and a Working Group on the Declaration that had finished at the third phase of its work. Many delegations had spoken of the need to take account of the Draft Convention that would be put to the General Assembly soon. The rules that had been drawn up in the human rights area also had to be taken into account. The right to self-determination of indigenous peoples and the rights of those peoples to be able to administer and possess the resources on their land should also be taken into account. They finally described their expectations. In the future, they hoped for a Convention that would be based on internationally accepted standards and rules that would enshrine certain essential principles such as the right to self-determination. The equitable sharing of the exploitation of GR also had to be ensured. The holders and possessors of TK and Folklore should be able to be the beneficiaries of their resources. The indigenous peoples and indigenous organizations must be able to make their voice heard on an equal footing with others. Indigenous peoples had no resources and they were certainly in need.

51. The representative of Metis National Council stated that the issues of TK, intellectual property, GR and folklore were integral to the livelihood, integrity and identity of indigenous peoples in Canada and around the world. The importance of the Committee's work could not be underestimated in terms of the impact that the outcomes would have on indigenous peoples world-wide. For this reason, practical and genuine participation of Indigenous Peoples had to be considered in the most sincere forms. Measurement of this sincerity included the application of the Voluntary Fund for Indigenous Peoples' participation. The representative congratulated Sweden's genuine efforts towards recognizing and supporting the importance of world-wide indigenous participation by contributing to the fund. He further acknowledged Canada's contribution to the Metis Nations' participation in this forum recognizing however that there were numerous amounts of indigenous nations and groups across a vast geographical region that could not be in the meeting despite their will and desire to participate. Given Canada's historical relationship with indigenous peoples in Canada and the subsequent economic advantage as a result, the representative recognized Canada's capacity and encouraged more formal and substantive support for indigenous participation by all nation-states not just internally but world-wide through contributing to the voluntary fund. In

addition, in WIPO/GRTKF/IC/9/4, paragraph 13, which set out some of the possible approaches to the form and status of the outcome of the Committee's work, the representative supported a binding international instrument including the possibility of a stand-alone instrument or other obligatory contracts applying the prescribed standards in national law. He recognized a binding approach to the outcomes of the Committee's work as the ultimate in commitment and most genuine of acts in guiding the advancement towards the best interest of Indigenous Peoples. In the next few years, he looked forward to witnessing a cooperative approach towards a consensus-based decision keeping in mind the lives of those whose children and subsequent generation would be directly affected by the outcomes of the forum.

52. The representative of the Assembly of First Nations stated AFN was a representative body for the original peoples of Canada. It provided political advocacy on behalf of some 633 indigenous governments which comprised of the eighty indigenous nations in Canada. The comments that were provided were preliminary in nature. The indigenous governments in Canada had not had the opportunity to turn their attention to the work of WIPO or the Committee on Intellectual Property and GR, TK and Folklore. The comments provided were without prejudice to any position that a First Nation government may have in the future. At the outset, he indicated that First Nations governments placed considerable importance on the issues of intellectual property, TK, GR, folklore and prevention of appropriation of these cultural treasures. In 2003, the AFN passed Resolution 27/2003 providing the mandate for the AFN to ensure the protection of TK both nationally and internationally. Generally speaking, the AFN was pleased that the international community had recognized limitations of traditional intellectual property law, patent regimes and contract law. It was important that a more culturally appropriate legal regime was developed to ensure protection of TK and GR. In establishing a new legal regime, he hoped that attention would be paid to effective enforcement and preventative sanctions. The AFN would continue to observe the discussions of this forum. He encouraged all Member States to use their best efforts to reach consensus on issues. He saw merit with focusing on issues that the collective could agree to in moving forward with this process. In the discussions, it was important to remember the target audience the Committee hoped to engage at the end of the day. The outcomes must be relevant to indigenous peoples and reflect their interests. With this respect, he encouraged the Committee to consider the positions of First Nations peoples in Canada. As mentioned the day before by the representative of the Kaska Dena Council, the indigenous peoples in Canada shared the common belief that TK, GR and folklore were a collective right and were property of the collective. TK holders merely kept ancestral knowledge in trust for the collective. TK holders had the responsibility to pass the knowledge to the future generations. The work of the Committee could not undermine this relationship and understanding. Secondly, the outcomes of the Committee must fully recognize and reflect their holistic view of intellectual property. In First Nation customary law, one does not compartmentalize knowledge, expressions or GR. Each of these aspects was integral to the whole and part of the whole. First Nations people did not separate knowledge of medicine from the techniques for its use, its ceremonies and cultivation. It was important that the legal regime recommended by the Committee provided proprietary rights in perpetuity for indigenous collectives. He believed that protection of knowledge for a short period of time would not foster the intended participation by First Nations groups. There were many other examples that could be highlighted, however it was important that a legal regime contemplated by the Committee be responsive to the needs of indigenous peoples. Failure to do so would result in an intellectual property regime that would not be utilized by indigenous peoples at all. The AFN encouraged more participation by indigenous peoples into this process. It was essential that indigenous peoples had full participation in these discussions as they had much to offer in guiding and assisting Member States in developing a culturally appropriate regime. The

Voluntary Fund was a positive step towards this. However, Member States could do more to ensure indigenous peoples were included. The AFN encouraged Member States to secure the participation of indigenous women and youth in the discussions. In conclusion, he added that the comments above had not been further consideration. While the AFN was prepared to offer some preliminary comments, these comments did not and should not be construed to imply the full informed participation of First Nations governments in Canada in this dialogue. Until such time as First Nations were fully consulted and were engaged in the development of an international regime, no final decision would be made. This demand equally applied to the Government of Canada who had legal and constitutional obligation to consult with First Nations when Treaty and aboriginal rights might be affected to ensure the interest of First Nations were incorporated as appropriate.

53. The representative of the League for Pastoral People and Endogenous Livestock Development, on behalf of the Call of the Earth Group, informed the Committee that it worked in the fields of capacity building, consulting and advocacy. One of the highlights of its work was the definition of Livestock Keepers' Rights by an international gathering of pastoralists and NGOs in a place in Kenya near Nairobi, according to which this definition was called the Karen Commitment. The representative cited a few sentences from the statement recently made at CBD COP8 in Brazil, by one of the members of its global network, Vivekanandan from a livestock keeping community in Tamil Nadu, India. The representative informed that it planned to make a presentation, probably a side-event during the next session of the Committee. Pastoralists made use of arid and semi-arid areas that mostly were unsuitable for cropping. They supplied not only milk and meat, wool, hides and skins, but also draft power and manure, and were therefore crucial not only to rural but also national economies. In the SADC region, the livestock sector contributed 38% of the Gross Domestic Product — and this did not yet include the subsistence economy, drought power and manure. Almost 100 % of the sheep, goat, pig and poultry were indigenous. Cattle was indigenous to between 50 and 99% in the SADC region, depending on the country. Pastoralists and other livestock keeping communities had developed a large range of local breeds with very specific features. These breeds were very productive in their environments and these production systems could be sustainable, as would be shown by an IUCN study which was underway. Some of these breeds had been transported around half of the world already centuries ago. An Indian Zebu breed was the genetic basis of almost all South American and a good part of the North American cattle. The Australian sheep industry had greatly benefited from the Namibian Damara breed and the Garole sheep brought from West Bengal as far back as 1792, and more recently, Australia took the Awassi sheep from the Near East to conquer the meat market of the Gulf States. All this may not have been possible if the breeds had been monopolized by patents. It was right to pay a good price for a good breeding animal, but it was wrong to monopolize the genes. It would be wrong to grant patents to breeding methods that were applied by most pig breeders around the globe. Patent applications on such pig breeding methods had been submitted last year in 160 countries. Once patents were granted, it was very costly to challenge them. In the case of the Enola Bean from Latin America, which had been patented in the United States, the patent had been challenged by a very renowned International Agricultural Research Center, that unlike many others involved in TK, had access to excellent lawyers. Six years after the grant, even this challenge was not decided upon. One third of the time granted was over. Practical measures need to be taken very soon to prevent such delays, with the increasing patent activities involving TK. She had copies available of a Press Release dated four months before issued on the shortest day in the North of 2005 on one of the longest running patent challenges. Some aspects of this case were described in WIPO/GRTKF/IC/9/8. The Livestock Keepers' Rights formulated by pastoralists and NGOs from around the world addressed Intellectual

Property Rights, Access and Benefit-Sharing, and Participation in Decision-making. They were inspired by Farmers' Rights. The representative added those two concepts to the excellent points made by the indigenous panelists the day before, and recommended that the Committee looked more deeply into Livestock Keepers' Rights, livestock GR and related TK. It added that it would be helpful if pastoralists from different communities could be invited. TK and Domestic Animal GR had been largely neglected as compared to crops, not only by the relevant UN organizations. Therefore it warmly welcomed the invitation of the Swiss Government to FAO's Technical Conference on Animal GR. This conference was expected to address issues like TK and GR, and also attract much public and media attention. The representative informed it would be held in Interlaken in September 2007. It came ten years after the Technical Conference on Plant Genetic Resources held during 1996 in Germany. The representative was keenly waiting for results of the work of this Committee. TK and GR needed to be protected — from monopolization — without any further delay. Finally, the representative addressed an issue that needed urgent attention, nanotechnology. According to the ETC Group, a civil society organization that worked on issues essential to world food sovereignty, had recently pointed out that the largest single holder of nanotech patents in the world was a Chinese researcher, Yang Mengjun, who was taking ancient Chinese medicinal herbs, reducing them to nano-scale formulations, and claiming exclusive monopoly over the herbs, or the process used to nano-size them. He held over 900 patents on nano-scale versions of traditional Chinese medicinal plants. Similar patents were being granted in the US and Europe. For example, the Pacific Corporation (Korea) had won a European patent on nano-scale ginseng for use in cosmetic products. Patent claims on nano-scale formulations of traditional herbal plants were providing new pathways to monopolize TK — one more reason why the United Nations organizations dealing with TK should address the implications of nanotechnology and other emerging technologies.

54. The representative of the Tulalip Tribes, on behalf of the Tulalip Tribes, the Kaska-Dena Council, the Saami Council, the Foundation of Aboriginal Islander Research Action, the Canadian Indigenous Biodiversity Network, and the Creators' Rights Alliance thanked the Secretariat for the standard level of excellence in preparing documents that had given clarity to many of the options before the Committee. He welcomed the proposal of Norway in WIPO/GRTKF/IC/9/12. This contained many useful ideas that would move the Committee collectively forward in the deliberations. The representative believed that the long discussions of the Working Group had been necessary and fruitful in elaborating the deep and complex issues involved in protecting TK, TCEs, and traditional GR, and that there was still some distance to go in these discussions. However, the time spent exclusively in discussions was coming to an end, and there was a need to have some concrete products from this process. The Norwegian proposal had much merit. The development of a general political statement on principles that had received a large amount of agreement among the parties and observers representing indigenous peoples and civil society organizations seemed to be a sensible exercise. This was the general pattern in creating internationally binding regimes in international law. Many regimes started with soft law statements of general principles and aspirations over which parties had come to broad agreement. These principles could be implemented nationally and regionally, and provided the experience and institution-building upon which more substantive regimes may be built. More groundwork for issues such as reciprocity in legal recognition, prevention of misappropriation, trans-boundary recognition of customary law, surveillance, compliance, and enforcement needed to be laid before an effective international regime could function. A political declaration provided a set of principles that could be effective in helping to educate national systems, and these could be combined with existing experience and toolkits that had already been developed to aid in national institution building. Given that there seemed to be broad

support for the suggestion that the Committee had reached some degree of consensus on broad principles, the representative believed that this forum should move forward on drafting a statement. To achieve this would require a process to move to an outcome that could help strengthen the work of these deliberations and move it in a parallel track to more substantive discussions. One way forward would be to establish a working group during this meeting that could work in the margins to begin drafting a set of broad, consensus principles involving parties, representatives of indigenous peoples, and civil society organizations. Additionally, or alternatively, this work could be supported by an intercessional workshop to further develop such a statement. The products of these deliberations could be made available on the WIPO Secretariats' web site for comments, and the draft could then be made available for consideration at the next meeting of the Committee. The elaboration of a political statement of principles and aspirations should not be developed exclusively from other considerations in this forum, and the development of such a statement should not be the end product of the deliberations. Nothing in this work should be prejudicial to or preclude further work on these issues. This work was part of the process towards the potential development of an internationally binding regime. It should not hinder further negotiations to meet this end in any way, or with any timetables proposed for the negotiation of such a regime or detract from the urgency of finding substantive solutions for the effective protection of TK. Indeed, the recent development of a 2010 target by the CBD for the development of an international regime on ABS would seem to necessitate progress by this body in addressing issues related to GR and associated TK to support this process. He believed there was consensus on some principles to make a political statement useful as an interim measure. The representative also commended the parties for establishing the voluntary fund and Sweden that had helped to fill this fund, enabling the participation of indigenous peoples' representative at the next meeting of the Working Group. The indigenous peoples' caucus attending this meeting had met and had chosen three delegates to serve on the advisory body for the distribution of funds available through the Voluntary Fund.

55. The representative of FILAIE referred to TCEs because TK and GR included aspects which in some countries were regulated by industrial property. FILAIE represented 13 countries in the Iberian peninsula and the whole of Latin America practically, with the inclusion of the three last which were Bolivia, Paraguay and Peru. Through 23 management entities, this enabled them to have a direct contact with more than 150 000 active performers without any problem with the system of reciprocity. They had a knowledge of the reality of the artistic world. This whole process for FILAIE was not just very attractive but was something they had to fulfill because on December 20, 1996, WIPO approved the Performances and Phonograms Treaty and extended the vision of performers, not just using the formula of the Rome Convention, the person who sings, performs, interprets any form of artistic or literary work but also included all expressions of folklore into the definition. Therefore the 23 intellectual property management entities had opened their membership to all the performers who came from indigenous communities. Therefore this definition of performer compelled them to have a very active position in this international organization. The representative referred to his previous intervention at the eighth session and reiterated what was said in paragraph 37 where the theory of the four "Rs" was mentioned. In other words to be able to make progress in this very important field, they required recognition, respect, legal regulation and, finally, remuneration. This concept would then be analyzed in a more detailed manner. Basically, they had to make a creative act legally speaking because sad reality was that today expressions of folklore were considered by almost all the firms as if they were a public domain issue. This was a constant act of misappropriation. Therefore, FILAI's philosophy was that expressions of folklore could not ever fall into public domain because it would mean full use of these interpretations and performances. It was a very

important issue to settle: who were the right holders? We should think about the modification of the concept of copyright, which had a deadline included in most legislation: the life of the author plus 70 years after the death. The community could also be the author and if it was in the public domain this would be rather contradictory in the field of law. If it were to be in the public domain, the whole concept of the ownership of these communities would disappear. Rather important issues would need to be solved such as the question of indigenous cultures that were nomadic and traveled through territories. In that case, he asked if the States represented them. The international Treaty should be based mainly on authorizations which indigenous communities would give and not just authorization given by authorities which were exclusive in nature because of a need to protect the world heritage. It was necessary to have the regulation of this international instrument as currently versions of the indigenous topic were being included in all sorts of works, in derived works and seemed to be providing economic resources. The indigenous communities were not receiving these resources. For example, the representative referred to the national geographic cultural programs where authentic audiovisual works were being created based on music, dances and performances, and were then disseminated on TV stations; the indigenous communities were not receiving any remuneration whatsoever. Therefore, they were in favor of a treaty which would not have direct ties to GR or TK. There seemed to be a consensus on the need to have a treaty. Therefore the time would be right to begin to work on the wording of the paragraphs and provisions of this international treaty. He referred to the Voluntary Fund and informed that FILAIE had had a meeting in Barcelona in which it was approved that they should not just promote autochthonous performers communities but that they should hold two concerts, one in Latin America and one in Spain, to gather funds for the Voluntary Fund.

56. The representative of the National Council of Otomi stated that the present collective efforts would bring fruitful results with win-win situations for the people of the world. The Otomi Nation was recognized as one of the most long-standing civilization in Mexico and Latin America. Its people were also called Olmeca, Tolteca and Teotihuacano because of their official history and anthropology. Throughout more than 30 thousand years of history, they had fought to maintain their political, cultural and spiritual self-determination. Proof of this was that in 1978, the Otomi people decided to build a ceremonial Otomi center as part of their cultural project and from their own cosmic ancestral vision. This was located in the municipality of Temoaya in the State of Mexico, with a purpose of opening a cultural space, a symbol of their ethnic identity and a focus of their social cohesion. Various Otomi regions and communities took part in this monumental work within NFOXTE or collective work. On August 15, 1980, during the inauguration of the ceremony, the President of the Republic José Lopez Portillo and the Governor of the State of Mexico Jorge Jiménez Cantú ratified the membership of the property of the ceremonial center of the Otomi people and recognized this sacred place was the community work which was the most representative of their Otomi culture. Contrary to this recognition of the Federal State authority, a decree was issued on January 4, 1980, to create an ecological park which was called the Otomi Park-Mexica of the State of Mexico. In this park, they had included the Otomi ceremonial center without any consultation whatsoever and dispossessed their intellectual heritage and infringed their historical territorial cultural right as a people. The Federal Government and the State of Mexico had prevented the Otomi Nation from exercising their autonomy to administer and decide on the use and destination of the Otomi ceremonial center. Since then the State Commission on Parks and Fauna (CEPANAF) and the Mexican Institute of Physical Culture and Sports (IMCUFIDE) and also the National Sports Commission had been illegitimately controlling their sacred place, the cultural center and Otomi IP. This was a violation of the Otomi communities because they had never been consulted. In this very painful activity and bad faith of the Government, they had been promised that in 1992 the sacred house would be

given back to the Otomi people but this had not yet occurred. Their authorities had violated the Otomi ceremonial center, they had committed indignant and offensive acts by filming in their center a North American movie entitled "License to kill", in which their center appeared as a center of international drug trafficking. It was used for political and electoral events, police training and military practices, massive dancing and artistic events on television. All this was very far from the Otomi culture and indigenous communities. They had been aggressed physically, verbally and psychologically by the state and municipal authorities. They had even been represented as some community or an instance of the Otomi spiritual cultural organization. They had been offended and had not been allowed to use their own ceremonial Otomi center, their sacred house. Therefore, they requested the support and intervention of WIPO so that the Otomi nation be listened to by the government of the State of Mexico and the Federal Government for the recognition of their inalienable rights to free determination and the respect of the Otomi ceremonial center as the big house, a sacred place and a capital of the Otomi nation in order for the Otomi people themselves to manage it autonomously. That meant taking care of their own ceremonial centers and sacred places and benefiting directly from the educational and cultural proposal. Secondly, they requested legal counseling of WIPO on their rights. As indigenous peoples, they could be recognized and respected in their exercise of free determination. Thirdly, they asked that WIPO requested from the Mexican Government the immediate ceasing of the occupation and violation of their ceremonial Otomi center, the cancellation of the decrees which created the ecological Park *Zempoala La Bufa* on their sacred territories and requested the prompt fulfillment of national and international legislation regarding collective rights of indigenous peoples for the defense of their intellectual property and the exercise of their free determination.

57. The Delegation of Bolivia stated that the issues of TK, GR and folklore were of the highest importance for its country since the majority of the population was of indigenous membership which came from Quechuas, Guaranis, Mojenios and others. There was a request of this majority with the remaining part of the population which it was representing in the Committee. This was why this Committee had to respond to this request which did not come just from Bolivia but from a vast majority of countries in order to most promptly have an international legally binding instrument which would protect resources from acts of misappropriation. Bolivia was undergoing a new process which was initiated with the accession of the President Evo Morales, the first indigenous President of Bolivia. One of his mandates was to have a constituent assembly which would be inaugurated on August 6, 2006 whose scope would be the very foundation of Bolivia. Since the founding of Bolivia the indigenous sectors and farmers sectors although they were direct stakeholders, were excluded, set aside, deceived and in some cases even massacred. This situation had been maintained for over a century but it had not been able to go against the richness of their indigenous population and the farmers. After twenty years, neo-liberal policies had left economic and environmental policies which were detrimental to the interests of the indigenous population and the State of Bolivia. Inter alia, the facts of this model had been the following. First, within the social scope, the interests and the requirements of the indigenous and farming cultures had not been taken into account. They had just been used for the purposes of the reduced group of the national oligarchy. Secondly, the environmental national policy subject to certain international interests had left Bolivia with serious environmental problems: superficial subterranean waters which were polluted, forest resources which were used for oil and wood companies, degraded and impoverished earth and a whole set of polluted territories because of undue use of the resources. The richness of Bolivia's folklore and GR in their traditional ancestral knowledge had all been maintained today. They were the main pillars for the development of Bolivia despite all this. Through the vice-ministry of environmental policies and biological diversity new policies would be developed. There had been practical

recognition of indigenous technology in the sovereignty of the national resources, in recovering, maintaining wisdom, use and custom in the handling of these natural resources, democratization in the use of biodiversity, sovereign participation in protected areas, protection in house value and maintaining of traditional practices and knowledge in collective rights regarding biodiversity, effective democratization, the access of indigenous people and farming communities to forest resources and biodiversity, strengthening social organizations for the sustainable use and processing. In this context, the Delegation made an appeal yet once again that the Committee had tangible results in this and future sessions. It was greatly surprised that this body was given an international mandate only in 2003 and there were no international instruments which really covered the needs expressed by the developing countries. It hoped the Committee would be able to fulfill its objectives of the 2003 mandate which was renewed in 2005. To the contrary, it considered that the necessary steps should be taken to renew this commitment and give it a new heading which was up to the expectations of developing countries. For Bolivia, it was essential to have the participation of indigenous communities in the discussions which directly affected their requirements and interests. Therefore, the Delegation of Bolivia expressed its appreciation for the creation of the Voluntary Fund for the participation of represented indigenous communities. However, a complementary financing system should be created which would increase the regular funds of WIPO and emphasize that the election of the participants would be in a transparent manner taking into account representativeness. Regarding the participation of representatives of the indigenous communities, it pointed out that in the report of the eighth session, there was information about the participation of a representative of a group of folklore experts of a department of Bolivia which financed its participation with its own resources. The Delegation would send the respective information to the Secretariat. Finally, it reiterated the interest of Bolivia for the topics the Committee dealt with.

58. The Delegation of St. Vincent and the Grenadines stated that it was also making this statement on behalf of the other Caribbean Countries as there was no official Caribbean delegation. It re-iterated the statements made at the 8th Session by the representative of Trinidad and Tobago in that most of their heritage and folklore was derived from Indian and African as well as colonization. Being a small nation in a very small part of the world, it was not often they were given the opportunity to address their concerns. While they welcomed the opportunity to be at the Committee, they felt that their issues were not adequately addressed. Grouping Caribbean Countries with Latin America did not particularly assist them in this regard. It hoped the discussions and deliberations at this ICG would benefit them in the areas of protection of TK and folklore and as well as capacity-building activities. Further, they also hoped that finance from the proposed fund for assistance of NGOs would assist NGOs from the Caribbean region. It very much looked forward to greater and more active participation as a region throughout the remainder of the mandate.

AGENDA ITEM 7: PARTICIPATION OF LOCAL AND INDIGENOUS COMMUNITIES

Panel presentations

59. In accordance with the decision of the Committee at its seventh session (WIPO/GRTKF/IC/7/15, paragraph 63), the ninth session was immediately preceded by a half-day panel presentations, chaired by a representative from a local or indigenous community: the panel were chaired by Mr. Terry Williams, representative of the Tulalip Tribes, and presentations were made according to the program (WIPO/GRTKF/IC/9/INF/7). Presentations and documents from the panel sessions were posted on the WIPO website.

60. The Chair invited the chairman of the panel presentations, Mr. Terry Williams, to provide a brief report to the Committee of the discussion held during those.

61. The representative of the Tulalip Tribes stressed the fact that the panel was important for the substantive discussions conducted by the Committee since it addressed the way the issues involved should be concretely faced and what their real impact would be. There was a large variety of issues that arise. Some pertained to countries that had constitutional provisions that provide certain types of rights and guarantees for indigenous peoples, or at least some direction. To some extent, the United States of America recognized tribes self governance or sovereignty, but the rights involved needed to be worked out in terms of resources and practical processes. Those processes were still crude and the stakeholders are just moving forward. Some discussions addressed the very serious issue of registration, like the burden of proof, what ought to be registered, how to manage the registers, how to put the necessary infrastructure in place to respond, review and investigate, how to fund the registration process, how to allocate fees and revenues. Echoing what was said during the panel presentations on all these issues, the representative of the Tulalip Tribes made a call for a agreement on the main policy areas in order to build a solid foundation for the work of the Committee. He was of the opinion that the Committee was closed to such a foundation. The tremendous amount of agreement the Committee is closed to needs to be captured without further delay. In a later step the Committee should continue working on other issues that are more difficult to find the structure for.

Voluntary Fund for accredited indigenous and local communities

62. The Chair recalled that the Committee had discussed at length how to enhance the participation of indigenous and local communities in its work. It had also implemented several practical measures, including the panel, like the one organized just before the present session. One important development in that context was the decision by the General Assembly (WO/GA/32/13 paragraph 168) in its 32nd session to create a Voluntary Fund to support the participation of representatives of accredited observers representing indigenous and local communities. In line with the General Assembly decision the Voluntary Fund had now been formally established. This decision was based on a recommendation by the Committee developed in the course of eight previous sessions. The General Assembly accepted *inter alia* that the binding recommendations on funding be taken by an Advisory Board appointed by the Committee on the proposal of Chair. The Chair took this opportunity to draw the Committee's attention to the Information Note WIPO/GRTKF/IC/9/INF/8 which stated that the Swedish International Biodiversity programme (SwedBio) had already pledged a generous sum for the Fund ensuring that it will be able to operate for the benefit of the holders of TK and TCEs. The Chair warmly thanked this generous donor for his valuable show of support.

63. The Secretariat introduced WIPO/GRTKF/IC/9/3 and WIPO/GRTKF/IC/INF/8, adding to the Chair's presentation that the Committee had developed at its eighth session a recommendation to the General Assembly to create a Voluntary Fund. That recommendation was refined in line with an agreed commentary process. The General Assembly at its 32nd session in 2005 took a formal decision to establish the Voluntary Fund. The details of this process and the outcome were set out in WIPO/GRTKF/IC/9/3. The Annex of that document provided the structure and the working procedure of the Voluntary Fund. The Secretariat pointed out the basic principles that were built in at the request of the Committee. The Voluntary Fund was distinct from WIPO's own mainstream budget and depended on

voluntary contributions by donors. Contributions would be allocated exclusively to pay the expenses of relevant accredited observers to come to meetings of the Committee and the Fund would be earmarked for that purpose. The Secretariat referred to the initial steps it needed to take to set the Fund in operation, communicating the process under way to all members of the Committee and all accredited observers of the Committee. This led for example to nineteen applications submitted already to make use of the Voluntary Fund. The factual state of play concerning applications and contributions had been provided in WIPO/GRTKF/IC/9/INF/8. As the Chair mentioned, the agreed arrangement was that the Committee itself should appoint an Advisory Board that was required to meet on the margins of the sessions of the Committee and adopt in the course of the week a recommendation for the use of the fund, based on established criteria that focus on holders of TK and TCEs who were already accredited observers of the Committee. That recommendation, once agreed by the Advisory Board, would be binding for the Director General who would simply implement it. The Secretariat clarified that its role is limited to simply administer and implement the recommendations of the Advisory Board and stated that it was available to provide administrative support for the Advisory Board inasmuch it was required to do so. The composition of the Advisory Board was also set out in the Annex of WIPO/GRTKF/IC/9/3. It was up to the Chair to make a proposal of the composition of the Advisory Board based on five delegates of WIPO Member States, three representatives of accredited observers to the Committee and the Chair of the Committee or one of the Vice-Chair and up to the Committee to appoint those members. Once the Advisory Board would be constituted and reach its recommendation, the Secretariat would be required to circulate before the end of the present session an information note (WIPO/GRTKF/IC/9/INF/9) which would report on the recommendation of the Advisory Board and action then taken. The Secretariat clarified that the Advisory Board would meet to adopt recommendations for the funding of observers to the tenth session of the Committee. Thus the Advisory Board would be looking at available funding and at the applications circulated in WIPO/GRTKF/IC/9/INF/8, and deciding essentially on the use of that Fund for the tenth session of the Committee. Then there would be a further round of applications and the Advisory Board would need to meet on the margins of the tenth session to consider attendance at the eleventh session and so on, in line with the decision adopted by the General Assembly.

64. The Delegation of France said that the French government, which had always supported the principle of creating the Voluntary Contribution Fund, had decided to make a financial contribution of EUR20,000. The Delegation hoped that the contribution would allow the Fund to finance, as quickly as possible, the effective participation of indigenous and local communities in forthcoming meetings, and expressed satisfaction that the funding could commence from the Committee's tenth session onwards. The Delegation said that such participation was what constituted the Committee's originality, usefully clarified and enhanced its discussions, and represented progress which should be preserved. It hoped that numerous contributions by the Member States would ensure the Fund's complete success and trusted that the International Bureau would keep the Committee informed of the Fund's activities and its position.

65. The Delegation of Sweden welcomed the establishment of a WIPO Voluntary Fund for Accredited Indigenous and Local Communities approved by the last General Assembly. It confirmed a contribution of 500,000 Swedish Krona from the Swedish International Biodiversity Programme to the Voluntary Fund, equivalent to 53,600 Euros or USD 65,700. As that programme was part of the Swedish Development Cooperation, this was an excellent opportunity to underline the Swedish general ambition to strengthen the full and efficient participation of indigenous and local communities in the processes that were closely related to

their TK and management of GR, and in this particular case the Committee process. As to the selection of funded participants, it stressed the criteria expressed in article 5(c) subsection (d) of Annex to document WO/GA/32/6, namely that the Advisory Board should take due account of the need to support those who lacked alternative financial resources, and particularly of those observers based in developing and least developed countries. It expressed confidence that the Voluntary Fund would prove to be an efficient tool providing practical support to indigenous and local communities and other holders of TK and traditional cultural expressions, and encouraged other potential donors to contribute to the Fund.

66. The Delegation of Austria, on behalf of the European Communities and their Member States and the Acceding States Bulgaria and Romania, stated that they 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 TCEs were of great importance. In this regard, it found the indigenous panel that was held at the previous session of the Committee and the panel held just before the present session to be a valuable addition to the Committee session, which enhanced the voice and participation of indigenous people and local communities. On the funding issues, it welcomed the establishment by the WIPO General Assembly of the Voluntary Fund for accredited local and indigenous Communities. The establishment was further testimony to the fact that WIPO had developed a full and comprehensive machinery to address questions of GR, TK and TCEs in an inclusive and comprehensive manner, including the full and effective participation of all stakeholders, in particular indigenous and local communities. It was gratified to see that the proposal for the funding mechanism, which, as many participants would recall, was first tabled by the European Community with the support of several other Committee members, had now become reality. It was looking forward to working on the operational aspects of the Voluntary Fund, including the operation of the Advisory Board of the Voluntary Fund as outlined in the document. It also recalled that the Committee in the past had encouraged Member States which had indigenous people among their population to include a representative of those in their delegation or to support the cost of attendance of such representatives through the Voluntary Fund. It reiterated its view that it was essential for the Voluntary Fund to operate in an objective, transparent and low cost manner, including through appropriate selection mechanisms and believed that the newly established Committee Voluntary Fund would meet these conditions.

67. The Delegation of Peru stressed the importance of the Fund and expressed support for a broader participation of indigenous communities at the Committee. It thanked Sweden for its initial contribution to the Fund and France for the contribution it had just mentioned. The Delegation referred to what Sweden just mentioned as important, that the Fund should help representatives from developing countries, so that they could be represented, precisely because those indigenous communities had to face difficulties in coming to meetings of the Committee. It thanked the Secretariat for the list of applicants and noted though that some applicants were from developed countries. It did not understand why someone in Geneva would ask to be a beneficiary of such a Fund. It was its understanding that the Fund had been specially designed to finance the participation of representatives from indigenous communities from developing countries. In its capacity of coordinator of GRULAC, the Delegation was pleased to inform the Committee that GRULAC had nominated the distinguished Delegate of Colombia, Mr. Ricardo Velez Benedetti, as a representative of that region in the work, that it described as delicate, which would be undertaken by the Advisory Board.

68. The Delegation of Nigeria expressed gratitude to the Secretariat for the background work that it had done in implementing the decisions of the Committee concerning the participation of indigenous and local communities. It welcomed the generosity of the Swedish Government, the Swedish International Biodiversity Programme (SwedBio) and France for the announcement that it had just been made. It was hopeful that the gesture of the Member States in contributing to support the participation of indigenous communities and local communities would bring a fresh impetus to the effective participation of the primary stakeholders and ultimate beneficiaries of the product of the Committee. It reiterated that the importance of the Fund could not be overstressed, particularly for developing countries where the cost of participation could be a huge burden and a major constraint to effective participation.

69. The representative of the Métis National Council, although she recognized that the Annex of WIPO/GRTKF/IC/9/3 already outlined criteria for financial support from the Fund, strongly encouraged the newly formed Advisory Board to consider the profit which could be taken from funding young representatives of indigenous communities and urged the Fund to take action and give financial support.

70. The representative of the Saami Council trusted that the Chair would continue the practice of its two predecessors and increasingly provide for more effective and timely participation by indigenous peoples' representatives in the Committee's debates as well as in informal consultation processes. In this context, he drew the Committee's attention to the recent decision by the 8th Conference of the Parties to the CBD, calling on the Chair of the CBD Working Group on ABS to provide for enhanced indigenous peoples' representation in that group. Although this decision fell way short of fulfilling all the expectations of indigenous peoples, it did as much as recognizing the fact that indigenous peoples were custodians of, and right-holders to, GR and TK, and that their entire cultural identity might depend on how these matters were regulated. It warranted a right for indigenous peoples to participate in these processes that went beyond that of mere stakeholders and NGOs. The representative noted that the Committee addressed issues very similar to those being discussed in the CBD ABS Working Group. Consequently, it was logical that the same acknowledgement as to indigenous participatory rights would be made in the context of the Committee. Since the Saami Council placed such importance on indigenous participation in the Committee, its representative was pleased that the Voluntary Fund for indigenous participation in the Committee and related processes had finally been established. He commended the Government of Sweden, through SwedBio, for being the first contributor to the fund, and also the Government of France for its contribution just announced. He encouraged other Governments to follow this example and contribute to the Voluntary Fund, so that it would become truly operational, and not merely window-dressing.

71. The Representative of the Council of the Otomí Nation, explaining its project on the "Indigenous International University of Mexico", said that the Indigenous University was a proposal by the wise old men and women, as the guardians of tradition and depositaries of the sacred teachings of the indigenous peoples and nations, which aimed to encompass the great house of Science and Ancestral Knowledge, and thereby help the whole of humanity to learn to live in greater harmony with its own heart, as a family, and as a community with mother nature and the universe. The Representative said that the Council of the Otomí Nation sought to feed and nourish itself from its cultural heritage, world vision and ancestral experience. The Indigenous University had provided the possibility for its peoples to be able to decide their own path and historical destiny, as well as to determine their own ways to live, perceive

reality, think, be educated, feed themselves, heal themselves, work and organize themselves, enjoy recreation, protect their territory and live together with mother earth. The Indigenous International University had been the fruit of the Otomí indigenous, international and global movement, and a permanent aspiration of the indigenous peoples to have their own educational institutions as part of their complete re-establishment, and the full exercise of their right to free determination expressed in cultural autonomy. The request to set up the Indigenous University had been made in various indigenous fora, meetings, assemblies and congresses. As a historical date, the Representative mentioned the “Second Continental Meeting of Indigenous Nations, Peoples and Organizations”, held at the Otomí Ceremonial Center, in Temoaya, Mexico, in 1993, where the resolution to set up the Indigenous University, with its village as the headquarters, had been passed. The Representative pointed out that currently the Indigenous University had a head office in the city of Toluca, and would shortly open its doors in other regions of the country and the continent. It said that the task of the Council of the Otomí Nation was to promote and disseminate all the expressions of the sciences and ancestral knowledge of the indigenous peoples and nations of America and the world, in order to strengthen and develop the educational institutions and models, study plans and programs based on the indigenous world view, while ensuring that the education dispensed was intergenerational, and provided dignity for older people, as the great masters and sages of their cultures, just as the knowledge that helped to solve the problems afflicting humanity should be shared. It commented that its aims were to promote, disseminate and develop the specific models of education that were based on the indigenous world vision and free determination; to provide studies at different levels and by different methods in the following disciplines: spirituality and world vision, medicine and health, languages and literature, arts, ancestral philosophy and sciences, collective rights and mother earth among other related studies. The Representative asked WIPO and the Chair of the Committee for support and participation so that the Indigenous International University promoted by the Otomí Nation could be given specific form, be strengthened institutionally, and fulfill its aims of protection and defense of its ancestral knowledge and intellectual property for indigenous peoples. It also requested the good offices and legal advice of WIPO so that, in accordance with the rights belonging to it as the Otomí Nation and as an indigenous people, its Indigenous University project could be recognized and respected as a right to the practice of its educational and cultural autonomy, and as the exercise of its free determination. It further requested WIPO to support the Council of the Otomí Nation in promoting and disseminating its projects, so as to be able to obtain international funding for developing its programs and projects, for the benefit of its cultural heritage and intellectual property as an indigenous people. The Representative said that he was speaking on behalf of Mr. Däbädi Thaayrohyadi, General Coordinator, Founding Director of the Indigenous International University, Spiritual Chief and Guardian of the Otomí Tradition.

72. The Chair submitted eight candidates for appointment by the Committee to the Advisory Board in an individual capacity, according to article 8 of Annex to WO/GA/32/6.

73. The representative of Indian Movement *Tupaj Amaru* expressed its gratitude for the creation of the Voluntary Fund despite the fact he had been expressing for so long his preference for the funding of the participation of indigenous communities to be from the ordinary budget of WIPO. It regretted that the EU and other countries from the North opposed that proposal. He recalled to have seen the result of a Voluntary Fund mechanism in the United Nations where there are two voluntary funds for indigenous population. As the Delegation of Sweden had mentioned, these voluntary contribution funds must help people from the Third World, from developing countries, mostly from countries in which indigenous populations constituted a majority such as Peru. He referred to the previous statement made

by the Delegation of Peru and informed the Committee that a representative from Cusco had not been allowed to leave his country and had been forbidden from taking part in meetings in the United Nations and in the Committee. He stated that the support of the Voluntary Fund was needed for him too. He recalled that the way in which Member States operated was discriminatory, referring to the decision of the General Assembly which foresees that Member States should not be involved in the distribution of the funds. The Advisory Board had the responsibility for deciding who would benefit from the Fund. The representative of Indian Movement *Tupaj Amaru* emphasized firstly that *Tupaj Amaru* had never benefited from any fund and that it had given resources to set up infrastructure for indigenous communities or to create a workshop for women, in contrast with Bolivia which did not give anything. In that context, he stated that no one could say that some should benefit, and others shouldn't. Secondly, referring to the names of the members of the Advisory Board as proposed by the Chair, he noted that contrary to what had been decided by the General Assembly, there was no representative from developing countries on the list. He very much opposed that proposal and the way in which it had been prepared. He stated that no one had been consulted, except from Indigenous peoples from the North working for their government. He voiced that rich countries from the North should finance their own indigenous communities representatives. He did not support the fact that there were no people representing the South on the Advisory Board. He strongly emphasized that the *Tupaj Amaru* movement had never asked anything from any one, that it expressed itself with complete independence. Where ever it went, it did not need charities and did not need funds, it simply accomplished its mission, by principle, built on a strong conviction.

74. The Chair noted that his nominations included representatives of Kenya, Columbia, the Islamic Republic of Iran and Morocco which were developing countries. He added that the appointment of delegates from Member States was in the hands of Member States themselves.

Decision on Agenda Item 7:

Participation of Indigenous and Local Communities: Voluntary Fund

75. The Committee took note of the establishment by the General Assembly of the WIPO Voluntary Fund for Accredited Local and Indigenous Communities and of the details of its objectives and operation set out in the Annex to document WIPO/GRTKF/IC/9/3

76. The Chair proposed, and the Committee elected by acclaim, the following eight members of the Advisory Board to serve in an individual capacity: as members of delegations of WIPO Member States: Mr. Hekmatollah Ghorbani, Islamic Republic of Iran; Ms. Jean Kimani, Kenya; Mrs. Larissa Simonova, Russian Federation; Mr. Ricardo Velez Benedetti, Colombia; Mrs. Maria Westman-Clément, Sweden; as members of accredited observers representing indigenous and local communities or other customary holders or custodians of TK or TCEs: Mr. Alejandro Argumedo, Call of the Earth; Mr. Matthias Ahren, Saami Council; Mr. Merle Alexander, Kaska Dena Council. The Chair nominated Mr. Abdellah Ouadrhiri, Deputy Chair of the Committee, to serve as his deputy on the Advisory Board.

77. The Committee was subsequently advised of the applications for funding for the tenth session, the funding received, the recommendations of the Advisory Board and the decisions taken on the basis of those recommendations through the information documents WIPO/GRTKF/IC/9/INF/8 and WIPO/GRTKF/IC/9/INF/9.

AGENDA ITEM 8: TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

78. At the invitation of the Chair, the Secretariat briefly introduced documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/6 and WIPO/GRTKF/IC/9/INF/4.

79. The Delegation of Austria, on behalf of the European Communities and their Member States and the Acceding States Bulgaria and Romania, welcomed the renewal of the mandate of the Committee. The Delegation stated it was keen to continue the constructive work of the Committee in a spirit of open and responsible collaboration and build upon what had already been achieved. It fully supported the approach the WIPO Secretariat had chosen in focusing the discussions at this meeting on practical steps forward with the aim of ensuring a concrete outcome of the Committee's work. The Delegations thanked the Secretariat for having once again prepared extensive and useful documents for this session, notably document WIPO/GRTKF/IC/9/4 on the subject of TCEs. In answer to the various questions the WIPO Secretariat had asked in this document, the Delegation wished to provide the following elements. It considered that, in view of the great variety of indigenous communities and the multiplicity of their aspirations for and experience of their TCEs, it would be difficult to include detailed and specific obligations in any text that the Committee would produce. Rather, one should focus on common denominators and issues which enjoyed a consensus of support from members of the Committee, it was stated. Regarding the substance or content of possible outcomes of this work, it appeared to the Delegation that some of the material found under the headings of "Policy Objectives" and "Core Principles" could provide a basis for a text. Regarding the form or legal status of any such outcome, the Delegation believed that after the many years of discussion on TCEs it was still apparent that to endeavor to produce legally binding obligations would not only interfere with the current international IP system but would pose many difficulties for balancing the interests of those seeking protection against the legitimate use of works in the public domain. The Delegation was rather in support of soft law which could take the form of a statement, recommendation or guidelines. On preferred procedures required to achieve any such outcome, expert-level consultations and inter-sessional commentary processes were supported as ways to move forward to optimize the successful completion of the work of this Committee in a reasonable time frame. It appeared useful that consultations with all stakeholders continued in parallel. On the Objectives: Paragraphs i-iii: the Delegation fully recognized the general and specific value that indigenous communities attached to their TCEs and acknowledged that these communities deserved respect. All countries of the world should be attentive to even the smallest communities. However, those States within and across whose borders the communities lived were naturally the most closely linked and therefore had a duty to ensure the wellbeing of the local indigenous communities and respond to their specific needs at first instance. Paragraphs iv-v: in respecting indigenous communities, States should also respect, both physically and morally, the TCEs that these communities produced. Paragraphs vi-xi: TCEs not only reflected the essence of a community's identity, but they could also fuel its development and act as an ambassador abroad. It was, therefore, important to enable communities to foster their TCEs as they form an integral part of the community. Moreover, individual communities made up part of the global tapestry and it was important that their unique contribution be allowed to flourish not only in its own culture but also by exchange and in communion with other cultures. Paragraphs xii-xiii: use of TCEs, especially by those who were not part of nor acting on behalf of the indigenous community, should be carried out with respect for and in recognition of the culture in question and in a such a way as not to be detrimental to the indigenous community. On the General Guiding Principles: (a) Recognizing the importance of the aspirations and expectations of indigenous communities as regards their TCEs, it however believed that enabling these communities to

use the current IP system, where appropriate, both nationally and internationally, was a practical first step. Unless part of a working legal framework, it was difficult to identify illicit acts. (b) The very nature of IP protection had always been based on a delicate balance of interests between the creators and those who wanted to enjoy or use these creations. For uses that were considered offensive, other areas of law, such as blasphemy or unfair competition rules, could be of use. (c) It was agreed that the current international IP system of rights and obligations should not be interfered with and double protection should be avoided. (d) In view of the great variety in indigenous communities and the different attitudes and needs expressed by them during the past years of the Committee, it appeared that it would not be possible to develop a single system as a solution. (e) The characteristics of TCEs set out in this section meant that protection via copyright was not satisfactory. Indeed, the notions of their evolving character, the difficulty in identifying the creator and time of creation, their lack of uniqueness and the indefinite term of protection being sought were problematic when compared to the strict criteria (regarding the identity of the creator, the originality of the work, the time and length of protection) required to qualify for copyright protection. (f) The Delegation was in favor of continuing to discuss TCEs separately from issues under the heading of TK. (g) The work of the Committee should not interfere with the internationally recognized agreements on the subject of human rights. (h) It appeared that there was a certain overlap with indications already contained in subparagraph (a). In the EU's jurisdictions, TCEs were in the public domain and therefore open for free use by everyone, including those persons belonging to the original community. (i) Whatever systems were introduced to administer rights attached to indigenous communities should not prevent those wanting to be inspired by such TCEs to create. On the international dimension (and referring also to WIPO/GRTKF/IC/9/6), the Delegation reiterated its comments made on the preceding document on the international dimension (WIPO/GRTKF/IC/8/6), in that the document provided useful information for potential future reference but that discussion should concentrate on arriving at practical and efficient solutions on a national level before moving on to international considerations.

80. The Delegation of Norway thanked the Secretariat for the high quality of the working documents as always. Document WIPO/GRTKF/IC/9/4 had been before the Committee for a while in different versions, and it had been discussed a great deal. These discussions had been informative and fruitful. However, the Norwegian Delegation now felt the discussions should move forward, and it had pondered over where it would find it useful to continue. Document WIPO/GRTKF/IC/9/4 listed in its Annex several policy objectives and core principles. All of these had been discussed at length. There seemed to be a great deal of consensus on these objectives and principles. However, delegations' views were considerably more diverse when the substantive provisions in the same annex were discussed. Regarding the objectives, there seemed to be a great deal more agreement on what should form the basis of some sort of protection system for TCEs. While having no fixed vision on what a desirable final outcome should be, the Delegation was certain that there was a need for international guidance from the Committee on how to prevent the misappropriation of TCEs. One starting point would be to discuss more in detail what constituted misappropriation and unfair use. Another question was how to preclude unauthorized IP rights over TCEs. To the Norwegian Delegation, these questions had an obvious international dimension. Yet the Delegation continued to have an open mind on the nature of the outcome of this work. The Delegation had prepared a document for this meeting (WIPO/GRTKF/IC/9/12) which would be presented more thoroughly when the Committee started the discussions on TK. This document provided a further overview of the Norwegian Delegation's position. The Delegation ended by expressing support for paragraph 27 of WIPO/GRTKF/IC/9/INF/4.

81. The Delegation of Canada stated it was keen to see advances being made on all the issues within the Committee's mandate. It was important that this process be structured in an appropriate and logical manner. Therefore, the Chair's proposal to discuss WIPO/GRTKF/IC/9/4 in a sequential manner was supported, focusing first on the draft policy objectives. The Delegation shared the views of the European Union and Norway that the draft objectives and principles in WIPO/GRTKF/IC/94 provided the Committee with an excellent start to its discussion on any possible outcome on its discussions on TCEs. It was the prevailing view of the Committee that work on this area should progress, and in the Delegation's view, focused paragraph-by paragraph discussion and refinement was necessary. It would also allow for the Committee to elaborate on the international dimension of the protection of TCEs, consistent with the terms of its renewed mandate. The Delegation suggested that once the Committee had completed such a paragraph-by paragraph examination with adequate technical rigor, the Committee would have a better sense of where common ground lay. This shared understanding would be most useful to discuss next steps, whether further discussion on substance or as the Delegation of Norway had put forward in its proposal in WIPO/GRTKF/IC/9/12, with the support of many other States, the development of some international understanding or statement that could be brought to the WIPO General Assembly in 2007. The Delegation agreed with the European Union that it would be useful to bring together experts on both IP and TCEs in an appropriately convened ad hoc working group to provide the Committee with technical output on this issue. Any output from such a group could be brought to the Committee for its review, especially on the interplay between IP and the draft objectives and guidelines in WIPO/GRTKF/IC/9/4. The Delegation stated that it had more detailed comments on the draft objectives and principles in the document and would make them when the Chair thought appropriate.

82. The Delegation of the United States of America stated that it appreciated the work of the Secretariat in preparing WIPO/GRTKF/IC/9/4 and that the preparation of the draft objectives and principles in this document was in itself an important accomplishment of the Committee. The Delegation looked forward to the further elaboration and refinement of these important objectives and principles.

83. The Chair proposed a program of work for the rest of the week, in particular that the current morning session would be devoted to WIPO/GRTKF/IC/9/4 and that the afternoon session would discuss WIPO/GRTKF/IC/9/5. It was not intended to finalize discussion of WIPO/GRTKF/IC/9/4 or to adopt it, but rather to explore a convergence of views on particular paragraphs. There was no use in dwelling on controversial aspects at this stage. The Chair called for comments on the draft objectives in the document.

84. The Delegation of the United States of America stated that discussion of WIPO/GRTKF/IC/9/4 should be deliberate and systematic. Regarding the title of the Annex to the document, the Delegation recommended revising it to read as follows: "Traditional Cultural Expressions/Expressions of Folklore: Policy Objectives and Core Principles". This change would ensure the continued consideration by Member States within the Committee of all approaches and measures related to TCEs/EoF. On the first draft objective, "Recognizing value", the U.S.A. supported this policy objective. In particular, the U.S.A. affirmed the importance of recognizing the "intrinsic value" of TCEs/EoF. The Delegation also noted with approval that acknowledging the value of TCEs/EoF provided a framework for promoting innovation and creativity that would benefit indigenous peoples and other cultural communities. Such goals were fully consistent with WIPO's mandate and longstanding commitment to social, economic and cultural development. It was suggested, however, that

the phrase “to recognize value” should be amended to read “recognizing value.” This change was intended to better capture the aspirational aspect of this principle. The same formulation should be applied to each of the policy objectives.

85. The Delegation of Brazil stated that while it was useful to go through the document step by step as the Chair had proposed, there should be no decoupling of the text in the Annex to WIPO/GRTKF/IC/9/4. This meant that all three parts of the Annex should be duly considered and negotiated. The substantive provisions were the core of the text and should also be considered.

86. The Chair confirmed that the intention was to discuss the entire document, subject to time constraints and the need to consider all agenda items.

87. The Delegation of Austria, on behalf of the European Communities and their Member States and the Accessing States Bulgaria and Romania, stated it was willing to follow the procedure suggested by the Chair and would engage in the discussion on the objectives and general guiding principles proposed in WIPO/GRTKF/IC/9/4 paragraph by paragraph. It was hoped that this discussion – in combination with wider stakeholder consultation and expert review – would lead to refined wording which could provide a basis for a recommendation or another soft law instrument which helped to find practical and efficient solutions on a national level. However, it was stressed that its assessment of the provisions in WIPO/GRTKF/IC/9/4 had already be given in the statement made the day before. Nevertheless, the Delegation was keen to clarify its position and hoped that it could deliver comprehensive replies. Furthermore, it was the Delegation’s understanding that the idea that the Committee should start to draft provisions for legally binding instruments based on the suggested substantive provisions had not found sufficient support. It therefore joined those delegations which believed that discussion of the substantive principles was premature. On the draft Objectives, paragraph (i), the European Community its Member states and Accessing States considered that provisions aiming at the protection of TCEs should be focused on IP aspects as a matter of priority according to the framework of WIPO. WIPO was not in the position to define the global rights of local and indigenous communities which was important but was being dealt with in other fora.

88. The Delegation of South Africa, speaking on behalf of the African Group, appreciated the proposal of the Chair on procedure, and supported the position of the Delegation of Brazil that a step-by step approach was acceptable provided all three parts of the document were discussed. Discussion should also take place on the nature of the instrument, its substantive content and the procedure needed to achieve it. The process needed to be holistic and inclusive. All three parts were connected and should not be decoupled.

89. The Delegation of India stated that it welcomed the Chair’s suggestions as to procedure. It was necessary to discuss WIPO/GRTKF/IC/9/4 with a view towards adopting a legally binding instrument which would prescribe obligations on the use of TCEs. Discussion of objectives and principles must be composite and followed by discussion of the substantive principles as well as definitional issues, the Delegation stated. The objectives and principles related to specific subject matter, TCEs as described in Article 1, and this needed discussion. The Delegation of Nigeria shared the concern of the African Group that there would not be enough time to fully discuss each objective, principle and provision. The Delegation suggested that in view of the limited time available, it might be advisable to discuss all the draft objectives together and then all the draft general guiding principles. This might create enough time to discuss the draft substantive provisions.

90. The Chair suggested discussing the objectives and principles in clusters. He proposed, for example, discussing three draft objectives at a time.

91. The Delegation of Mexico supported the Chair's proposal to discuss the document paragraph by paragraph. The Delegation could not, with regret, agree with the interventions made by the European Union and the United States of America. The objective was to give protection to the holders or alleged holders of TCEs, so to eliminate the word "protection" from the title would remove the essence of the provisions. It was the Delegation's understanding that the text was not defining indigenous communities' rights but rather recognizing rights they had already.

92. The Delegation of Brazil stated that it had been agreed to examine the document paragraph by paragraph, yet some delegations had said some paragraphs should not be discussed because they were premature. It was now unclear on the procedure being followed. The Delegation had been willing to discuss the document paragraph by paragraph on the understanding that the whole document would be discussed. There had also been a reference to an inter-sessional meeting and the Delegation requested further clarification.

93. The Chair stated that there was no intention to adopt anything at this session but just to get comments on the document. This was a first reading of the document.

94. The Delegation of the Russian Federation was in favor of the document being discussed as a whole. If there was not sufficient time to do so during the session, delegations should be given the option to submit their comments in writing. Those comments would be summarized by the Secretariat and distributed to delegations during the inter-sessional period for discussion purposes and an exchange of views. In addition, the Delegation said that, if the wording was going to be discussed in the session, it was difficult for the Delegation to do so since the text was not available in Russian.

95. The Delegation of the Islamic Republic of Iran appreciated the shortage of time and the difficulties that this posed. The Delegation recognized that the Secretariat had played a crucial role in preparing WIPO/GRTKF/IC/9/4 which was the result of some six years of work. All views on all article of the document should be heard as far as possible.

96. The Delegation of Canada requested clarification on the proposal that had been made by the Delegation of Nigeria. The Delegation asked whether the Chair was proposing discussing three or four objectives as a time, which the Delegation could support doing. As this was a first reading of WIPO/GRTKF/IC/9/4 and as there might not be enough time to complete discussion of the entire document, delegations could revert with written comments at a later stage, the Delegation suggested.

97. The Delegation of Ghana noted that draft objective (i) referred to "intrinsic value" and suggested separating social, cultural and spiritual values from economic, scientific and commercial values. The Delegation suggested having two sub-sections in the draft objective, one referring to social, cultural and spiritual values and the other to economic, scientific and commercial ones to the extent that these were relevant, . With regard to draft objective (iii), the Delegation asked whether the reference to "indigenous and traditional and other cultural communities" was necessary. A reference to "indigenous and other cultural communities" was adequate, it was suggested.

98. The Delegation of Bolivia thanked the Secretariat for the documents prepared on TCEs. The misappropriation of the folklore heritage of developing countries was very often carried out through IP instruments, so it was urgent to address gaps in the IP system. Consequently, an international legal framework was needed to protect the rights of the traditional communities who were the victims of this misappropriation of their wealth. The country had a great richness of folklore not only because of cultural diversity, but because there were 32 different nations in the country's territory. These were found in a broad range of different ecosystems in Bolivia which was a megadiverse country. The Committee was proceeding very slowly compared with the needs of developing countries and indigenous peoples in developing and developed countries. While the Committee continued to discuss these issues, it was not only neglecting solutions for past misappropriations, it was becoming an accomplice for future misappropriations. The Delegation wished to believe that it was to remedy this situation that the Committee had been requested to proceed swiftly in its work, and the Delegation did not understand the lack of discussion of document WIPO/GRTKF/IC/8/4 submitted as an Annex to document WIPO/GRTKF/IC/9/4. The document submitted at the last session was the same as the current document. The Committee should be possible to produce an outcome this session, the Delegation concluded.

99. The Delegation of El Salvador thanked the Secretariat for the document which was extremely technical. The issue being discussed was of great importance for El Salvador. The country was recovering its true values and it wished to promote legislation on this issue. It would be of great value if the Member States of WIPO were to develop an international instrument or precise guidelines on this subject. The Delegation also supported the Delegations of Mexico and Brazil in stating that the important document WIPO/GRTKF/IC/9/4 should be discussed immediately. The Delegation also highlighted the success of the diplomatic conference held recently in Singapore, where a new treaty had been adopted without many difficulties. Therefore, in spite of the limited time, the Delegation suggested that the Committee make the most of the time remaining.

100. The Delegation of Japan wished to follow the cluster-by cluster approach proposed by the Delegation of Canada. The Delegation's first comment on the Annex to WIPO/GRTKF/IC/9/4 concerned the wording in the chapeau of the draft Objectives. With regard to the terms "traditional cultural expressions" and "expressions of folklore", Japan wished to reconfirm that at this point there existed no clear definition or a common understanding among the participating countries on what these terms meant. The terms "traditional cultural expressions" or "expressions of folklore" did not at this point presume or preclude any definite meaning, and they were open to future discussion.

101. The Delegation of Austria, on behalf of the European Communities and their Member States and the Acceding States Bulgaria and Romania stated that with regard to paragraph (iii) of the draft Objectives in the Annex to WIPO/GRTKF/IC/9/4, it was not seen why a reference to the "rights under national and international law" was useful in this context and what this reference would mean. It seemed more appropriate to concentrate on the actual needs of communities. Furthermore, as the Delegation had already stated the day before, those States within and across whose borders the communities lived were naturally the most closely linked and had, therefore, a duty to ensure the wellbeing of the local indigenous communities and respond to their specific needs at first instance.

102. The Delegation of the United States of America stated it was pleased to continue analyzing WIPO/GRTKF/IC/9/4 paragraph by paragraph or cluster by cluster. Regarding draft objective (ii) "Promoting respect", the Delegation supported this policy objective. Over

the last several years, the U.S.A. had repeatedly stated that fostering an environment of respect for TCEs/EoF was a fundamental principle that should guide and inform all of the work within the Committee. Concerning draft objective (iii) “Meeting the actual needs of communities”, the Delegation supported this policy objective. In the opening presentations by indigenous groups and traditional communities at this session of the Committee, the members of the Committee had once again heard eloquent testimony that underscored the importance of being guided by “the aspirations and expectations expressed directly by indigenous peoples and by traditional and other cultural communities” (the Delegation stressed the words underlined). The U.S.A. was particularly impressed by the rich cultural and jurisprudential diversity reflected in the various presentations, which served to emphasize an important theme in the work of the Committee. These presentations also carried an important cautionary lesson for the continuing work of the Committee. Any work undertaken at the international level must be careful to avoid doing damage to this complex network of existing national and customary laws, the Delegation stated. Like physicians taking the Hippocratic Oath, members of the Committee also must pledge to do no harm. The Delegation also noted that “community” was a complex concept that should be clarified as the Committee moved forward with its work.

103. The Delegation of Nigeria wished again to put on record its immense appreciation to the Secretariat for the enormous amount of work that had gone into the preparation of document WIPO/GRTKF/IC/9/4. The Delegation had in the past expressed concerns that the application of classical IP thinking and terms in the field of folklore might easily distort the picture and at best confuse issues. For instance, while it was admitted that EoF might have been publicly available – and this was understandably so given the character of the subject matter and particularly its mode of transmission – this did not mean that such materials had fallen into the “public domain”, a term of art which suggested an expiration of protection. One was dealing with subject matter that had never enjoyed formal protection. Most communities had their traditional mechanisms for the protection of their EoF. The Delegation found great practical wisdom in dealing with the international dimension of these issues in an integral manner as had been suggested by many delegations. It was agreed that there was need for further deliberation and cross-fertilization of ideas on the options available for addressing the many questions that had been raised by various delegations. However, the Delegation was satisfied that the present revised drafts were a fair distillation of the work undertaken so far and should form a credible basis for future work in this area. It was the hope of the Delegation that deliberations at this session would help to clarify some of the issues and assist in the articulation of appropriate draft policy objectives, guiding principles and more importantly, contribute meaningfully to the formulation of the substantive principles. On the draft objectives in the Annex to WIPO/GRTKF/IC/9/4, the Delegation accepted in principle the list of objectives elaborated as representing the general basis of the work of the Committee subject, however, to the comments that it would be making at the session and might wish to submit later. On objective (i), the recognition of the intrinsic value of folklore and its benefit to humanity was welcomed. However, it was the understanding of the Delegation that this would not be interpreted to imply that the exploitation of all of folklore, irrespective of source or character, should be open to everyone on equal terms (underlined word emphasized by the Delegation). On objective (iii), reference to the aspirations and expectations expressed directly by indigenous peoples and by traditional and other communities might be unduly restrictive (underlined word emphasized by the Delegation). The Delegation agreed with draft objective (ii).

104. The Delegation of Canada stated that it concurred with draft objective (ii) to promote respect, but suggested that it might be useful to add that the successful promotion of TCE systems could only take place if the views of all the creators and users of TCEs were taken into account as well as those of the broader general public. The word “equal” could be added before the word “respect.”

105. The Delegation of Italy stated that like the Delegations of Japan and the United States of America it had difficulties with the definition of the term “indigenous peoples and other traditional and cultural communities.” The Delegation considered that the definition should be very broad so as to cover all communities where there were TCEs/EoF, such as religious communities not particular to any territory. Thought needed to be given to this definition, as it was also relevant in Article 2 on the question of beneficiaries. The Committee should find an expression that could cover all communities where there were TCEs/EoF.

106. The representative of ARIPO concurred with the proposal for the way forward. However, a number of issues had not been clarified and the concerns raised by the Delegation of Brazil had not been adequately addressed. The Council of Ministers of ARIPO had approved a draft framework for the protection of EoF, which also contained three parts dealing with objectives, general principles and substantive provisions, with a view to developing a draft legal framework. At the 8th session of the Committee, a number of delegations had raised objections to part three of what was now the Annex to WIPO/GRTKF/IC/9/4. There was a need to decide on the procedure to be followed by the Committee.

107. The Chair clarified that nothing was agreed until everything was agreed.

108. The Delegation of New Zealand stated that it supported the first three draft objectives. In relation to the third, the Delegation noted that the needs of communities would differ from country to country and community to community, so the objective would have to be interpreted with some flexibility if it were to feature in some form of international undertaking.

109. The Delegation of Japan commented in relation to paragraph (iii) of the draft objectives that it was the understanding of the Delegation that at this stage there was no consensus on the creation of any new specific rights, obligations or mechanisms. Therefore, the concern was expressed as to whether it was appropriate to include in the text wording that might prejudice the establishment of certain specific new rights or mechanisms, or wording that was normative in its nature. Within this context, the Japanese Delegation had a certain amount of concern over the use of the word “right” in the phrase “respect their rights” in the second line of paragraph (iii).

110. The Delegation of Mexico expressed agreement with analyzing the document paragraph by paragraph, but said it was also open to other proposals. The Delegation did not approve the suggestion of the Delegation of the United States of America to delete the word “protection” from the document, nor did it approve the position of the European Union not to determine the rights of indigenous peoples, but to recognize the rights of such peoples. The Delegation participated in two ways: one included a mention of the right to the free determination of peoples in paragraph (iii) of the objectives, or rather of all the objectives; and the other, endorsing the proposal made by South Africa, of mentioning customary law through the recognition of practices and customs. Similarly, it expressed its trust in the Chair

of the group owing to the rational way in which he had conducted the discussions, and said that no one had opposed the parts of the documents which the Secretariat had transmitted, but expressed concern that not all the items on the agenda might be discussed. The Delegation proposed a road map in order to provide a follow-up to the subject and said that it would have to consult its national capital in order to send opinions in writing, a process for which the road map was necessary, since it included the concern of a number of delegations. In line with Canada, the Delegation observed that the discussion of those subjects within the WIPO framework (a forum where they should be discussed and negotiated) was of great importance for Mexico, which was a megadiverse country and, in its territory, had indigenous peoples with age-old cultures descended from ancient and important American civilizations with traditional knowledge and original expressions of folklore. The Delegation asked for the comments to be sent in writing so as to analyze the points of view of other delegations (United States, Brazil, India and so on), which were important countries in the negotiation, and said that a substantive discussion, in order to reach agreement on item 11 of the agenda, and also on the opinions that would be put forward, was still not possible. It pointed out that, without prejudging the instrument, it would have an effect in that field, and asked for the truth to be told on both sides (by the delegations which had intervened constantly), since there had been evasiveness in relation to concepts, as a result of which progress had not been made.

111. The Delegation of South Africa also wished to render its support for the first three objectives on page 3 of the Annex to WIPO/GRTKF/IC/9/4. In the regard to the issue of “rights” in objective (iii), it appeared that the intent of the paragraph was respect for rights. The key of the paragraph was respect for rights already recognized in national and international instruments. It was suggested by the Delegation that references to customary laws be added to this paragraph. The paragraph was not creating new rights but only respecting and recognizing existing rights.

112. The Delegation of Mexico stated that the proposal by the Delegation of South Africa to include customary law in draft objective (iii) was interesting and that it wished to add a reference to safeguard the interests of those countries that did not have a customary law system. There could be a reference to practices and customs under national and international legislation, the Delegation stated.

113. The Delegation of the United States of America stated that draft objective (iv), “Preventing the misappropriation of traditional cultural expressions/expressions of folklore”, raised an important threshold issue. The Delegation agreed with the view of the Delegation of Norway that this policy objective, which focused on the misappropriation of TCEs/EoF, differed from the others because of its “substantive character.” Norway had stated the difference well when it noted the prevention of misappropriation policy objective also contributed to the fulfillment of other policy objectives. The U.S.A. looked forward to a robust, focused and sustained discussion within the Committee of the application of this concept to addressing issues and concerns related to TCEs/EoF. However, such a discussion should be taken up only after a consensus had been reached around the policy objectives and core principles. As currently drafted, the language of this policy objective, which embodied many complex legal issues, invited a more focused, in-depth discussion. To take just one example, the phrase “derivatives therefrom” raised complex legal and policy issues that would need to be discussed more fully by members of the Committee. More broadly, the very notion of “misappropriation” was complicated from both legal and cultural perspectives. To oversimplify the cultural dimension, the term had varied and nuanced meanings across diverse traditional communities. In its deliberations, the Committee would also need to be assured that this principle was applied in a way that was fully consistent with the obligations of

Member States under international IP treaties and trade agreements. Regarding draft objective (v) “Empowering communities”, the U.S.A. supported this policy objective. It believed that “empowering indigenous peoples and traditional and other cultural communities” to address issues and concerns related to TCEs/EoF in a “balanced and equitable manner” was an important policy objective. The Delegation recommended amending this policy objective by deleting the phrase “exercise rights and authority over” and substituting the phrase “promote, protect and preserve.” This change would provide greater flexibility in addressing issues and concerns related to TCEs/EoF and recognize the diverse ways that indigenous peoples and traditional and other cultural communities addressed particular issues and concerns related to TCEs/EoF. The Delegation also supported draft objective (vi) “Support for customary practices and community cooperation”. The U.S.A. acknowledged the important role played by customary practices and community cooperation in promoting, protecting, and preserving TCEs/EoF. As noted earlier, and following from the illuminating presentations at the opening of this session of the Committee, it was important to acknowledge, and to do no harm, to the rich and diverse jurisprudence of customary law. Dr. Peggy Bulger, Director, American Folklife Center and member of the Delegation, then took the floor to discuss and illustrate these points in greater detail. As had been mentioned, the definition and scope of the term “misappropriation” would vary among traditional communities. The Delegation wished to advance the role of ethnographers (folklorists, anthropologists, ethnomusicologists, etc.) and archivists in the documentation and preservation of TCEs and in ensuring that they were not misappropriated. This important role had largely been absent from the Committee’s discussions to date. Scholarly societies in the U.S.A. (such as the American Folklore Society, American Anthropological Association, Society for Ethnomusicology, Society of American Archivists) all had codes of ethics that spoke to the responsibility of the researcher to his or her subjects. In addition, there was a new emphasis now on repatriation of cultural materials and ensuring the protection of sensitive cultural expressions (especially sacred expressions) that had been documented in the name of scholarship. It was submitted that each group of tradition-bearers ought to be consulted individually to define what constituted misappropriation. In terms of IP, ethnographic archives in the U.S.A. were merely the custodians of cultural materials and the IP rights all resided with the individuals or groups that had been documented. The American Folklife Center at the Library of Congress had developed protocols and procedures for the use of cultural materials by researchers for non-commercial use. All commercial uses of these recordings or images were restricted and users had to seek permission for use, or demonstrate a “good faith” effort to locate the rights holders. A good example of close collaboration between the American Folklife Center (AFC) and an indigenous group, for the purpose of preserving and sharing important cultural information, was the case of the AFC’s work with the Omaha tribe, in the state of Nebraska, in the American Midwest. The AFC’s relationship with the Omaha began in 1979, just three years after the AFC was created by an Act of the U.S. Congress. In that year, the AFC initiated a major effort, called the Federal Cylinder Project, that had gathered together a huge number of fragile wax-cylinder field recordings of Native American songs and stories made between 1890 and 1942, and then made preservation recordings of them in the AFC’s studio. The recordings were the first to document the music and narratives of various American tribes. In addition to preserving these one-of-a-kind recordings, the AFC also made copies of the recordings for the many tribal groups represented. At the time, it was a rare example of the government giving cultural materials back to the groups from which it had come, and it was considered one of the proudest achievements of the AFC. The recordings of Omaha songs were the first to have been recorded on the reservation, the range of the songs was wide, the quality of the sound was outstanding, and the people who made the recordings were important folklorists. Because of these factors, the AFC approached the tribe to produce a record album. Discussions took

place in Nebraska with members of the tribal council, and permission was granted to proceed. Selections of songs made between 1895 and 1905 were made in collaboration with the tribe. Members of the tribe also assisted by providing information about the songs. Following the wishes of the Omaha, songs that were considered too sacred for public dissemination were not selected. An album was subsequently produced, along with a 19-page interpretive booklet that put the songs in context. To celebrate the release of the album, in 1985, Omaha musicians and dancers had visited Washington and performed at the Library of Congress. The AFC collaborated with the Omaha again in 1999 to produce an extensive online presentation, called “Omaha Indian Music,” which was made available on the Library of Congress’s website. The key to the success of these two endeavors—the album and the online presentation—had been close collaboration with the owners of the cultural materials; an attitude where showing respect, carefully listening to tribal concerns, working together toward common goals, and taking the time to do things properly had been fundamental.

114. The Delegation of India questioned whether the terms “misappropriation” fully captured the distortion and mutilation of expressions of folklore which seemed closer to “misuse”. With regard to draft objective (v), the key was to strike the right balance between the rights of a community to protection and the scope for individual creativity and legitimate individual use. There was a need to recognize a wider rights dimension too, taking into account that TCEs/EoF had deep cultural roots and ritual significance and use by third parties could impinge on the rights of communities to use these cultural expressions in their cultural and spiritual context. The Delegation suggested adding the words “including overarching rights and obligations” after the word “rights: in draft objective (v).

115. The Delegation of New Zealand stated that its comments applied to both WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 and that it would use the term “traditional knowledge” in a general manner to refer also to TCEs. The concept of misappropriation featured in a number of the principles and policy objectives, and this was not surprising as it was concerns about misappropriation of traditional knowledge that had led to the establishment of the Committee. It was noted that this term was used to mean different things by different people and groups. Other terms were also used interchangeably but might not mean the same thing, such as “misuse”, “expropriation”, and “unfair”, “disrespectful or “inappropriate” use. If any ten people in the room were asked to give their understanding of misappropriation there might be ten different explanations. In New Zealand, the Trademarks Act, 2002 used the term “offensive use” and this had given rise to some discussion on its meaning. While it seemed that there was a general agreement that this was an essential principle and objective for the protection of traditional knowledge, it was important that there be a clearer understanding of it, the Delegation stated. For this reason, it was suggested that the next meeting of the Committee focus on the concept of misappropriation, and that delegations come prepared to focus on the substance of this matter. In this regard, the Delegation agreed with the Delegation of Norway that there was benefit in distinguishing between principles and policy objectives that might be suitable for substantive regulation at the IP interface and that WIPO might be able to effect or influence on the one hand, and more general principles that provide the broader context in which traditional knowledge existed, was used or was sought to be preserved and protected, and general principles relating to flexibility and consistency with existing international obligations, on the other. It was also agreed with Norway that the Committee should focus on areas of agreement, and that the policy objectives and general principles seemed to provide greatest potential for such. The Delegation considered that a substantive discussion of core policy objectives and principles — and their international dimension, with a focus on misappropriation - should take place during the period of the extended mandate, with the objective of reaching some form of

international understanding on the policy objectives and guiding principles that could guide further work in the area, including substantive protection at the international level. Given the diverse range of views and traditional knowledge systems, it was suggested that incremental progress was a realistic expectation and the Delegation therefore supported the process proposals contained in part three of the Norwegian paper (WIPO/GRTKF/IC/9/12). In order to make progress, it was also suggested that there was merit in taking the large number of policy objectives and guiding principles contained in the two documents and narrowing them down in some way to facilitate progress during the period of the extended mandate. For example, many of the objectives and principles relating to culture and preservation and conservation were quite similar (perhaps as a result of the commenting process) and could be combined. Also, as noted by New Zealand at the last session, many of the principles and objectives were the same or similar across the two documents. This made it quite difficult for stakeholders to grasp the content (this point had been made by New Zealand stakeholders). The material could be combined with lists of common objectives and principles and those that were distinct to TCEs and TK. The Norway proposal (WIPO/GRTKF/IC/9/12) took the concept of misappropriation and suggested a new form of substantive protection against misappropriation of traditional knowledge based on 10bis of the Paris Convention. This proposal expanded on unfair competition principles, but went further by including protection against acts of offensive use as well as those that created confusion. The Delegation indicated that it would support consideration of this proposal, as well as proposals that others might have which were perhaps more suited to the TCE side of the equation, as it would aid the Committee's consideration of misappropriation. Sharing of national experiences using 10bis of the Paris Convention would be useful, along with some hypothetical case studies that would test this sort of model against some of the examples of misappropriation raised by indigenous and local communities. While consideration of the 10bis model was supported, the Delegation did not think it would be realistic to aim for agreement on it within the period of the extended mandate.

116. The Delegation of Austria, on behalf of the European Communities and their Member States and the Acceding States Bulgaria and Romania stated with respect to paragraphs (iv), (v) and (xii) of the draft objectives that the Delegation supported the objective that States should respect the TCEs that indigenous communities produced. Furthermore, use of TCEs, especially by those who were not part of nor acting on behalf of the indigenous community, should be carried out with respect for and in recognition of the culture in question and in a such a way as not to be detrimental to the indigenous community. However, the position was reiterated 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. Greater use should be made of current IP rights where appropriate and of non-IP instruments such as rules against unfair competition and laws on blasphemy. In the view of the Delegation, the suggested text in WIPO/GRTKF/IC/9/4 did not sufficiently reflect the fact that many WIPO Member States were still not convinced that sui generis rights were an appropriate instrument for the protection of TCEs. Regarding the draft General Guiding Principles, the Delegation repeated its earlier comments and added that the suggested principle of comprehensiveness should be flexible in itself. Whereas a number of WIPO Member States might wish to provide sui generis property rights this was not the case for others. The suggested choice of legal mechanisms should encompass the decision to abstain from new property rights as well, the Delegation concluded.

117. The Delegation of Ghana stated that the proposal by the Delegation of the United States of America concerning draft objective (v) would seriously weaken the objective. Communities should be encouraged to promote, protect and preserve their TCEs.

118. The representative of the Saami Council supported the entire section on draft objectives in WIPO/GRTKF/IC/9/4. The Saami Council had serious concern with the positions of the European Union and Japan on the reference to “rights” in draft objective (iii), which said only that there should be respect for rights. The draft objective should continue to refer to such “rights”.

119. The representative of the Kaska Dena Council stated that the Council was particularly supportive of the language in all three parts of the annex to WIPO/GRTKF/IC/9/4 and throughout the objectives regarding the use of the term “Indigenous Peoples”. This language affirmed and complemented Canadian judicial rulings that had held: (1) traditional cultural expressions/traditional knowledge were an incidental but inseparable right of constitutionally protected Aboriginal rights and treaty rights (citing *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 56. which had stated that “to ensure the continuity of Aboriginal rights, a substantive Aboriginal right will include the incidental right to teach such a practice, custom and tradition to a younger generation”), and (2) aboriginal/treaty rights, by their very nature, were collective rights held by members of the particular Aboriginal nation (citing the case of *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1082-83 (para. 115)). The representative stated that he raised these points not to simply inform the Committee of legal nuance, but to argue that this inherent recognition was affirmed by Canadian law. With regard to draft objective (ii), the representative concurred with the intervention made by the Delegation of Canada for additional language on “equal respect”. Given that Canadian case law had supported that a legally and morally defensible analysis of Aboriginal rights placed equal emphasis on Aboriginal legal perspectives and common law perspectives, Canada’s intervention was supported. This was, however, without comment on the common circumstance that Aboriginal peoples’ perspectives’ were usually not given appropriate weight in relation to those of the general public. Equal respect would be an improvement for most Aboriginal peoples. With regard to draft objective (iii), the Kaska Dena Council affiliated itself with the perspective of the Delegations of Mexico and South Africa regarding the importance of “rights” language and, consequently, opposed the European Union’s and Japan’s proposed deletion of “rights” language. The representative strongly supported South Africa’s inclusion of a reference to customary law under this objective. Indigenous customary law was explicitly recognized and affirmed as a continuing right in Canadian law. There was a recognized co-existence of these substantive rights. The representative accordingly suggested that the draft objective read as follows: “Meet the actual needs of communities: (iii) be guided by the aspirations and expectations expressed directly by indigenous peoples and local communities, respect their rights under customary law, including indigenous customary, national, regional and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities.” With regard to objective (v) regarding “Empower Communities”, the Kaska Dena Council did not agree with the Delegation of the United States of America regarding deletion of the “rights and authority” wording. The Kaska Dena Council agreed with Ghana’s perspective on this point and this was complementary to the Council’s intervention regarding indigenous customary law.

120. The representative of Music in Common commenced his intervention by quoting Peter Seeger, whom he introduced as a distinguished American musician. Mr. Seeger had said: “Old songs, worldwide, now in the Public Domain are often ‘adapted and arranged’ and the

new song copyrighted. We propose that a share, .01% or 99.99%, of the mechanical, print, and performing royalties go to the place and people where the song originated. Every country should have a "Public Domain Commission" to help decide what money goes where."

Building upon the ideas expressed by Mr. Seeger, the representative proposed that the duties or functions of a Public Domain Commission would fall into three main categories: (1) preservation and development, (2) resource allocation, and (3) accounting and accountability. Regarding preservation and development, where the Commission would act as a "conservatory", the Commission would address issues of (a) canon formation, (b) archive/library and (c) masters/teachers. Exemplary works held to be so by general acclamation of the community, tribe, ethnic group or nationality involved would be assembled and performed by exemplary masters of the tradition. These might be recorded in both print and sound forms but they would necessarily be carried on in oral form to be passed on as they had already been for generations or centuries. This had been accomplished in some cases, had been partially done in others, and had yet to be undertaken systematically in still others, the representative noted. Regarding resource allocation, the Commission would focus on (a) funds for training youth, (b) funds for exemplary performance (regular festivals, customary events, etc.), (c) funds for instrument building and performance space construction and maintenance, and, (d) funds for sustaining master crafts people (instrument builders, performers and composers). The representative stated that to ensure traditions were kept vital and alive new generations had to be introduced to them in a way that honored the music itself as well as those who maintained its highest forms of expression. Infusions of new energy and enthusiasm had to be balanced with the mastery of the spiritual and practical skills needed to perform the music well. Structures suited to local conditions and histories should be constructed to ensure long-term sustainability. Concerning accounting and accountability, the Commission in each country would (a) monitor the health of the music, the musicians, and the community it arose from and served, (b) monitor the uses to which the music was put in the rest of the world, (c) collect funds generated anywhere, and (d) disperse funds correctly according to the principles outlined above. Through international agencies, performing rights societies, governmental bodies or combinations of all three, the uses of music could be monitored and evaluated. The representative stated that the public domain maintained in the public interest and available to all, as was a library, did not mean that monies generated by sale somewhere not be returned to their source of inspiration, namely the peoples or countries whence they had arisen. Indeed, it would be one function of the Public Domain Commission to ensure that two apparently contradictory purposes were served: to ensure preservation and development of a "natural resource" for the benefit of all and, at the same time, to limit use by those seeking to profit from it and to ensure that a reasonable portion of those profits were returned to the source to sustain it. Ultimately, accountability to the local Public Domain Commission should be the rule. Thus, a universal principle would be applied locally by those entrusted to do so. The representative went on to suggest that the composition of the Public Domain Commission should include music makers (musicians, composers and instrument builders) recognized as masters of their crafts. It might also include musicologists, historians and others sufficiently trained to ensure traditions were honored and healthily maintained. Educational and administrative functions corresponding to local conditions needed to be constructed but oversight should always include music makers. There were three areas where a United Nations Public Domain Commission would be useful in the implementation of these proposals: (1) origins, jurisdiction and rights designation. The origins of much of the world's music preceded the formation of present-day nations. Indeed, much of the world's music continued to be made and used by tribal, ethnic or other groupings who resided in different countries simultaneously. Furthermore, there were cases where no national body was recognized or trusted by ethnic groups whose music was in question. In such situations, a UN Public Domain Commission might afford the best solution, the representative proposed. This

should not, however, be merely a juridical “court of appeal”. On the contrary, the principal function of such a body would be to ensure the preservation and development of the music in question in accordance with the needs and wishes of the people actually involved in making it. If no local entity had the capacity or authority to carry out this task then the UN Public Domain Commission should do so. In determining a specific music’s origin the following questions should be answered: who made the music now? For what purpose was it made (sacred, festive, work, education, etc)? How would this be preserved and developed in the future? In determining what kinds of rights were applicable, a UN Public Domain Commission should use the conservatory model proposed above. The conservatory’s basic function was to ensure that the makers and users of the music in question continued to flourish. Prohibition or limitation of use was a secondary function only useful in the context of the successful fulfillment of the first. This meant, the representative stated, that resources from taxation, charitable institutions or profitable sale should be directed, first and foremost, to the preservation and development of the music and music makers involved; access to music should not be limited unless those who made and used it specifically designated it secret, sacred or otherwise unavailable to the world at large (in which case its unauthorized appearance would not only constitute simple theft but desecration subject to human rights protections); and, respect for the work, skill and creativity that had been and continued to be invested by those involved. This required public education within and beyond the communities in question to ensure that all who heard the music knew the history and present circumstances of the people who made it. The representative cited some illustrative examples in the words of Peter Seeger: “When I learned the story of how little royalties for the song ‘Mbube’ (‘Wimoweh’ in the USA) had gone to the African author, Solomon Linda, I realized that this was a worldwide problem. Why not try to start solving it? I had been collecting book and record royalties for ‘Abiyoyo’, a children's story I made up in 1952. It uses an ancient Xhosa lullaby. The royalties are now split 50-50, with half the royalties going to the Ubuntu Fund for libraries and scholarships for Xhosa children near Port Elizabeth, in southeast South Africa. In 1955, I put together a song ‘Where Have All the Flowers Gone’. The basic idea came from an old Russian Folk song, ‘Koloda Duda’. Some royalties for the song will now go to the national folk song archives in the Moscow library. In 1960, I put a melody and three words, ‘Turn, Turn, Turn’ to a poem in the Book of Ecclesiastes, written 252 B.C. The English translation was done in London 400 years ago. I have decided to send some royalties to an unusual group in Israel which is trying to bring Arabs and Jews together. In the USA, all the royalties for the song ‘We Shall Overcome’ have gone, for 40 years, to the ‘We Shall Overcome Fund’ which every year gives grants for ‘African American Music in the South.’ Bernice Johnson Reagan (Sweet Honey in the Rock) is the chairperson of that fund.”

121. The representative of INTA stated that INTA supported the recognition of TCEs and fully appreciated the objectives identified by the Committee concerning preventing the misappropriation of TCEs. INTA was fully committed to contributing its expertise with a view to achieving a proper balance between those objectives, established principles of trademark law and the legitimate interests of trademark owners. It was within this spirit that INTA offered comments on the earlier draft of WIPO/GRTKF/IC/9/4, a number of which had been reflected in the revised current draft. The Secretariat was commended for its work in putting together the present version. INTA noted that draft objectives (iv) and (xii) used the word “derivatives.” While familiar to copyright law, this concept was not familiar to trademark law. Trademark protection was limited to the same or similar mark as the protected mark and there was a need to show a likelihood of confusion. The relationship

between these two draft objectives needed further clarification. INTA might have further comments as this was a first reading of these draft provisions. The representative also advised that INTA had established an indigenous rights committee, showing the importance it attached to this issue and to the work of the Committee.

122. The Representative of the Ibero-Latin-American Federation of Performers (FILAIE) expressed its gratitude to the Secretariat for providing some excellent working documents as a result of praiseworthy efforts. He said that FILAIE represented 13 countries from Latin America and the Iberian Peninsula in Europe, with 23 performers' rights management entities. He also said that FILAIE had collaborated with the committees since 1990, bringing together more than 150,000 performers. The Representative referred exclusively to traditional cultural expressions and folklore, and therefore left aside traditional knowledge and genetic resources, since they were not relevant to his aim. He expressed the view that a disagreement on such subjects could create problems, since one of them would be detrimental to and paralyze others. He approved the existence of a consensus on a possible international treaty on traditional cultural expressions, which had emerged in all the statements made by government delegations, and said that advantage should be taken of this situation. He also said that when the WIPO Performances and Phonograms Treaty (WPPT) had been approved in 1996, the definition of performer used as its basis the conventional definition contained in the 1961 Rome Convention, but that a very significant element had been added, i.e. the performer was defined as the person who acts, sings, delivers etc...in any form a literary or artistic work and expressions of folklore. The Representative observed that, by adding that element, FILAIE had realized the extraordinary importance of that fact and had opened up its membership to that group of people who, generally speaking, were performers from indigenous communities. He reiterated that it should not be forgotten that indigenous performers, with their individual or choral chants, received a legacy that took care of, preserved and at times modified, from generation to generation, activity extending to dance and performance with musical instruments. In relation to the philosophy inspired by FILAIE's statement or principles which it wished would give rise to the possible international instrument, the Representative referred to what had been said at the Eighth Session of the Intergovernmental Committee, in paragraph 37 of document WIPO/GRTKF/IC/8/15, and recalled its theory of the 4 "Rs", i.e.: recognition, respect (protection), legal regulation and access to remuneration. The Representative believed that folklore should not enter the public domain as, if it did, that would go against its essence, which was continuity in time with respect to the indigenous community's authorship. The Representative stated therefore that there should be a legal definition of the concept of authorship which fell to the indigenous community, without being subject to a term or deadline in the exercise of the right. Recalling the problem caused by nomadic cultures living in multinational regions, he expressed the opinion that granting intellectual property rights to those ethnic groups and giving access to forms of remuneration for the authorizations granted could not be an exclusive process, since the groups' heritage should be directed to the whole of the international community and not limited. He reiterated that indigenous communities should be given protection mechanisms which would include civil, criminal and administrative provisions. In conclusion, the Representative said that in relation to the Voluntary Contribution Fund, FILAIE was studying the subject so as to be able to support it, since the matter had been dealt with at the Organization's General Assembly, held in Barcelona, Spain, in order to study forms of cooperation and the most appropriate assistance. Finally, he said that the management entities of which FILAIE consisted had been made aware of and viewed with satisfaction the work which the Intergovernmental Committee was doing.

123. The Delegation of Nigeria expressed its support for the views stated by the Delegation of Ghana on draft objective (v). On draft objective (iv), the Delegation of Nigeria was willing to engage in further dialogue in the reformulation of the objectives. While it agreed that the use of the word “misappropriation” in objective (iv) might not adequately represent what the holders of EoF required, the Delegation took the view that the objectives should reflect the need to provide protection for EoF and give communities the right to control their expressions of folklore. The general idea was that the objective was to prevent misuse and other illicit exploitations of EoF. On the possible implication of this for archives, documentation centers and other users of EoF, the Delegation was of the view that appropriate exceptions could be made.

124. The Delegation of China thanked the Secretariat for its efficient and constructive work, and supported WIPO/GRTKF/IC/9/4 as a basis for further deliberation. It believed that in the policy objectives, prevention of misappropriation should be set as a core objective for discussion of folklore protection at national and international levels, and proposed that the term “misappropriation” should be clearly defined in the substantive provisions. As regards the form of discussion, the Delegation seconded the proposal by the Delegation of Russia that comments of a specific and technical nature on WIPO/GRTKF/IC/9/4 as a whole could be submitted to the Secretariat in writing. The Delegation added the following specific comments and questions: (1) the term “misappropriation” should be specifically defined. Was it also necessary to add the term “misuse” (in the parts concerning objectives and substantive principles)?; (2) in the substantive principles, Article 3 concerning “Scope of Protection”, how was “(folklore) of particular cultural or spiritual value or significance” to be measured? If it could not be measured, the Delegation stated, it would not be possible to implement the requirements on registration or notification of “folklore of particular cultural or spiritual value or significance” as provided for in Article 7 of the substantive principles, let alone protection of such folklore; (3) in the substantive principles, Article 4 concerning “Management of Rights”, where did the “rights” derive from? Was it appropriate to use the term?; (4) in the substantive principles, Article 5 concerning “Exceptions and Limitations”, item (i) of subparagraph (a) provided for “the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community as determined by customary laws and practices”, while subparagraph (b) allowed “unrestricted use of TCEs/EoF by all members of a community”. What was the difference between the two provisions? Why was it that the term “normal” was used in former context and “unrestricted” in the latter? In addition, at the end of the sentence in subparagraph (b), the phrase “all nationals of a country” was added. What was the reason behind it, the Delegation asked; (5) in the substantive principles, Article 8 concerning “Sanctions, Remedies and Exercise of Rights”, the Delegation proposed to insert a subparagraph to the effect that it should be encouraged that disputes that had arisen in the exercise of rights should, as much as possible, be resolved through customary law or alternative dispute resolution mechanisms.

125. The Delegation of Australia stated that it supported the need for measures to ensure that TCEs were not misappropriated but, with reference to draft objective (iv), these should not conflict with existing property rights. Australia had measures for the prevention of such misappropriation and was also developing indigenous communal moral rights legislation to prevent the misappropriation of works that draw on traditional culture. The reference in the draft objective in question to including “effective enforcement measures” was too prescriptive and should be removed. This would give States greater flexibility. The Delegation supported draft objective (v) in principle, stressing the aim was to achieve a balance with existing IP laws and principles not to override them. Australia could not support measures for the protection of TCEs which would override existing IP laws and principles. On draft objective

(vi), the Delegation supported it in principle but believed there could be no recognition of separate systems of customary law. There could be recognition of customary practices to the extent they did not conflict with established international and national laws and policies, the Delegation stated.

126. The Delegation of Canada stated in relation to draft objectives (iv), (v) and (vi) that it shared in the global concern to prevent the misappropriation and misuse of TCEs. However, appropriate legal and policy mechanisms might vary in different jurisdictions and the term “misappropriation” was complex as the Delegations of the United States of America and New Zealand had said. With regard to draft objective (v), the Delegation affirmed its support for empowering communities but suggested maximum flexibility.

127. The representative of *TupacAmaru* stated that he agreed with the Chair’s proposal of proceeding paragraph by paragraph as this would enable more rapid progress. In terms of specific comments, first, the document proposed by the Secretariat did not contain the definition of the material to be protected. As one could see in the CBD and in copyright, there were very clear definitions of what was protected. Secondly, in the document there was no mention of obligations for the States to preserve and to protect expressions of folklore. This Committee was meeting in a multilateral setting and preparing an instrument to which States would be parties. On draft objective (i), the concept of value was an economic notion, but for indigenous people, expressions of folklore and TK were not only of a material but also a spiritual value. Therefore, the representative suggested adding the words “material and spiritual” after the word “cultural”. He also agreed with one governmental representative who had said that this draft objective could be split into two parts. In other words, there could be a spiritual part and an economic part, and this would be more understandable. With regard to draft objective (ii), respect was not a legal but moral one, and the objective should say “promote the right to respect” or “the customary right to respect.” The representative supported an earlier statement by the Delegation of South Africa on this point. Customary respect was absolutely critical for the TK and folklore. Draft objective (ii) should say “promote and safeguard respect” for traditional cultural expressions and folklore, because many instruments such as Convention 169 and the Draft Declaration of the United Nations on indigenous peoples already used those terms. The work in the Committee should not depart from other existing instruments. On draft objective (iv), the word “prevent” was weak. In draft objective (vi), whereas it said “support”, it should recognize customary practices and laws, and promote community cooperation for indigenous people and the right to self-determination. The right of self-determination was vitally important, and the Saami Council’s representative had already said this. Finally, draft objective (xii) it should refer to preventing the granting of unauthorized IP rights.

128. The Delegation of Mexico stated that it would submit written comments to the Secretariat on all paragraphs of the Annex to WIPO/GRTKF/IC/9/4.

129. The Delegation of Japan wished to make some clarifications in answer to concerns that had been raised by the representatives of the Saami Council and the Kaska Dena Council about the Japanese proposal to “delete” the word “right” from draft objective (iii). The Japanese Delegation had never proposed this, but had expressed a certain amount of concern over the use of the word “right” in the text, as the Delegation was not prepared to accept any wording which might prejudice the creation of certain new rights or mechanisms that were normative in any nature. The Delegation certainly had no intention to deny the existing rights of communities under existing national and international laws. If it could be clarified that the word “right” was to be understood in such a way, the Delegation had no intention to deny this

word. With respect to draft objective (v), the Delegation had the same problem with the word “right” in that paragraph. If the word “right” in this paragraph suggested creation of a certain new right or a certain specific mechanism, the Japanese Delegation would have to express its concern as to whether this word was appropriate. If this word only referred to existing rights under the existing national and international laws, that concern would be allayed. However, this led to another concern over the word “empower” in the same paragraph. The word “empower” usually meant giving a new right. If this was not so, and if the word “empower” here was used only to mean empowering someone to exercise existing rights, then there was a need to clarify the difference between the word “respect” in draft objective (iii) and the word “empower” in draft objective (v).

130. The Delegation of Brazil stated that it also had concerns over the phrase “derivatives” in draft objective (iv), as this was an unfamiliar term in relation to folklore. With respect to draft objective (vii), the Delegation suggested adding the two adjectives “natural” and “cultural” before the word “environment.” In draft objective (ix), the Delegation proposed adding “in accordance with prior and informed consent” after the word “promote.” Concerning procedure, the step-by-step approach that had been adopted would enable the entirety of each document to be discussed, but the Chair had said that discussion on WIPO/GRTKF/IC/9/5 would begin after lunch. How would the remaining paragraphs of WIPO/GRTKF/IC/9/4 be examined, the Delegation asked. One could not decouple the three sections of WIPO/GRTKF/IC/9/4. It was not useful to agree just on objectives and principles, and not discuss substance, the Delegation concluded.

131. The Chair stated that the agenda had to be completed and it was necessary to consider the process in its entirety. The process had still a long way to go.

132. The Delegation of Brazil raised a point of order and stated that the Chair’s explanation had not been sufficient. To cover all the documents, the Committee had to consider them all in their integrity, and the Delegation did not agree with moving on to discussing WIPO/GRTKF/IC/9/5. A piecemeal approach was not agreed to and was not what had been agreed to earlier, it was stated.

133. The Chair stated that if the session focused on one document only, the agenda would not be completed. The Chair proposed to discuss this matter directly with the Delegation of Brazil.

134. The Delegation of Brazil stated this was fine but confirmed it was not in agreement to continue with WIPO/GRTKF/IC/9/5.

135. The Delegation of the United States of America stated it was ready to discuss draft objectives (vii), (viii) and (ix).

136. The Delegation of Thailand stated, on draft objective (i), that it believed that all peoples and all communities, in particular indigenous peoples and traditional cultural communities, cherished and valued cultural heritage and wanted to preserve and protect expressions of their traditional cultures and folklore. This should be adequately emphasized in objective (i). On objective (iv), the Delegation was particularly concerned about the possibilities for a wide and diverse range of interpretations of the term “misappropriation”. Although the word “misuse” was welcomed in the text, the entire issue should be subject to further consultations and discussions before final agreement on the text could be reached on this very complex point. In this regard, Thailand viewed the work done at previous consultations as well as the

discussions so far at the present session as a big step forward. However, it was believed that consultations on the entire document WIPO/GRTKF/IC/9/4 should be pursued further at the regional and national levels. Like some previous interveners, Thailand maintained that its silence on other paragraphs should not be interpreted as consent. The Delegation also asked the Chair to clarify that Member States would have the right to submit written comments on WIPO/GRTKF/IC/9/4 at a later opportunity.

137. The Delegation of Guatemala stated that Guatemala was multi-cultural and multi-linguistic, and that the text should make clear that it was the indigenous people themselves who should administer rights against the misappropriation of their heritage.

138. The representative of the United Nations University (UNU) stated that customary laws had to be better reflected in the text. Customary legal regimes played a central role in the protection of TCEs and TK.

139. The Delegation of Canada stated that the Committee had collectively agreed to take a step-by-step approach and many delegations had supported and participated in this approach by providing initial comments. There was a need to discuss all the issues on the agenda.

140. The Delegation of the Islamic Republic of Iran stated that a way should be found to hear all points of view on the document.

141. The Delegation of Mexico clarified that it had stated that it would submit comments in writing because not much progress was being made in the session on the paragraph-by-paragraph approach. For this reason, it would submit comments in the inter-sessional period.

142. The Chair stated that he wished to act as impartially as possible and needed therefore to consult with members of the Committee. He had proposed the paragraph-by-paragraph approach but the complete agenda also had to be completed. There was never any intention to exclude any items. There were many proposals for how to proceed, and he invited further suggestions in this regard.

143. The Delegation of Australia supported the procedure the Chair had proposed and had been following. This had involved dividing the time for the session between the three main agenda items which meant one would at least open discussion on each of the documents. A paragraph-by-paragraph approach enabled a discussion of the substance, but it had been clear that not all the documents could be discussed fully in the session itself. Therefore, the Delegation had understood there would be some inter-sessional work done on the documents and it would propose that Member States be asked to comment on the entire documents in writing so that for the next Committee session there would be fresh and rewritten versions of the documents. The Secretariat had proved in the past its ability to do excellent work on documentation inter-sessionally. The Delegation would, for the next session, expect to see more focused and tighter documents which could also pick up proposals such as the proposal by Norway which could then be something the Committee could take to the WIPO General Assembly.

144. The Delegation of South Africa, speaking on behalf of the African Group, stated that the African Group continued to express its confidence and support for the Chair. However, the Group wished to express its concern that there seemed to be more interest in completing the agenda than tackling the issues. The issues were more important than completion of the agenda. The African Group also wished to identify itself with the position that the Brazilian

Delegation had taken that until WIPO/GRTKF/IC/9/4 had been discussed in its entirety it was not prepared to discuss WIPO/GRTKF/IC/9/5. The African Group wished an all-inclusive approach which looked at the document in its entirety. The Group also raised concerns about the rules of procedure, and the suggestion to move to a working group and a focus on editorial issues and not substance. Document WIPO/GRTKF/IC/9/5 should not be discussed while discussion of WIPO/GRTKF/IC/9/4 was inconclusively incomplete. The session had moved from one approach to another and this was unusual. A set of procedural rules was needed. The African Group concluded by stating that this would affect African countries the most and the subject under discussion was of great concern for them. The Group ended by confirming that until WIPO/GRTKF/IC/9/4 had been discussed in its entirety, it was not prepared to discuss WIPO/GRTKF/IC/9/5. This was an issue of concern to African and all developing countries.

145. The Delegation of India stated that while discussion of WIPO/GRTKF/IC/9/4 could take place paragraph-by paragraph, the document should be looked at as a whole and all three parts should be discussed. One part of the document could not be put on a fast-track. Document WIPO/GRTKF/IC/9/4, while requiring some refinements, formed a good basis for a meaningful discussion.

146. The Delegation of Brazil stated that the African Group had expressed the position well. The issue was not the Chair. As the African Group had said, it was necessary to discuss the issues and not mechanically follow an agenda. The Brazilian Delegation was very grateful for the document which contained three important parts which were a good basis for discussion, and, for some, part three was the most important. The Delegation did not want to leave the third part for some undefined inter-sessional process. This five day session should be long enough to discuss both WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 in sequence. The agenda items should not be mixed up, and agenda item 8 should be completed before moving to agenda item 9. The Delegation wished to have a full discussion on a good and adequate document prepared by the Secretariat.

147. The Delegation of Mexico recorded its full trust in the Chair and his way of directing the discussion. The Delegation also stated that nobody had expressed opposition to any part of the document that the Secretariat had submitted. Going through the document paragraph by paragraph was very constructive, because it helped the Delegations to express their views on each paragraph of the text, and the discussion so far had been good. There was no objection to dealing with all parts of the document as far as the Delegation of Mexico was concerned, but there was a concern that the exercise would not be completed. A road map was needed to reach the goal. At some point there was going to have to be a discussion of part three. There had so far been good momentum on parts one and two, and this would help with the discussion on part three because the objectives and general principles were difficult. The other question was whether there was time to make comments on all the other proposals and comments made, such as the proposal from Norway. Some of the other comments and proposals contained far-reaching concepts and it was necessary to revert to capitols, consult and submit comments in writing to the Secretariat. The Mexican Delegation suggested as one possible road map that discussion continue on WIPO/GRTKF/IC/9/4 until it was completed and then the discussion on WIPO/GRTKF/IC/9/5 could commence, paragraph by paragraph. This left open the possibility for additional comments to be sent in writing to the Secretariat in the inter-sessional period, after which the Secretariat could collect together and produce a structured analysis of the comments. That would be the basic document for discussion at the next Committee session.

148. The Delegation of Austria, on behalf of the European Communities and their Member States and the Acceding States Bulgaria and Romania, supported the Chair's proposal. More time on WIPO/GRTKF/IC/9/4 would be desirable, but it was necessary to move on. As was known, delegations were present for specific issues. Some persons were present for the TCEs/EoF item only while others were present for the remaining agenda items and it was important to hear their views. It was also a good proposal to send in written comments. These could be the basis for a new document for next session.

149. The Delegation of Singapore also agreed with the Chair. The discussion should move on and delegations could hand in written comments inter-sessionally. There should be a formal mechanism for making such comments which could be placed on the website as before. This would enable all comments to be considered before the next session.

150. The Delegation of the Islamic Republic of Iran stated that one could not cut up the document into three distinct sections. The Secretariat had fully explained the close relationship between the three parts in previous sessions. The entire document WIPO/GRTKF/IC/9/4 should be completed as a package.

151. The Delegation of Canada stated that it was important for the Committee to discuss all three items on its agenda, namely TCEs/EoF, TK and genetic resources. The Committee had never previously indicated a preference to discuss one item above the others. If the Committee did not move to a discussion of WIPO/GRTKF/IC/9/5, it would not get to the genetic resources item. There was no intention, however, to leave any issue incomplete. The Delegations of Australia, Mexico and the Russian Federation, amongst others, had suggested that Committee members provide written comments on the documents inter-sessionally. Next sessions could then work on fresh documents prepared by the Secretariat which would be a compilation of written comments provided, which would advance the useful work being done on the documents.

152. The Delegation of the United States of America supported the procedure being followed and believed it was important to advance on both WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 in parallel. The agenda contained other important items too, such as genetic resources, which needed to be discussed. The Delegation recorded its regret that time was being taken up with procedural discussions.

153. The Delegation of New Zealand stated that the objectives and principles in WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 were similar and could perhaps be discussed together to save time.

154. The Delegation of Nigeria endorsed the Chair's leadership. The Delegation had anticipated troubled waters and had earlier suggested a clustering of issues. Taking its cue from the Delegation of New Zealand, the Delegation noted that some issues in WIPO/GRTKF/IC/9/5 were a mirror of the issues in WIPO/GRTKF/IC/9/4. Therefore, moving further on with WIPO/GRTKF/IC/9/4 would save time when discussing WIPO/GRTKF/IC/9/5. The opportunity to comment during the inter-sessional period was appreciated. As the documents had grown from session to session, it would be better to have fewer and shorter documents to deal with at the next session. What concerned the Delegation, however, was a perception that the time was not ready for part three of WIPO/GRTKF/IC/9/4, that this part was a "no go" area and was being held back.

155. The Delegation of Colombia noted that this was a topic of great importance to it. Procedures were of great importance, and it was necessary to take a two year perspective, in other words by biennium. There were two years within which to make progress under the current mandate. Dealing comprehensively with WIPO/GRTKF/IC/9/4 would enable progress, the Delegation stated. There had been only a fragmentary analysis of the documents in past sessions of the Committee. There should be a complete examination of one topic, such as TCEs, and only then could headway be made. Then it could be seen when it might be opportune to deal with a new topic within the framework of the current two year mandate of the Committee.

156. The Delegation of Japan supported the interventions made by the Delegations of Australia, Canada, and the United States of America. All three topics, namely genetic resources, TK, and TCEs, should receive equal attention and time for discussion. It was necessary to accept the fact that there were time limitations.

157. The representative of *Tupac Amaru* said that after five years, the Committee had not made any progress because Western countries were blocking progress. The representative also regretted that the Delegation of Mexico did not have instructions from the relevant Ministry.

158. The Delegation of Mexico, in raising a point of order, asked the Chair to limit the time allocated to delegations. The Delegation had received specific instructions. If the representative of *Tupac Amaru* had comments about the instructions, he should not make them in this way, the Delegation added.

159. The Chair invited the representative of *Tupac Amaru* to conclude his intervention as rapidly as possible.

160. The representative of *Tupac Amaru* supported the interventions that had been made by Brazil and South Africa and stated that discussions should continue. The Committee should not jump from one text to the next.

161. The Delegation of Germany supported the view that all issues on the agenda be covered and that written comments be submitted after the session. Second, the Committee should not waste all its time. The Delegation proposed that the Committee devote more time to TCEs/EoF and try to finish it this day, and then commence with TK and genetic resources the following day.

162. The Delegation of Pakistan stated that it took the business of this Committee very seriously and was surprised at the procedural discussion that was taking place. The work of the Committee should be seen from an historical perspective and progress had been slow. However, in the last year, since there were texts under discussion, there was progress in the right direction. It was necessary to discuss WIPO/GRTKF/IC/9/4 deeply and completely. It suggested completing WIPO/GRTKF/IC/9/4 before moving to the next document.

163. The Delegation of Canada stated it had listened to the intervention by Germany with great interest, and proposed considering that at the next Committee session, the agenda be re-ordered to allow more discussion of genetic resources and TK and a number of proposals in these areas from Japan, Switzerland and the European Union. This was not a question of prioritizing but in recognition that at this session there had been a full discussion of TCEs which could continue inter-sessionally.

164. The Delegation of South Africa recorded that it had noted the compromise suggestion of the Delegation of Germany and proposed to discuss the entire WIPO/GRTKF/IC/9/4, including all three parts, for the rest of the day.

165. The Delegation of Morocco stated that the Committee should make headway in its work and that much progress had been made. Time should not be wasted on discussing procedural issues. There were two choices according to the Delegation. Either all the agenda items should be discussed or progress should be made on WIPO/GRTKF/IC/9/4 which would also facilitate progress on WIPO/GRTKF/IC/9/5.

166. The Chair thanked the Committee for its support. There was a need to move forward as there were some concerns that the Committee worked too slowly. There was a need for a road map and timetable. There were also the issues of written comments and priorities. This was at present an effort to have a first reading of WIPO/GRTKF/IC/9/4 as to how to improve the text. The Chair suggested continuing discussion of WIPO/GRTKF/IC/9/4 until the end of the day, whether paragraph by paragraph or the entire text, and whether of the first, second and/or the third parts. Delegations should just mention which paragraph or article they were commenting on. Once WIPO/GRTKF/IC/9/4 was completed, discussion of WIPO/GRTKF/IC/9/5 would commence. Thursday afternoon would be set aside to discuss genetic resources and future work and the session could finish on the Friday morning.

167. The Delegation of the United States of America had no objection to continuing discussion of WIPO/GRTKF/IC/9/4. It would have preferred to concentrate on parts one and two but would have no objection to other delegations making comments on part three as well. However, there should be no further revision to part three until there was agreement on parts one and two and an agreement to go on.

168. The Delegation of the Islamic Republic of Iran agreed with the Chair's proposal and suggested that delegations could comment on five paragraphs from each part of the three parts of the document and then submit further written proposals to the Secretariat.

169. The Delegation of Brazil thanked the African Group for its flexible proposal. The Delegation was willing to go on and discuss the entirety of WIPO/GRTKF/IC/9/4. The Committee should strive to reach convergence on all three parts of the document. The mandate of the Committee excluded no outcome and there should be convergence on all three parts of the document. No part of the document should be left aside.

170. The Chair expressed his gratitude for the Committee's support and invited further comments on WIPO/GRTKF/IC/9/4.

171. The Delegation of Brazil provided comments on the general guiding principles in WIPO/GRTKF/IC/9/4. With regard to principle (b), which referred to balance, the Delegation stated that the objective of the document was to safeguard communities and there was no need for balance. Regarding the substantive provisions, the Delegation thanked the Secretariat for the high quality of document WIPO/GRTKF/IC/9/4. Complementing comments made at the 8th session of the Committee, the delegation stated that on article 3, there should be no conditions for the protection of expressions of the folklore, more particularly, registration should not be required as a condition for communities to have the right to protect their folklore. Regarding, article 3(a), where there was a reference to "prior and informed consent" (PIC), there was no other reference to PIC in the rest of article whereas there ought to be, the

Delegation believed. PIC should, for example, be part of article 3(b). Article 4 was very important and should be kept as is, but the case where a TCE was held by more than one community should be covered. In article 5, the exceptions for news and incidental uses were too broad and unnecessary. In article 6, the term should be linked only to the criteria for eligibility for protection. There should be no registration as provided for in article 7. The Delegation had concerns with the references to alternative dispute resolution (ADR) in article 7 (iv), since one was dealing with communities who did not have the same bargaining power and this could be dangerous for communities. Article 9 should retroactively cover rights acquired previously in violation of the provisions. Finally, the Delegation stated that it was not possible to discuss the draft objectives and principles without discussing part three of the document. The substantive provisions were a fundamental part of the discussion.

172. The Delegation of South Africa believed, in responding to some delegations who had raised concerns about definitions, that with regard to draft objective (i) there was enough policy space for national legislations to define TCEs as they wished. Regarding the comment of the United States of America on draft objective (v), the words “exercise rights and authority” should not be deleted but one could add after that phrase the words “so as to promote, preserve and protect” The Delegation endorsed the views of the Delegation of Brazil on formalities, and agreed that there should be no formalities. It agreed also with the Delegation of Brazil on article 9 on retroactivity. The Delegation concluded that it would make further comments in writing.

173. The Delegation of Canada stated that it agreed with the comments made by the Delegation of Australia that the objectives and guidelines in the document needed to look carefully at IP rights and the need to balance with national and international IP laws and the integrity of the IP system. At the same time, the IP system was only one factor that affected TCEs. Regarding objective (ix), Aboriginal communities in Canada were already developing research protocols of their own and the Delegation continued to encourage those communities to provide information on such work to the Committee as appropriate.

174. The Delegation of Indonesia was of the view that the general guiding principles could be improved to refer to a principle of respect for national law because national laws were key in implementing the objectives and principles. A reference to national laws also reflected the flexibility principle. Draft objective (iii) referred to national law as did some of the substantive provisions which made it clear that the objectives and principles were subject to national laws. In the absence of a definition of indigenous peoples, for example, the draft article 2 on beneficiaries allowed States to use other terms in their national laws. The application of customary laws in article 8 on sanctions was also subject to national laws. As a further example, the management of rights under article 4 should be carried out under governmental processes in accordance with national laws. Paragraph (c) of the general guiding principles should be improved to read “Principle of respect for national law and consistency with international and regional agreements and instruments.” Delegation would provide further comments in writing.

175. The Delegation of Japan wished to clarify that discussing the text in its entirety did not mean that it was necessary to present all comments on all paragraphs in all parts of the text at the same time. Jumping from article to article, as was taking place, was confusing. What was needed was a discussion about each part of the text in an organized, responsible and meaningful manner. The Delegation wished to follow the Delegation of Canada and others who had commented on clusters of paragraphs in an orderly and sequential manner, and recommended to other delegations to do the same. On draft objective (xii), the Japanese

Delegation had concerns over wording which might prejudice the creation of certain new rights or mechanisms or that were normative in nature. The content of this objective, “Preclude unauthorized IP rights”, raised this concern for the Delegation which questioned whether it was appropriate to have this objective in the text.

176. The representative of the Saami Council noted that the Saami Council had previously commented extensively on the policy objectives and core principles contained in WIPO/GRTKF/IC/9/4 both during Committee sessions and in written document submitted to the WIPO Secretariat, as requested. He referred to these previous interventions, and stated that he would only now offer comments on the most crucial issues contained in the document. Generally speaking, the Saami Council believed that the TCE policy objectives and core principles had improved considerably during the course of the work of the Committee, and wanted to congratulate the WIPO Secretariat for very skilfully putting together the input from all participants. In particular, the Council thanked the Secretariat for being receptive towards the comments from indigenous peoples’ representatives. The policy objectives and core principles now contained several elements that – if adopted and implemented – could prove very useful for the protection of indigenous peoples’ TCEs. However, the Saami Council would like to see some improvements before their adoption. Chiefly, its concern related to points (c) and (i) in the list of recurring issues in paragraph 11 of WIPO/GRTKF/IC/9/4. It was reiterated that any international regime on the protection of TCEs needed to be clear on who were the owners, bearers and custodians of TCEs. In addition, further work was needed to address the issue of TCEs that conventional IPR laws regarded as so-called public domain. More specifically, the Saami Council could accept the draft objectives as drafted in WIPO/GRTKF/IC/9/4. It particularly underlined the importance of objectives (iii) – respect for indigenous peoples’ human and other rights – and (vi) – respect for indigenous peoples’ customary practices with regard to TCEs. These objectives were absolutely imperative in any regime on protection of TCEs. The Saami Council was also happy with the draft general guiding principles. Particular importance was placed on the commentary to the principle of responsiveness to the aspirations and expectations of indigenous peoples, which clarified that the responsiveness included respect for indigenous customary laws. There was a concern, however, with the principle of balance, as explained in the commentary. Certainly, there was a need to take into account also the interests of TCE users. However, interests could never be balanced against rights of TCE holders, such as, for example, their right to consent or not consent. Logically, a right – particularly a human right - always took precedence over an interest. The Saami Council was largely in agreement with most of the substantive provisions, too. It could support Articles 1 and 2 as drafted, but with regard to the commentary, it underlined that the notion that indigenous peoples’ rights to TCEs should be vested in a governmental office or agency was completely unacceptable. With regard to Article 3, the Saami Council could sympathize with the three layer approach proposed. A protection system for TCEs, agreeable to all, would have to distinguish between various forms of TCEs, based on the value and importance of that particular element to the originator of the TCE. The Saami Council recommended the inclusion of the reference to “free, prior and informed consent,” suggesting an exclusive right for indigenous peoples to certain elements of their cultural heritage. That said, the Saami Council firmly believed that the lists contained in Article 3 (a) (i) and (ii) needed to be enlarged, so that protection was extended to a larger part of indigenous TCEs that conventional IPR systems regarded as public domain. Further, there was still some concern that protection for TCEs was made subject to registration in a public register. With regard to Article 4, comfort was taken from the fact that the commentary clarified that a government agency only had a role to play in the management of TCEs if the people from which the TCE originated consented to such a process. The Council was concerned, however, that the actual Article 4 – referring merely to “consultation”

– did not clearly convey this demand for consent, and suggested that the article be redrafted accordingly. On Article 5, the Saami Council found itself in agreement with paragraphs (a) (i) and (ii) as well as paragraph (b). The list in paragraph (a) (iii) was too inclusive, however. The reference to research was particularly troublesome, given that indigenous peoples traditionally had had a lot of problem with research institutions. Article 6 was acceptable, and with regard to Article 7, the Council had already flagged its concern with the demand for registration for protection of TCEs. Article 8 was acceptable, provided that the government agency got involved in the enforcement of rights only to the extent indigenous peoples consented thereto. As to Article 9, the Saami Council could accept the intermediate solution chosen, acknowledging that it might take some time to bring IP legislation into conformity with the objectives and core principles. Still, it would have liked to see the reference to “respect for rights previously acquired by third parties” deleted from the Article. The Saami Council supported Article 10. With regard to Article 11, it believed that this issue demanded further consideration. The Saami Council commended the WIPO Secretariat, however, for recognizing the role that indigenous customary legal systems had to play also in cross-boundary protection of TCEs. In conclusion, if the concerns just mentioned were catered for, the Saami Council could support the adoption of the objectives and principles, as well as the initiation of a process aiming at transferring the provisions into a legally binding document. That said, if it was not possible to reach consensus on such a process forward, the Saami Council, as indicated in its opening statement, was also interested in entertaining the Norwegian proposal, with the clear understanding that the elaboration of a political declaration was merely an interim step, and should in no way interfere with the continued work towards an international regime. As stated earlier, such a political declaration could preferably be elaborated through a process parallel to the continued negotiations on an international regime.

177. The Delegation of Austria, on behalf of the European Communities and their Member States and the Acceding States Bulgaria and Romania, stated that the principle of comprehensiveness should be flexible in itself. It should be possible to abstain from establishing new property rights.

178. The Delegation of Mexico stated that there had been many comments by delegations, some of which affected the substance of the draft provisions. The Delegation repeated the request that the Secretariat compile all suggestions made in a table and that delegations be able to submit written comments in the inter-sessional period.

179. The Delegation of the United States of America stated that it had agreed to discuss WIPO/GRTKF/IC/9/4 on the basis that it would not be updated. With regard to draft objective (vii) “Contributing to safeguarding traditional cultures”, the U.S.A. supported this policy objective, which addressed preserving and safeguarding TCEs/EoF. One of the consistent themes of the work of the Committee had been the importance of contributing to the preservation and safeguarding of the environment in which TCEs/EoF were created and maintained. Such efforts were to the benefit of not just indigenous peoples and traditional and other cultural communities but also humanity in general. It would be a hollow victory if WIPO were to recommend to Member States measures aimed at the promotion, protection and preservation of TCEs/EoF just at the moment of their disappearance. Accordingly, the U.S.A. believed that the Committee should continue to make the protection against disappearance of manifestations of the world’s diverse cultural heritage a high priority, focusing on the relationship of the IP system to achieving this objective. Such efforts by WIPO should complement – not duplicate – important work taking place in other international forums. In particular, the U.S.A. noted the adoption of the UNESCO Intangible

Cultural Heritage Convention, 2003 which had recently come into force. This Convention required parties to the treaty to draw up inventories of intangible cultural heritage and provide information on them. As the mechanisms for administering this convention were put into place, enhanced coordination between WIPO and UNESCO would be beneficial to all concerned. Over the last several years, the U.S.A. had pointed out specific projects of the American Folklife Center of the Library of Congress (the AFC) that were highly relevant to the work of the Committee. Currently the AFC was engaged in a number of exciting programs at both the national and international levels, which Dr. Peggy Bulger, the Director of the Center and member of the Delegation would describe. Regarding draft objective (viii) "Encouraging community innovation and creativity", the U.S.A. supported this policy objective, which addressed the important goal of fostering community innovation and creativity. In the opening presentations by indigenous groups and traditional communities at this meeting of the Committee, it was learned how these groups understood the economic value of the knowledge created, used, and managed in their communities, including music, handicrafts, and textile and clothing design. The very helpful paper submitted by South Africa entitled "Indigenous Policy Knowledge Systems" (WIPO/GRTKF/IC/9/11) called attention to the ways in which Member States were adopting national policy frameworks which integrated TCEs/EoF and other cultural assets into overall development plans. The U.S.A. looked forward to learning more about the South African program and, more broadly, exchanging views with other delegations on the national policy dimension of TCEs/EoF. Concerning draft objective (ix) "Promoting intellectual and artistic freedom, research cultural exchange on equitable terms", the Delegation supported this policy objective. It believed that the important values of intellectual and artistic freedom, research, and cultural exchange had to co-exist with the values of protecting and sustaining TCEs/EoF in an environment that recognized their intrinsic value. Dr. Bulger cited an example of an international cultural partnership that could inform the work of the Committee, the World Digital Library. The Library of Congress was creating bilingual, multimedia digital libraries with partners from around the world. To date, the Library had partnered with the National Libraries of France, Spain, the Netherlands, Russia, and Brazil to make unique cultural and historical material available on the world wide web. Each partnership was negotiated between the two libraries to be tailored to the specific needs of those repositories and to be in compliance with IP legislation in both countries. For instance, one online digital library in the Global Gateways project was titled "The United States and Brazil: Expanding Frontiers, Comparing Cultures" and it explored the history of Brazil, interactions between Brazil and the U.S.A. from the eighteenth century to the present, and the parallels and contrasts between Brazilian and American culture and history. The project was a collaboration between the Library of Congress and the National Library of Brazil (international.loc.gov/intldl/brhtml/brhome.html). This initiative was one that clearly demonstrated the value of joint or regional cooperation in creating immediate access to cultural heritage resources for scholars around the world, as well as indigenous and traditional communities themselves. There were many examples of important work being done on a national and regional level across the globe. The Committee should take note of these successful efforts that were preserving and presenting TK and TCEs. Dr. Bulger also provided the Committee with information on programs to preserve and provide access to a Zuni Storytelling Collection consisting of 222 audiotapes documenting the oral tradition and history of Zuni Pueblo, New Mexico, and its people in the American Southwest. Nineteen Zuni community elders had related traditional Zuni folktales in the tribal language for the purpose of documentation. A generation (now deceased) of these respected tribal members had contributed over eight hundred stories, community legends and folktales, more than four hundred hours of recorded cultural/linguistic documentation. Working in concert with the New Mexico Heritage Center, the Zuni Tribal Council had determined that the recordings

should be transferred to the AFC so that these important cultural resources could be preserved. The transaction was given the blessing of the Zuni Tribe in the form of a Council Resolution (M70-90-L094), and the AFC received the master tapes for the Zuni Collection in 1996. Over the last 10 years, the AFC had made a number of efforts to preserve and protect these recorded materials. Regarding IP issues, the AFC constantly strove to balance questions of scholarly research and access to collections material with the requirements and wishes of communities of origin regarding the control, use, and wider circulation of their intangible cultural property. Since 2004, Pueblo members had expressed keen interest in using the recordings for cultural and linguistic maintenance and preservation projects among their people, particularly Zuni youth. Issues of cultural patrimony, limiting access to culturally sensitive texts, and related issues remained major concerns for Zuni Pueblo and for the AFC. By exercising due diligence in its collaborative efforts and by remaining respectful of and responsive to the needs of the community, the AFC would ensure that the Zuni Storytelling Collection was best able to serve as a critical cultural and educational resource for its primary audience - both present and future generations of Zuni people.

180. The Delegation of the Islamic Republic of Iran stated it would submit its comments in writing.

181. The Delegation of Australia stated that it objected to draft objective (xii) as it would undermine the IP system. While it could support proposals that led to the co-existence of IP laws and TCE laws, the Delegation could not support an objective that undermined the IP system. The Delegation confirmed its view as stated at the seventh and eighth sessions of the Committee that substantive provisions should only be developed after draft objectives and general guiding principles had been agreed. Part 3 of WIPO/GRTKF/IC/9/4 was set out in treaty-like text which pre-empted consideration of the form and status of the protection of TCEs. The provisions as they stood were very detailed and prescriptive and they focused on legally enforceable rights, yet there had been no agreement to get to that point. Without prejudice to this view, and just as an example in order to be constructive, nothing in the draft objectives and general principles justified draft article 6 on the term of protection. The Delegation objected to the notion of an enduring IP right as this was not consistent with the IP system and it was not based on the draft objectives and general guiding principles. The Delegation would accordingly oppose this article.

182. The Delegation of Nigeria was of the view that on objective (vi), the text should address the respect for customary practices by communities. This was not the same as the reference in the heading to “support”. While cultural intercourse should be actively supported and were indeed supported by other instruments, the primary concern of these provisions should be on respect for accepted usage by, within and between communities. On objective (vii), the Delegation preferred to place emphasis on “enhancement” rather than “contribution” to the preservation and safeguarding of expressions of folklore. This was to emphasize the complementary role of these provisions as far as the issues of preservation and conservation were concerned. The benefit envisaged need not be “direct” and it was proposed that this paragraph be rephrased accordingly. With respect to objective (viii), it was enough to limit reference to “tradition-based creativity”. Additional reference to innovation in the context of expressions of folklore might distort the thin divide between this subject matter and TK. The heading here could be misleading since although expressions of folklore were tradition-based, and their custodianship might accrue to a community, they were not truly “community creativity”. On objective (x), while cultural diversity should be promoted it was doubtful if this should be an objective of WIPO/GRTKF/IC/9/4. It was the hope of the Delegation that this objective would not be read in a manner that would dilute or further jeopardize the

interests of communities that were already burdened by the diversity of cultures. Concerning objective (xi), while the Delegation was convinced that communities should indeed be free to determine the manner in which their expressions of folklore should be commercialized, it was not certain that this was conclusion to be drawn from the present wording of the paragraph. As a policy objective, the Delegation suggested that this should not be made subjective. The exclusion of the opening phrase “where so desired by communities and their members...” was suggested. Secondly, reference to trading activity in the heading and marketing opportunities in the body of the text might be replaced with “commercial” which was considered to be more embracing. On objective (xii), although reference to “persons” rather than “parties” would have been more appropriate, it was suggested that for the sake of clarity the sentence should be rephrased to refer to “IP rights acquired over expressions of folklore” without due authorization rather than “IP rights acquired by unauthorized parties”. Objective (xiii) was laudable. The Delegation then turned to the draft general guiding principles. On draft principle (a), the Delegation acknowledged the role of customary laws, practices and protocols in the determination and administration of expressions of folklore but it was also important to bear in mind the fragile state of customary laws in many communities where statutes had eroded the relevance and applicability of customary laws. This limitation on the application of customary law, in some cases, should be instructive in further deliberations by the Committee. On principle (b), while balance was always welcomed, the allocation of weights in setting the point of balance was often a delicate task that had to be approached with caution. The Delegation accepted the need for balance between the rights and interests of those that develop, preserve and sustain expressions of folklore, on the one hand, and those who use and benefit from them, on the other. Further elaboration on “the need for specific protection measures to be appropriate to the objectives of protection, and actual experiences and needs” might unduly tilt the balance away from the interests of communities and for this reason its exclusion was suggested. Regarding principle (c), the principle of consistency was cardinal in ensuring the desired harmony. While the concerns that informed the formulation of this particular principle was understandable, care should be taken to ensure that it was not read in a manner that would subject the protection of folklore to the overbearing influence of other instruments that did not primarily address the promotion of the interests of communities and for this reason it was suggested that the principle here be reworded in a way that clearly reflected the principle of mutual respect. On principle (d), the Delegation agreed that a “one-size-fits-all” approach or a “universal” international template was not advisable and that there should be sufficient flexibility at national and regional levels for giving effect to the policy objectives laid out. It was, however, more important that whatever size was agreed upon fitted the communities concerned. To this end, this principle, in the view of the Delegation, had to be complemented by the principle of effectiveness of protection. Regarding principle (e), and while agreeing with the general characterization of expressions of folklore as dispersed and ever-changing, it was also important to recognize that all expressions of folklore did not have the same levels of dispersal and fluidity. It was also important that the characterization of contemporary folklore was not forced on traditional folklore. On principle (g), the Delegation was satisfied with the manner in which the Secretariat has reworded the proposal that had informed this principle. Concerning the substantive provisions, and referring to the draft article 1, the Secretariat was commended for having improved on the description of the subject matter. However, the suitability of including mere words should be reconsidered. Even in the context of source indication as contemplated in Article 3(a)(ii), it was not clear if mere words would be justifiable. The Delegation agreed that in order to determine what was an expression of folklore it was not directly relevant whether the expression had been made collectively or by an individual. However, it was the Delegation’s view that when speaking of contemporary creative expressions, a distinction should be made between an expression in the context of the accepted customary or communal usage (which would merely serve as a

vehicle for the perpetuation of the cultural expression) and a separate (exploitative) use in a non-traditional context. The latter might involve use of expressions of folklore but should not in itself qualify as such. Otherwise, it could blur the line between the traditional holders and users and create an unintended overlap between expressions of folklore and classical copyright. Regarding draft article 2 on “Beneficiaries”, the Delegation supported the definition of the primary beneficiaries of protection to be the indigenous peoples and other communities. However, the Delegation also supported the view expressed by the African Group that the role of States in this area should be recognized. The role of States where there were no recognized indigenous peoples or where it was for other reasons more expedient for a Government authority to administer the rights or hold the rights in trust for the communities concerned should be considered. If the intention of the Article was to extend the term used here to include nationals of an entire country then the choice of “communities” as against “cultural communities” was suggested in order to avoid confusion. Turning to draft article 3, subject to further deliberation and discussions in this area, the Delegation of Nigeria was able to go along with the multi-layer approach recommended in defining the scope of protection. It was hoped that this approach would address the concerns of those delegations that wished to see more certainty in the kinds of expressions of folklore that would be protected. Having said that, it recalled that this concerned acts that went beyond mere misappropriation. Distortions, mutilations and other illicit acts had to be anticipated, so reference should be to “misuse” and “illicit acts” rather than misappropriation which was really of little consequence in the area of expressions of folklore as compared with TK. On draft article 4 on the management of rights, having accepted that there were instances where a State agency might appropriately administer the rights on behalf of communities, it should be accepted that there were instances where the authority of the State agency might not necessarily be based on the request of a particular community and where it might be inexpedient for the agency to always deal directly with the communities on case by case basis. This was more so in those countries where indigenous people did not exist or where the territories of communities were blurred. Regarding draft article 5, the Delegation stated that the reference in sub-article (a)(i) should be to traditional or customary context as it was in sub-article (ii). The exception allowing for the making of recording and other reproductions for archives or inventories should be narrowly defined to require that such reproduction or inclusion must not be offensive to and should not adversely affect the interests of the relevant community. This was akin to the safeguard provided for in the field of copyright for exceptions and limitations. In this regard, the Delegation welcomed the development of appropriate contracts, IP check-lists and other guidelines and codes of conduct by the International Bureau and the outcome of these initiatives should be made available to members of the Committee. The value of including “incidental use” as an additional exception should be considered further. In the same vein, the Delegation wanted to see the proviso that the uses be “compatible with fair practice” worded with more certitude. The Delegation supported the allowance for special exceptions to be made available to members of a community or to the nationals of a country. This should not be seen as derogation from the national treatment principle but recognition of the special character of the subject matter as well as social and cultural realities of the environment in which it was situated. On draft article 6, dealing with the term of protection, the Delegation noted that although an expression might be divulged or known outside the holding community, it might yet remain secret in the context of the community or the language. In view of this, it was proposed that article 6 (ii) should be reformulated to reflect this in a way that did not suggest loss of the expression of folklore after the secrecy has been breached so long as the community continued to treat it as secret or it remained secret under their customary laws and practices. Loss of protection “as such” should not mean loss of protection altogether. On article 7 on formalities, the Delegation wished to see further elaboration on this provision. It was hoped that the reference in (a) to “from the moment of their creation”

did not suggest a dating of folklore. If anything, it ignored the evolutionary character of folklore and in the context of this provision might be superfluous. The Delegation proposed that there should be inserted a separate provision requiring that registrations or notifications be subject to reviews or some other forms of maintenance requirement so as not allow for the continue existence on the register of expressions of folklore that might have been orphaned or abandoned by their owners or otherwise lost their characteristic elements as expressions of folklore. Regarding draft article 8, while the intention in (b) was clear, it was doubted if it would be politically expedient or practical to insist that the same agency referred to article 4 should be the one to be tasked with the responsibilities in article 8. On draft article 9, the allowance for continued use in (b) should be subject to a good faith requirement. From experience and accounts, it was seen that this might be of particular relevance in the context of expressions of folklore where the acquired rights might have been based on a prior abuse and could still be found objectionable by the holding community going by the way and manner they were obtained. This might not be the same in the context of classical copyright. Finally, on draft article 11, the Delegation agreed that there was need for further elaboration on the implications of how the various approaches to the protection of foreign right-holders would translate in real terms in the context of expressions of folklore, bearing in mind the peculiar character of this subject matter and territorial spread of some communities that hold them and the mobility of members of holding communities. The Berne Convention-type national treatment might be a good starting point for this consideration.

183. The Delegation of Brazil stated that it did not agree that there should not be an incorporation of comments on the third part of WIPO/GRTKF/IC/9/4. Comments were being made and may be submitted in writing which were meant to contribute to the development of all parts of the document.

184. The Delegation of Colombia stated it would submit its comments in writing.

185. The Delegation of Italy regretted the purely formal nature of the discussions that were taking place and that there was no dialogue and exchange of views. The Delegation had reservations about WIPO/GRTKF/IC/9/4 along the lines of those expressed by the Delegation of Austria, on behalf of the European Communities and their Member States and the Acceding States Bulgaria and Romania. The Delegation would only emphasize the question of compatibility with international copyright treaties. This compatibility needed to be checked. The Delegation endorsed the views expressed on behalf of the European Community, its Member states and Acceding States, Bulgaria and Romania on, for example, draft articles 3 and 6. Some parts of draft article 3 were already provided for in the Berne Convention and the WIPO Performances and Phonograms Treaty, and there was a need to shed light on these overlaps and duplications. The Delegation hoped to have the chance to discuss substance later. Draft article 2 should clarify that beneficiaries were indigenous as well as other communities who were custodians of TCEs and EoF, as one could not just protect some communities and not others, the Delegation concluded.

186. The Delegation of the United States of America confirmed that it did not support any updating of part three of WIPO/GRTKF/IC/9/4 and that it did not believe the International Bureau had any mandate to undertake such updating. There was first a need for a greater convergence on the first two parts of the document. Turning to draft objective (x) “Contributing to cultural diversity” in the document, the Delegation supported this policy objective. The Delegation also supported draft objective (xi) “Promoting community development and legitimate trading activities” and added that the U.S.A. recognized that, appropriately managed and protected, TCEs/EoF could play an important role in the

economic, social, and cultural development of a nation. This policy principle was consistent with views expressed by many participants in the ongoing discussions within the Provisional Committee on the Development Agenda (PCDA). Draft objective (xii) “Precluding invalid IP rights”, which addressed unauthorized IP rights, like the policy objective on misappropriation of TCEs/EoF, differed from the other policy objectives because of its substantive character as previously pointed out by the Delegation of Norway. The U.S.A. looked forward to a robust, focused and sustained discussion within the Committee of the application of this concept to addressing issues and concerns related to TCEs/EoF. However, such a discussion should be taken up only after a consensus had been reached around the policy objectives and core principles. A number of weaknesses in the language and structure of this policy objective should be addressed in a focused and sustained discussion within the Committee. The U.S.A. also noted the concerns with this policy objective raised by other delegations, which deserved serious consideration by members of the Committee. On draft objective (xiii) “Enhancing certainty, transparency, and mutual confidence”, the Delegation supported this policy objective. Enhancing certainty, transparency, and mutual confidence among all of the parties concerned with and involved in creating, sustaining, promoting, protecting, preserving and using TCEs/EoF was an important policy objective.

187. The Delegation of Thailand confirmed it would submit written comments on WIPO/GRTKF/IC/9/4 at a later date. These would benefit from more comprehensive and thorough debates and discussions with all stakeholders at the local, national and perhaps regional levels. The Delegation wished to know whether there would be a deadline for delegations to send in their written comments, did written comments have equal weight with the statements delivered orally during the session, and would written comments be considered as conclusive, or could amendments be made to them at a later date.

188. The Secretariat replied that if the next Committee session were to take place towards the end of 2006, comments would ideally have to be submitted by the end of July 2006.

189. The Chair stated that delegations could subsequently amend written comments provide by them.

190. The Delegation of India stated that it was satisfied that the entirety of WIPO/GRTKF/IC/9/4 was being considered and this was a positive step towards reaching the target of a legally-binding instrument. The expression “cultural expressions” should include combinations of cultural traditions particularly in countries with a varied and diverse cultural heritage. In the Indian context, the term “indigenous peoples” might not be appropriate. With regard to article 5, the exceptions and limitations should allow legitimate and non-commercial academic research and legitimate publication of such research through normal commercial publishing channels. Further more specific comments would be submitted in the inter-sessional period.

191. The Delegation of Brazil saw no basis to exclude any part of the document from updating by the Secretariat, and recalled the mandate of the Committee. This mandate could not be fulfilled if some parts of the document were not updated. The whole document should be updated in line with the comments made. Regarding objective (xii), it was supported by the Delegation of Brazil and was closely linked to the substantive provisions, again demonstrating that all three parts of the document had to be discussed together.

192. The Chair proposed that further discussion on next steps take place under the Future Work item.

193. The representative of the Tulalip Tribes stated that draft objective (ix) did not adequately protect the rights and interests of indigenous peoples and holders of TCEs and it required qualification. While recognizing the value of promoting intellectual and artistic freedom, research and cultural exchange, the representative pointed out that this might in many cases lead to violations of customary laws related to the use of TCEs. Indigenous peoples had in many cases shared their knowledge, and made it available for such uses. The reference to “equitable terms” by itself did not provide sufficient guidance as to who held the right to determine what was equitable? It was believed that wherever the concept of “equity” appeared in WIPO/GRTKF/IC/9/4, it should always occur within the procedural context of being “fair and equitable”, in the substantive context of requiring free prior informed consent and based on mutually agreeable terms. The representative suggested that the draft objective read: “Promote intellectual and artistic freedom, research and cultural exchange on fair and equitable terms based on free prior informed consent and mutually agreed terms.” On the general guiding principles, the Tulalip Tribes supported the view of many of the delegates and the Saami Council on the issue of “balance”. The representative particularly supported the Saami Council on the issue that rights could not be traded against interests. The representative stated that the Tulalip Tribes came from a nation which recognized the prior rights of indigenous peoples. These rights were not granted, but recognized. These rights were held to exist until ceded by treaty, voluntarily ceded by the indigenous peoples or extinguished by a deliberate act of the United States Congress. These rights were also not dependent upon their continual and unbroken exercise. Any abridgement of these rights by others who exercised their rights by virtue of state grant constituted an illegal abridgement of these rights. Simply put, their rights could not be balanced against privileges.

194. The Delegation of the United States of America agreed to discuss a road map for next steps under the Future Work agenda item. Concerning the general guiding principles in WIPO/GRTKF/IC/9/4, principle (a), the Delegation supported the central tenet of this principle that issues related to TCEs should be addressed with sensitivity to the concerns and aspirations of relevant communities. The U.S.A. further supported the concept embodied in the principle that acknowledged the importance of indigenous customary laws in protecting TCEs. The related commentary, however, suggested that this principle had grown to cover a broad range of legal mechanisms and limitations on those mechanisms which appeared out of character of a general guiding principle. The Committee should discuss the scope of this principle. The Delegation supported principle (b), although it might need to provide for greater flexibility to account for special cases where an equitable balancing would not be appropriate. The Delegation fully supported principle (c), as this referred to a cornerstone of the international IP system and was one of the fundamental principles underlying all the work of WIPO. The Committee should, however, clarify the meaning of the word “processes.”

195. The Delegation of Guatemala, referring to draft articles 2 and 4, stated that as regards the use of the heritage of indigenous peoples and the rights of these peoples to allow the use of this heritage, IP law and copyright in particular had its limits. In Guatemala, only collective management societies were able to collect and distribute royalties. This should be considered further at the next session.

196. The Delegation of Honduras stated that the Committee should discuss all three parts of the document in a coherent and systematic way. There should also be discussion of options for outcomes as it was difficult to discuss objectives and principles without knowing the eventual outcome.

197. The Delegation of Japan agreed with the Delegation of the United States of America concerning draft general guiding principle (a). In the commentary to this principle, there was a reference to the complementary use of defensive and positive mechanisms. This wording presupposed the establishment of a legal mechanism and the Delegation wished for this to be clarified.

198. The representative of the Creators' Rights Alliance supported the changes suggested by the Saami Council and the Tulalip Tribes. On draft article 6, the representative proposed it provide that secret TCEs/EoF which are misappropriated or which are disclosed without authorization be protected in perpetuity. Generally, the representative believed that WIPO/GRTKF/IC/9/4 was an excellent beginning for the establishment of international principles on the protection of TCEs/EoF. The representative urged the Committee to move forward towards an international protective framework, be it a declaration, model provisions or a binding outcome. The proposed outcome suggested by Norway could be a interim outcome and a first international outcome, while a binding instrument should be ultimate goal. The Creators' Rights Alliance could support such an incremental approach and also supported inter-sessional meetings.

199. The Representative of the Indian Council of South America (CISA), speaking on behalf of his Aymara community from the province of Larecaja, Bolivia, said that Aymara music and dances had an emotional character and were performed by the communities only on certain occasions related to the agricultural calendar. The Representative had expressed his concern for many years regarding the community's expressions, since folklore from the Andean region enjoyed commercial success at the global level. Since they had been considered to be in the public domain, those expressions had no protection against unlawful use or out of context. Similarly, he wished to draw attention to the fact that the Aymara peoples were divided into four different States: Bolivia, Peru, Chile and Argentina, which was another factor that made the effective protection of their traditional expressions difficult. He said that the Aymara believed that their cultural expressions should not, as a result of their special character, be considered national or Andean folklore, nor should advantage be taken of them, as an exotic attraction, by groups alien to their communities and outside the ritual context. The Representative indicated that, for that reason, he was following the work of the Committee with great interest and expressed further interest in the proposal to create a non-binding instrument or an international declaration which would include the proposal that indigenous peoples should be trained to defend their own interests and define their cultural values, since they were the only ones who were familiar with the profound significance of their expressions. In that connection, he also said that the Aymara communities of Larecaja had already made progress in creating an archive of their dances and music, which they had also published on the Internet. He said that owing to a lack of financial resources, they had been unable to extend that work or to include the cultural values of other neighboring communities. In conclusion, he expressed the wish that more representatives of indigenous peoples could participate in the conferences in order to impart their experiences in relation to folklore.

200. The Chair concluded the discussion of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/INF/4 by stating that decisions on WIPO/GRTKF/IC/9/4 would be discussed further under the Future Work agenda item.

Decision on agenda item 8: Traditional cultural expressions/expressions of folklore

201. The Committee took note of the extensive comments made on the contents of document WIPO/GRTKF/IC/9/4, and the indications of a number of delegations that they would be submitting written comments to the Secretariat. It was agreed that the question of subsequent steps would be taken up under Agenda Item 11, Future Work.

202. The Committee also took note of documents WIPO/GRTKF/IC/9/12 and WIPO/GRTKF/IC/9/INF/4.

AGENDA ITEM 9: TRADITIONAL KNOWLEDGE

203. At the request of the Chair, the Secretariat introduced WIPO/GRTKF/IC/9/5, WIPO/GRTKF/IC/9/6 and WIPO/GRTKF/IC/9/INF/5.

204. The Delegation of the United States of America thanked the Chairman for giving direction to the work of the Committee and the Secretariat for its work on the Policy Objectives and Guiding Principles that were contained in document WIPO/GRTKF/IC/9/5. It felt that these Objectives and Principles were an important contribution to the work of the Committee and it was thankful for the opportunity to provide comments on the document. The Delegation suggested revising the title of Annex I from “Revised Draft Provisions for the Protection of Traditional Knowledge: Policy Objectives and Core Principles” to the following title: “Revised Policy Objectives and Core Principles Relating to Traditional Knowledge.” It recommended revising the chapeau of the policy objectives by striking the words “The protection of traditional knowledge should aim to” and replacing them with the following wording: “Member States may address issues and concerns related to traditional knowledge with a view toward:”. This change would ensure neutral treatment and continued consideration of all approaches and measures related to TK within the Committee. This recommendation also enforced the important concepts of freedom of choice and flexibility for Member States addressing these issues and concerns, which was discussed in the main body of the document. Regarding specific policy objectives, the Delegation supported Objective (i) and reaffirmed the importance of WIPO’s recognition of the intrinsic value of TK. In order to recognize the wide variety of indigenous and national TK systems that existed, and the distinct characteristics that many of them possessed, it suggested the substitution of the word “are” in line 4 with the words “should be” and the insertion of the word “may” before “have” in line 5. In the introduction to Objective (i), it suggested the replacement of “recognize” with “recognizing”. It suggested that this form be used throughout the text to introduce each policy objective. As the Delegation had pointed out for TCEs in relation to document WIPO/GRTKF/IC/9/4, these changes were intended to capture the dual aspirational and directional nature of the policy objectives set forth in this section.

205. The Delegation of Austria, on behalf of the European Communities and their Member States and the Acceding States Bulgaria and Romania, thanked the Secretariat for the preparation of excellent documents on the protection of TK. The European Communities recognized the importance of ensuring appropriate protection of TK and therefore supported the work of the IGC on draft Objectives and Principles for the Protection of TK. In particular, they supported further work towards the development of international *sui generis* models for the legal protection of TK and considered that the Committee had a viable basis for this work in the draft Provisions contained in document WIPO/GRTKF/IC/9/5. It supported a flexible approach and considered this essential in order to take account of the diverse options of TK protection which already exist and have been presented to the Committee. In paragraph 21 of

document WIPO/GRTKF/IC/9/5 the Committee had been invited to undertake further work by advancing three aspects, namely the substance or content of possible outcomes, the form or legal status of any such outcome, and preferred procedures required to achieve any such outcomes. On the substance or content of the possible outcomes, the European Community had the following comments: measures to protect TK needed to strike an appropriate balance between the interests of TK holders and the interests of those who use and benefit from TK. TK protection should also be consistent with existing IP systems and international treaties, without prejudice to specific rights and obligations already established under binding legal instruments. It believed that at this stage the focus of discussions should be on the objectives and principles for the protection of TK where the Committee members were more likely to find common ground. The European Community and its Member States believed that the focus on prevention of misappropriation was appropriate and important to keep an IP focus for the work, rather than focusing on other acts or objectives such as conservation, sustainable use, cultural heritage, biodiversity, human rights or other matters. The European Community took a keen interest in the proposal which seeks to prevent misappropriation through the suppression of specific acts of unfair competition by adapting existing unfair competition provisions, such as Article 10*bis* of the Paris Convention, to the protection of TK. It noted that in recent history, new and distinct forms of protection, such as the protection of undisclosed information, semi-conductors and geographical indications, had evolved from their origins in Article 10*bis* and unfair competition law. On the form and legal status of any possible outcomes the Delegation referred back to its opening statement where it had expressed a preference for a non-binding legal outcome. Nevertheless, the European Community was open to considering all possible non-binding legal options, especially where they were based on successful past experiences within WIPO, such as the development of Recommendations by the SCT. Regarding the suggestion in paragraph 21(iii) for an appropriate process to develop revised and updated drafts for the next session, the European Community felt it would be useful to build upon successful past experiences of the IGC with inter-sessional commenting processes with the aim of preparing revised drafts for consideration at the tenth session of the Committee. The European Community indeed had the intention to submit further comments during the inter-sessional process. Finally, it remained supportive of the view expressed in earlier documents WIPO/GRTKF/IC/8/5 and WIPO/GRTKF/IC/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, the European Community wished to reiterate that, in line with its preference for internationally agreed *sui generis* models, the final decision on the protection of TK should be left to the individual Contracting Party.

206. The Delegation of India reiterated its earlier statement that the objective of the IGC should be to move towards an internationally binding legal document that would protect TK holders against misappropriation and misuse. The issue had to be addressed holistically. The Objectives and Guiding Principles must be followed by Substantive Principles which would translate both Objectives and Guiding Principles into concrete action points. Therefore, document WIPO/GRTKF/IC/9/5 needed to be worked upon in its entirety and not in parts. A careful reading of the document WIPO/GRTKF/IC/9/5 revealed that the Articles in Part III were organically linked to the Objectives and Guiding Principles in Parts I and II and could not possibly be considered in isolation. The Delegation announced that it would submit its detailed comments in writing to the Secretariat.

207. The Delegation of China thanked the Secretariat for the comprehensive and detailed documents, especially the present document WIPO/GRTKF/IC/9/5. It felt that this document reflected the past work of the IGC and was a good basis for continuing the deliberations of the

Committee. The IGC had always played an important role and at the General Assembly in 2005, the IGC's mandate had been renewed. This represented the Member States' expectations towards the IGC and the responsibilities of the IGC. On document WIPO/GRTKF/IC/9/5, the Delegation stated that a detailed protection system had different aspects, including conservation, protection and utilization. The IGC should clearly define the role and status of the TK protection system. To clarify its near-term objectives, the Committee should identify priorities and highlight the issues at the international level, such as prior informed consent and benefit-sharing. The Committee should also highlight the contents concerning the right holders' interests so that the contents should not be too general. Furthermore, the Committee should also adjust the contents and avoid repetitions in the document, so that the document would be more concise and clear. The Delegation stressed that the Objectives, Guiding Principles and Substantive Principles were an integrated package and were organically linked. Otherwise, the Principles would become empty Principles. In the present text, the Policy Objective (iii), the term "local and indigenous communities" was used, and in Objective (v), the term used was "indigenous and traditional communities". The Delegation suggested clarifying whether these terms were different. If they had different meanings then that should be explained and if they were the same then they should be unified. Concerning its other detailed views on the draft Articles in document WIPO/GRTKF/IC/9/5, the Delegation would put forth its views in written form.

208. The Delegation of Brazil presented some remarks on the proposition of deleting references to the terms "protection" and "provisions" from the titles of documents WIPO/GRTKF/IC/9/5 and also from document WIPO/GRTKF/IC/9/4. Going along with this proposal would mean prejudging the work of the Committee and violating the mandate that the Committee received from the General Assembly when it talked about not excluding any outcome. The Delegation took a very democratic and inclusive stance and was willing to consider the views presented by all delegations. It therefore did not see why there should be a reason to exclude *a priori* the presentation or consideration of views put forward by some delegations. It wished to make it clear that it did not find it appropriate to exclude anything at this moment since that would mean prejudging the outcome of the Committee's work. The Delegation agreed with Policy Objective (iv), "Conservation and Preservation of TK." To ensure that this Objective would be fulfilled, the Delegation wished to add a sentence which would ensure that there should be promotion of measures aimed at conservation and protection of natural and cultural environments. The Delegation considered Policy Objective (vii), entitled "Safeguarding of TK", to be very appropriate. It felt that language more in line with Article 10(c) of the CBD would be appropriate and recalled that Article 10(c) CBD sets out to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation and sustainable use requirements. This language would be more suitable to the purpose of this objective. In Policy Objective (xi), entitled "Ensure Prior Informed Consent and Exchange on Mutually Agreed Terms," the Delegation preferred to delete the word "existing". In Policy Objective (xii), entitled "Promote of Equitable Benefit-sharing", it suggested to replace the word "promote" with "ensure", since the Objective should be more assertive. It also suggested to delete the last part of this Objective, starting with "and including through fair and equitable", so that the Objective would have a full stop after the words "prior informed consent." Regarding Objective (xiii), entitled "Promote community development and legitimate trading activities", the Delegation expressed its understanding that the initial words, "If so desired by the TK holders," meant a reference to respect for prior informed consent. The Delegation welcomed Objective (xiv), entitled "Precluding the grant of improper IP rights to unauthorized parties", and considered it to be of the highest importance. It welcomed in particular the reference to the requirements of disclosure as conditions for the

grant of patent rights and wished to see such a provision not only as part of the Policy Objectives but also as a substantive provision. It recalled that it had been recognized by the Conference of the Parties of the CBD that the disclosure requirement was an important mechanism to address the issue of misappropriation by means of granting improper IP rights without complying with CBD requirements of PIC and benefit-sharing. Regarding the General Guiding Principles, it welcomed the Guiding Principles that were presented in document WIPO/GRTKF/IC/9/5. It emphasized that the Policy Objectives and Guiding Principles had value as long as they were read in conjunction with the substantive provisions and reiterated its understanding that the three parts were interlinked and could not be decoupled. Regarding the comments on Guiding Principles (a), entitled “Responsiveness to the needs and expectations of TK holders,” and (c), entitled “Effectiveness and accessibility of protection”, it stated that it did not agree that enforcement measures were voluntary. Its understanding was the contrary and the Committee should ensure that enforcement measures were not voluntary, so as to make them effective. On Article 1, entitled “Protection against misappropriation”, it had some specific comments which it would transmit in written form but wished to propose that this article should include a specific provision regarding the disclosure requirement. This was an appropriate mechanism that had been identified by the international community to tackle cases of misappropriation through grant of improper IP rights. Regarding Article 2 it suggested that language should be included dealing with the *sui generis* system for the protection of TK, since this was an idea that all Committee members shared, but it was not expressly contained in the language of Article 2. It wished to see explicit language dealing with the *sui generis* protection of TK. On Article 3, paragraph 2, it suggested to replace the words “and knowledge associated with the resources” with the words “or any other knowledge associated with the resources”, so as to encompass all other sorts of knowledge, such as knowledge regarding agriculture, the environment or medicine. On paragraph (iii) of Article 4, entitled “Eligibility of Protection”, it suggested to replace “integral to” with the words “related to”, since the wording “integral to” did not cover adequately all the cases for possibility of protection. In paragraph 1 of Article 6, entitled “Fair and Equitable Benefit-sharing”, there should be language referring to national legislation in the country of origin in order to respect the CBD. In order to reflect this, the paragraph should begin with the words, “According to national legislation of countries of origin,” and then continue as it was. On paragraph 1 of Article 7, entitled “Principle of Prior Informed Consent”, it suggested to delete the words “from its traditional holders”. It proposed the deletion of paragraph 2 of Article 8, since it was quite vague. In paragraph 2 of Article 9, entitled “Duration of Protection”, it suggested replacing the words “specify the duration of protection” with the word “prevail”. In Article 10, entitled “Transitional Measures”, it wished to exclude the word “acquisition”. In paragraph 2 of Article 11 it wished to replace “In the interests of” with “To enhance”, since it considered that registration was not the only instrument aimed at ensuring transparency, certainty and the effective conservation of TK. In Article 12, entitled “Consistency with General Legal Framework”, it was important to incorporate language which made it clear that national legislation which should be respected was legislation from the country where the TK holders resided. In conclusion, the Delegation wished to make clear that the documents produced by the Secretariat were of high quality, but some adjustments could still be made.

209. The Delegation of Canada commended the pragmatic approach of the Chair on the discussion on TCEs/EoF and proposed the continuation of this approach in discussing TK. It considered this approach helpful to gain common ground amongst Member States in this area. The approach also helped the Committee to move in the right direction towards achieving a reasonable deliverable that could be forwarded to the WIPO General Assembly 2007, perhaps in line with the suggestions made in the ninth session by Norway. Canada was committed to

engaging in the discussion of the substance of document WIPO/GRTKF/IC/9/5 in a methodical manner, starting with paragraph (i) the policy objectives, but it would also seek to follow this up with written comments on the text at a later date and as appropriate. Before providing its comments, Canada wished to reiterate its support for the continued technical discussions on IP protection of TK in the IGC, because the Committee had a well-established IP expertise and its resources and capacity should be applied more fully to the discussions in the Committee. On Objective (i) it was Canada's view that the reference to equal scientific value as other knowledge systems should be clarified. The reference to scientific value seemed redundant since it was already mentioned in the first line of the text. Canada supported Objective (ii), entitled "Promoting respect", because it recognized the value that TK had for existing TK holders and society in general, including indigenous and local communities. However, the text could benefit from some additional clarity and, in particular, it would be useful if the text could reflect that the successful promotion and respect for TK systems would only be effective if the views of all TK creators and users as well as those of the broader general public were taken into account and balanced. On Objective (iii), entitled "Meeting the actual needs of TK holders", Canada had some concerns with the use of the term "rights" in this objective and suggested the addition of the words "intellectual property" prior to the word "rights".

210. The Delegation of Australia announced that Australia would provide detailed written comments at a later stage and its brief present comments were therefore without prejudice to its position on document WIPO/GRTKF/IC/9/5. Regarding Objective (iii) Australia believed that there should be a reference to the need for such rights of TK holders to be consistent with national and international laws. Regarding Objective (iv), referring to promoting the conservation and preservation of TK, it queried the reference to 'protecting' TK systems. Regarding Objective (v), Australia could not support this Objective in its current form if it made the existing IP system subservient to the protection of TK because it would risk undermining the integrity of the existing IP regime. As mentioned previously in its intervention on document WIPO/GRTKF/IC/9/4, it acknowledged that while any right given over TK would need to be balanced with current national and international laws and principles, it could not support this objective if its aim was to allow such rights to prevail over existing IP laws and principles. As to Objectives (vi) and (vii), which broadly deal with the role of customary laws and practices, Australia could give in principle support to these Objectives only where such customary laws and practices did not conflict with established international and national laws and policies. Regarding Objective (ix), the wording here referred to the need to "take account of and operate consistently with" other international and regional instruments and processes. However, Australia believed that this wording had the potential to make the existing IP system subservient to any possible mechanism for the protection for TK. It noted that in WIPO/GRTKF/IC/7/5 the reference had been to the need to 'concord' with said international and regional instruments and thus its preference would be for the use of that term in this Objective. As to Objectives (xi), (xii) and (xv), it wished to note that the role of prior informed consent in any possible mechanism for the protection of TK had yet to be determined. Therefore it would support further discussions on the contexts in which prior informed consent would be practicable, possible and desirable. While the Delegation could give in principle support to the concept of promoting the fair and equitable sharing of benefits, as reflected in Objective (xii), Australia believed that this Objective was too prescriptive in its reference to when fair and equitable compensation could occur and believed that this was an area that required more in-depth discussion. With regard to Objective (xiii), the earlier comments that the Delegation could not support rights of TK and local communities over their knowledge that would take precedence over the existing IP system, would also apply. Regarding Objective (xiv), Australia reiterated the concerns which

it had raised in regard to the similar provision in WIPO/GRTKF/IC/9/4, namely it could not support an objective which had the potential to undermine the existing IP regime. Australia also opposed the reference to the requirement that the disclosure in patent applications of the source and country of origin of TK and associated genetic resources as well as evidence of prior informed consent and compliance with benefit sharing conditions, were made a condition for the grant of a patent right. The issue of including such a disclosure requirement within the patent system was the subject of ongoing discussions which had not been finalised and it would be premature and inappropriate for such a prescriptive requirement to be included here. The Delegation supported in principle many of the General Guiding Principles, provided they were consistent with international and national laws and did not confer rights which would override existing IP laws and principles. However, it believed that Principle (e) was problematic because it aimed to import into WIPO, obligations from other international instruments, such as the CBD. It supported further discussion of areas such as prior informed consent and the role that it might have in these Principles. Finally, it considered it premature to have a discussion about the substantive provisions when there had not been agreement on the Policy Objectives and General Guiding Principles. It therefore could not support the provisions and reiterated its concerns about the overly prescriptive nature and the use of legally binding language in the provisions when there had not been agreement on the appropriate vehicle to give effect to any substantive outcomes.

211. The Delegation of South Africa, speaking on behalf of the African Group, expressed its appreciation of the manner in which the discussions in the Committee had been handled so far and expressed its confidence in the Chair's leadership of the proceedings of this important Committee. The African Group reiterated that it preferred a holistic and inclusive approach which considered all the three parts of documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 as integral and as constituting one single document respectively. The African Group also wished to acknowledge the credibility of the documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 and noted that the African Group had been a major contributor to the development of those documents. The African Group acknowledged the quality of the documents supplied by the Secretariat, it also noted that there were still a few gaps in the document. The first gap was that the articulation of the rights of the knowledge holders needed to be strengthened. There was also an issue where research had not been stressed in the documentation. A few issues, such as disclosure needed to be included in the documentation. Disclosure would encourage the saving of the knowledge, work towards contributing to knowledge owners, to contributing towards registers and databases and enhance the levels of protection. There was a need to stress that benefit-sharing was not only a monetary aspect but could also result into knowledge sharing and could give rise to comparative analysis of knowledge systems. It noted that the basis of document WIPO/GRTKF/IC/9/5 seemed to be from the Paris Convention's Article 10*bis* and that that Convention seemed to focus more on misappropriation and misuse, and that this approach to discussing TK needed to be broadened to the issue of misappropriation. There were other aspects, such as the rights of TK holders, which needed to be put in that context. As regards the way forward, the African Group agreed with the inter-sessional process of making submissions to the Secretariat to be included in the documents, but also made a request that there should be regional discussions which should then submit regional position papers to the Secretariat in preparation for the December session of the Committee.

212. The Delegation of the United States of America strongly supported Objective (ii), entitled "Promoting Respect," and believed that TK holders should be recognized for their critical contributions to the preservation of culture and the conservation of the environment. The Delegation also supported Objective (iii) and upheld the intrinsic value of TK holders and

indigenous and folk communities. The elders of the traditional communities were the most important asset to cultural conservation and they needed to have a voice in the TK protection and preservation efforts of WIPO. Government officials and legal experts could not formulate responsible cultural policy without consultation with the tradition-bearers themselves. Moreover, each community had unique needs that should be considered on an individual basis. Any work on the national, regional or international level should avoid assumptions based on outside nations. Each nation would need to consult the many different TK holders in order to assess their actual needs. In addition, culture-bearers in the diaspora would have very different needs from TK holders *in situ*. The Delegation also supported Objective (iv) and believed that databases were an important tool that would help the Committee to advance this objective. The Delegation introduced Mrs. Peggy Bolder, Director of the American Folklife Center, who provided information on how the United States was in the process of laying the groundwork for international cooperation on databases and archival tools. Mrs. Bolder referred to the Asian Group proposal contained in document WIPO/GRTKF/IC/4/14, concerning data formats and standards that would help to improve the interoperability of TK databases with various search engines in various national patent offices. She informed that the American Folklife Center at the Library of Congress was involved in work to begin the networking of ethnographic and TCE databases. These databases would ultimately benefit tradition-bearers, scholars, indigenous peoples, museums, libraries and governments in protecting not only TK but also TCEs against their disappearance or their misappropriation. However, it was recognized that before it was possible to link such databases there was a need for a common digital language and a way of describing TCEs that conforms across cultural lines. The American Folklife Center, in partnership with the American Folklore Society, was carrying out a project to develop an ethnographic thesaurus. This was a comprehensive, controlled language of terms that archivists, folklorists, librarians as well as patent and copyright lawyers could use to classify the enormous variety of literature about cultural practices and expressions that had been documented by folklorists, ethnomusicologists, anthropologists and other cultural scholars. These materials documented both TK and TCEs. Over a century of collecting and archiving ethnographic field recordings and accompanying materials had created a demand for the coordinated archival description of this huge body of work. In the coming century this ethnographic thesaurus would be essential to any effort to describe ethnographic collections, to digitize them for online preservation and ultimate retrieval. At present, a team of four consultants, namely a lexicographer, a database manager and two subject area specialists, were working on the development of this thesaurus. It was expected that this work would be completed by June 2007. Although the work had been begun just in English, it was recognized that this project would eventually be multilingual and it was hoped that this work would be useful to the IGC as international databases for TK and TCEs were developed.

213. The Delegation of Indonesia associated itself with comment made by the Delegation of Nigeria on its concern with the term “directly” contained in the Policy Objectives of Traditional Knowledge. It was of the view that the use of that term might limit the opportunity for TK holders to acquire protection. It maintained that the need for protection of TK should be met regardless of the aspirations and expectations expressed either directly or indirectly. It felt that the scope of paragraph (xiv) of the Policy Objectives with respect to the grant or exercise of improper IP, was too narrow. The exercise of improper IP may impair not only patent rights. Therefore, it suggested that in paragraph (xiv) some words be inserted after “by requiring, in particular, as a condition for the granting of patent rights and other IP rights”. On the General Guiding Principles for the protection of TK, it repeated its comments on the General Guiding Principles on the protection of TCEs/EoF. Indonesia attached great importance to respect for national law in this particular part. The role of national law in

providing adequate protection for TK was essential. A careful reading of Article 2 clearly revealed that legal protection of TK against misappropriation would be effectively provided by the direct involvement of national law. This was also the case in others articles in the substantive provisions. Therefore the Delegation wanted to see a reference to respect for national law in the General Guiding Principles. The Delegation also had some comments on the substantive provisions and intended to submit those comments in writing in due time.

214. The Delegation of Japan commended the Secretariat for the qualified document WIPO/GRTKF/IC/9/5 and was of the view that discussions on the document should be conducted in an organized and sequential manner. For the first reading of the document, the Delegation had two concerns which were similar to the concerns it had pointed out in relation to TCEs in WIPO/GRTKF/IC/9/4. The first concern was that the basic term itself, namely “traditional knowledge”, which featured in all paragraphs, was not clear and might have diverse interpretations. The points to be clarified were well illustrated in paragraph (xii) from paragraph (a) to (k). The second concern was there were paragraphs which seemed to prejudge the creation of new legal rights or some legal mechanisms and which were too substantive to be suitable for Policy Objectives or Guiding Principles. Paragraph (iii) referred to such wording as “respect their rights as holders”. The meaning of “rights” and “holders” was not clear to the Delegation. Such terms might prejudge the creation of a new legal system.

215. The Delegation of the Islamic Republic of Iran thanked the Secretariat for providing this high quality and organized document. The Delegation felt that, like with document WIPO/GRTKF/IC/9/4, all parts of this document should be considered with each other. They were interrelated. Regarding Objectives (i) and (v), which referred to the models of protection, the Delegation felt that such models should not be based merely on the existing framework. In Objective (vii) the word “indirectly” should be added to the text to make it more comprehensive and in Objective (viii) the word “prevent” should replace the word “repress”. In Objective (ix), the paragraph should be framed as follows: “take into account and operate consistently with such international and regional instruments and processes that promote and regulate access to”. Regarding Objective (xi), (xiv) and (xv), the Delegation had some views and it would submit these in writing. Regarding paragraph (iv) of Article 1, entitled “Protection against misappropriation”, which referred to Article 10*bis* of the Paris Convention, the Delegation felt that this article was focused on defensive protection and could be addressed as one of the alternatives for the protection of TK.

216. The Delegation of Bolivia expressed its thanks for the substantive discussion on document WIPO/GRTKF/IC/9/4 on TCEs, endorsed the statements of Brazil and South Africa on TCEs, and wished to enrich the TCE discussions with a written document, which it would hand to the Secretariat. The Delegation thanked the Secretariat for the document WIPO/GRTKF/IC/9/5 and provided some comments which were also relevant for document WIPO/GRTKF/IC/9/4. It mentioned that both documents should have a more balanced approach to cover the concerns of developing countries of achieving a legally binding international instrument. It stressed that more attention should be given to IP rights in the existing IP system which led to acts of misappropriation. In this way WIPO should use its specialized knowledge relating to IP to accommodate present problems and not digress from the objectives of the IGC discussions. There was explicit reference to IP in paragraphs (xii) and (xiv) of the document. In this sense making existing IP law the main incentive meant that effective defensive measures should be worked out. There should be more proposals from Member States to protect TK and folklore. While the Delegation agreed in principle with the principle of flexibility that was present in the document, it did not think that it should be

different from the flexibility present in all international legal instruments related to IPRs administered by WIPO. It expressed its surprise at those proposals which were trying to find a single solution in all negotiations on IP rights in this and other fora, except those referring to TK, EoF and genetic resources. With the respect to WIPO/GRTKF/IC/9/5, Objective (i) could be improved if it stated that these TK systems have been disseminated on a worldwide basis. The IGC should identify international legal mechanisms that prevented the spread of TK. It was important to include such elements right from the start of the documents, because the Policy Objectives provided a framework reference for the Guiding Principles and Substantive Principles. Finally, the Delegation pointed out that misappropriation carried out through IP systems should be remedied by IP measures in the system itself. Regarding the Guiding Principles, it pointed out that it approved of the deletion of A.6 and the second part of it, because the protection of TK from misappropriation at present was based on the principles of IP expressed in existing systems, whether multilateral or other, so the protection of those resources was inconsistent with the mechanisms that legalized and promoted the pillage of natural resources. Article 1, although it precisely listed the acts of misappropriation, did not provide any actual measures that should be taken to prevent those acts. It only had a weak reference to legal measures that should prevent such acts. Article 2 should fully comply with the 2005 mandate of the IGC, namely an international approach to these issues, because the forms of protecting TK should be included in the existing IP system. This way it would be possible not to grant monopoly rights to private individuals over TK. What would be achieved would be international protection of indigenous communities, for example dissemination systems that were required would be an international obligation to disclose the country of origin, source, proof of PIC, and proof of benefit-sharing so as to improve the protection of TK multilaterally. Articles 6 and 7, on benefit-sharing and PIC respectively, did not mention that there would be great benefit to the IP protection systems with the inclusion of requirements of disclosure. Thus in most countries the victims of misappropriation of their GR or TK through the patent system, there had been a lessening of the credibility of the patent system, including measures of justice to correct the balance in favor of the developing countries. Finally, the Delegation reminded the Committee that it should not forget the main objective underlying WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, namely that attempts of protecting TCEs and TK at national, regional and international level had failed, not due to lack of good intentions, but because in the time of globalization misappropriation had become an international problem, which required multilateral measures to resolve it.

217. The Delegation of India announced that it would submit its suggestions on specific proposals in writing later. What was the need to have a specific provision on disclosure of source of GR used in an invention? Disclosure was a core rationale of patent law. Such disclosure, as per the exacting standards of patent law, would not only benefit TK holders but would also improve the patent system. In the excellent document WIPO/GRTKF/IC/9/5, prepared by the Secretariat, there was no substantive article on this. It was therefore necessary to have an article on disclosure of source of TK. India had already compiled a Traditional Knowledge Digital Library (TKDL), the objective of which was to provide to patent offices an easily searchable database. It had been prepared as per the salient classification of patents and currently had over 100,000 entries. India was rich in codified TK systems such as Ayurveda, Siddha and Unani. Therefore, it suggested an additional subparagraph at the end of Article 4 to the following effect, “integral to systems of traditional knowledge, in particular systems of traditional medicine, which are codified in ancient written scriptures and are passed on between generations on the basis of these scriptures or through recognized courses of study of traditional medicine, subject to national legislation.” Regarding Policy Objective (i), the Committee had used the expression “fundamentally

important for indigenous and local communities”. However, it wanted this wording to be replaced by “indigenous and other traditional communities”.

218. The Delegation of Brazil understood that there were Committee members that seemed to have no flexibility at all to deal with TK and folklore under any substantive IP provisions or norms. What was happening was that those Delegations wanted some kind of a priori guarantee that the work would proceed only in terms that no norm-setting would occur in the IGC regarding TK, folklore and GRs. This approach would exclude a priori the position and views of countries who believed that TK and folklore were important enough for constituencies in their countries to be dealt with under the same normative and treaty like systems that WIPO was capable of producing and had produced throughout the course of its history. For the Delegation a discussion that would proceed on the basis that there would be no discussion on substance would be a meaningless exercise. It had difficulty understanding how excluding the views of most developing countries, who were the core group of demandeurs on these particular issues, could lead to fulfilling the mandate from the General Assembly to the effect that no outcome was excluded. An outcome would be excluded if Committee members could not accept that the Committee could discuss, consider and update the documents that refer to normative issues, to substantive provisions that could apply to the protection of TK and folklore. If those Delegations wanted to go on only on the basis that these issues and provisions were excluded, this was a very narrow perspective which meant that those Delegations would only accept to discuss TK and folklore if they had a guarantee that no legally binding treaty would or could ever come out of the discussions. This was a position with which the Delegation had great difficulty and it felt that this position did not do justice to the best traditions of WIPO to have meaningful discussions on the issues in an open fashion. During the previous readings of the documents, the Delegation had stated several times that it appreciated the documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. It felt that had a quality in these documents had been recognized by most Member States. The Delegation did not see how going through the reading of these documents, expressing views on the documents, and having updates being made of them, would prejudice any Committee members position on the documents, because the Committee was not agreeing on anything, it was simply having a substantive discussion. It referred to some Delegations’ statements that in their view there had been substantive discussions regarding Parts I and II of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. The Delegation begged to disagree with this, because there had been substantive discussions on all the three Parts of these documents. Under the guidance of the Chair an agreement had been reached that the two documents would be submitted to the Committee in their integrity and that countries would be allowed to make their comments on all Parts of the documents for future updating. If some Committee members did not wish to make references to Parts III, that was up to those members. In particular, the Delegation of Brazil had made substantive comments on Parts III of both documents and it wished to be taken note of in the Report of the meeting. It wanted it to be clearly reflected that it had made substantive comments on Parts III of both documents. It saw the possibility of the IP system providing a response to concerns of communities regarding the recognition of their ownership of their TK and folklore as something that would make the IP system more robust. Rather than weakening the IP system, this would make the IP system more robust, because in effect the Committee would be broadening the coverage of the IP system to include new subject areas, where for the first time in history these new subject areas would be areas of interest to developing countries and often minority communities in developing countries and not only to big, multinational companies from the private world. This would create justice for the common people who had developed their historical and cultural traditions, and this would strengthen the IP system by broadening its coverage and increasing the number of rights that were dealt with in the IP system. The

Delegation would not support the continuation of this exercise along the lines that prejudged any outcome. It did not wish to spend time going through these complex technical issues so that at the end the Committee had as an outcome only a declaratory or recommendatory statement that would provide no legal basis for action on the international level on anything. This would be a meaningless, non-substantive, non-normative result, which would occur outside of the IP system. It referred to the statements made by other Delegations that they could not support the idea of the IP system being subservient to issues of folklore or TK. It did not see the IP system as being subservient to folklore or TK, rather what the Delegation was looking for was for the IP system to respond to the needs of communities that had thrived in developing countries for many years and that had built a large knowledge basis that should be recognized, respected and protected in its own right internationally.

219. The Delegation of Nigeria expressed its appreciation to the Secretariat for having distilled the past work of the Committee and the comments of Committee members into document WIPO/GRTKF/IC/9/5. Considering the usefulness of the comments that had already been provided by various delegations on WIPO/GRTKF/IC/9/5 and how they had enriched the document, the Committee should not lose sight of what had gone into document WIPO/GRTKF/IC/9/5. Therefore, the Delegation wished to see the comments evolving, including in the further enrichment of the three Parts of that document. It supported the statement of the African Group. The Delegation was not able to go along with the deletion of the words “protection” or “provision” either in document WIPO/GRTKF/IC/9/4 or WIPO/GRTKF/IC/9/5. It understood the concern that might arise concerning the future outcome of the IGC, but wished to stress that the exclusion of any indication of protection in the heading or the substantive provisions or objectives may end up giving to TK holders and communities nothing more than a paper trophy at the end of the work of the IGC. The Delegation announced that it would hand in more detailed written comments later. As a matter of procedure, it was of the view that the discussion of the substantive provisions at this point in the work of the IGC should not foreclose any possible outcome. On Objective (i) it appreciated the nature of TK and its intrinsic value. It was convinced that these were indeed frameworks of ongoing innovation, not only in the communities concerned and for the TK holders themselves, but these were also frameworks for further development and innovation in other areas. This fact should not be belittled. The Delegation was therefore comfortable with the current objective. On Objective (ii), it felt that whatever mechanism was put in place at the end of the day would have to respect TK systems and not impinge on the integrity and values held by the TK holders themselves. On Objective (iii), the Delegation held the same view as it had expressed in reference to WIPO/GRTKF/IC/9/4, that reference to “the aspirations and expectations expressed directly by TK holders” would be unduly restrictive and the word “directly” should therefore be deleted. In particular, it might be overly restricted for those communities that might express their expectations through other channels. On Objective (v), the Delegation could go along with this paragraph. While it did not wish to see TK systems undermine IP systems, it also believed that the reverse should not be permitted. TK systems were not inferior to and should therefore not be subjugated to existing IP systems. It was of the view that both should be complementary and there should be mutual respect in the formulation of whatever provisions the Committee wanted to make for them. On Objective (xii), the issue of benefit-sharing was an important objective of this document and the Delegation agreed with those delegations which had called for a stronger formulation of this paragraph. In particular, it supported the replacement of the word “promote” with “ensure”. On Objective (xiv) it was not sure that the first phrase in that paragraph was necessary and wished to have it deleted. In closing, the Delegation announced that it would hand in further comments in writing and supported the African Group statement.

220. The Delegation of Thailand thanked the Secretariat for the informative and analytical documents presented under this agenda item. It believed that the exchange of views and the sharing of positions and concerns among Committee members on document WIPO/GRTKF/IC/9/5 had been very useful in enriching their concept and deepening their understanding of the subject in the area, and thus moving the Committee's work another important step forward. However, the Delegation considered TK to be a vast and holistic area, covering all fields of intellectual activities and knowledge system transmitted through generations, and also covering TCEs and folklore as well. As such, it was an area which needed more devoted attention and careful and coordinated consideration before specific comments could be made on the draft text in front of the Committee. The Delegation emphasized that preservation and protection of TK by means of international and national laws would be essential and necessary. It also requested the Committee's permission to convey the specific comments of Thailand on this item at a later date.

221. The Delegation of the United States of America clarified that it was not seeking to exclude any outcome, including substantive or norm-setting outcomes. It was certainly not asking for a guarantee of no substantive outcome but was seeking to have a meaningful discussion that would facilitate a meaningful outcome. It felt that the Committee had been engaged in a productive discussion of the present document and document WIPO/GRTKF/IC/9/4. The Delegation supported Objective (v), entitled "Empower holders of TK", and recognized that only by empowering TK holders would TK systems remain viable. It agreed that there was an overarching need to tailor solutions that met the distinctive nature of TK systems and that these solutions should be balanced and equitable. TK was local and personal – it was shared among a select group of people. Within one member state there would exist dozens, if not hundreds, of TK systems. On a rational basis, TK holders would have to be empowered to participate in the decision making process to find solutions. No government regime could "ensure" that TK was protected. This was a function that required TK holders to be in the forefront. With these thoughts in mind, it suggested textual amendments in line 4 by inserting "strive to" before "ensure", in line 7 by replacing "exercise due rights and authority over" with the words "promote, preserve and respect." This would provide the necessary flexibility to find appropriate solutions and recognized the ultimate ownership and power of TK holders themselves. The Delegation also supported Objective (vi), entitled "Support TK systems", and recognized the complexity of TK systems and their reliance upon customary use and sharing among groups. The recognition and respect for TK systems was a core value of the IGC and its work. As the IGC had learned from listening to the Indigenous Panel on the first day of the Committee session, it was imperative that the IGC moved forward in a responsible and considered manner in order to acknowledge and support the diverse and numerous customary law regimes that were in place. The Delegation enthusiastically supported Objective (vii), entitled "Contribute to the safeguarding of TK", and embraced the notion that TK would have to be preserved and safeguarded with the appropriate balance of customary law and other means. This Objective would require fact-finding and best practice examples to tailor efforts at safeguarding to the particular regime and group in need. Again, one size did not fit all and the IGC should be sure that all measures adopted for the safeguarding of TK were appropriate and useful to the TK holders and systems themselves. On Objective (viii), entitled "Repress unfair and inequitable uses", the Delegation agreed with the view that this policy objective differed from the others because of its substantive character. WIPO Member States would be in a position to consider a complex issue, such as misappropriation after the draft Policy Objectives and Guiding Principles were further refined and were agreed to among WIPO Member States. The Delegation supported this concept and suggested that the Committee might benefit by further exploring definitions of misappropriation as well as unfair and inequitable uses, when it was

in a position to take up a focused discussion on these issues. It also suggested that the IGC reach a deeper understanding of how TK could be protected before the Committee could make meaningful progress on misappropriation of that knowledge.

222. The Delegation of Norway commended the Committee on the high quality of its working documents and referred to the document WIPO/GRTKF/IC/9/12, in which it had identified a preliminary option for an interim normative outcome of the Committee's work, and underlined that such a possible outcome should only be seen as a first step. With a view to an international instrument, the Delegation wished to identify the international dimension of the principles and objectives in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. It thanked other Delegations for their support and comments with regard to the proposal and underlined that it valued these comments. While mentioning that it was a preliminary proposal, it wished to elaborate on its proposal contained in document WIPO/GRTKF/IC/9/12 for the benefit of the Committee. The Delegation stressed that it had no fixed vision on what a desirable final outcome should be; but it felt certain that there was a strong need for international guidance from the Committee on how countries can work together to prevent the misappropriation and unfair use of traditional knowledge. It underlined that its proposal should be regarded as a first step. It suggested that the Committee could do its work on an interim normative outcome in parallel and should keep working on the contents of documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. The Delegation wished not to exclude any outcome, including capturing agreement. The idea in the proposal was to focus on the items the Committee could agree on and on such items that actually met the expectations and needs of stakeholders in this area. The reasoning for this idea was straight forward, namely that there was little merit in only restating earlier positions and not looking for common ground. The fact that the proposal contained a concrete legal outcome, did not mean that the Delegation did not consider the more general concepts to be important. The Delegation wanted to identify the international dimension of the principles and objectives in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 with a view to an international instrument. It found it important to focus on the possibility of fulfilling the mandate of the Committee in this biennium. In the Delegation's view some of the objectives and guiding principles were of a more preambular or contextual character and others had a more substantive character. The main observation behind this was that said principles and objectives took on a broad variety of concerns, while only some of them were within WIPO's core activities, which the Committee should focus on. It recognised the work being undertaken in other fora, for example with respect to conservation of cultural expressions. The Norwegian proposal on a recommendation was modelled on Article 10*bis* of the Paris Convention regarding protection against unfair competition. The recommendation targeted the repression of misappropriation and unfair use of TK based on a legal standard on what an honest person would consider an act contrary to honest practices or amounting to inequitable conduct. As mentioned by several delegations further work on these concepts would be beneficial in providing guidance on these standards. It stressed that the Norwegian proposal fully takes on board the principles of prior informed consent and equitable sharing of benefits with regard to TK. The envisaged outcome would be an international legal instrument and could be viewed as some kind of first step, middle ground achievement. A recommendation would take legal effect at the same time it was adopted and would thereby send an important signal as a first step - quite different from an immediate treaty solution, the implementation of which would take a long time and also often lengthy adherence procedures. The recommendation approach had precedents in WIPO and had been followed in a number of other organisations such as the CBD, in form of the Bonn Guidelines, and the FAO as regards the International Treaty on Plant Genetic Resources for Food and Agriculture. TCEs were also discussed in document WIPO/GRTKF/IC/9/12 but they raised some specific concerns

which were quite distinct from TK and the Delegation hoped to be able to come back to a similar approach for TCEs at a later stage. On GRs, the Norwegian Delegation would present a proposal under agenda item 11 regarding disclosure of origin for GRs and TK. The proposal was very much similar to the European Union's earlier submission in document WIPO/GRTKF/IC/8/11. The main difference was that it also required disclosure in patent applications with regard to all related TK irrespective of any relation to genetic resources. Norway had signalled a proposal in this regard also in the TRIPS Council in March of the same year. The Delegation stated that it would work further and look into document WIPO/GRTKF/IC/9/INF/5 for inspiration with regard to national experiences. It also supported the proposal in its paragraph 21 of that document to further develop the material. It would appreciate any further comments and an intersessional commenting process on document WIPO/GRTKF/IC/9/12, and looked forward to engaging in the work in the next IGC session. In closing, the Delegation reiterated that it had no fixed vision on what a final outcome of the IGC's work, including a Treaty solution, should be, and its proposal could be viewed as an interim step.

223. The Delegation of Switzerland generally considered that the revised policy objectives and the general guiding principles were taking the work of the Intergovernmental Committee on the protection of TK one important step ahead. It had detailed comments to offer on two draft policy objectives: first, it supported the addition of policy objective (iv) regarding the promotion of the conservation and preservation of TK. It considered this to be a crucial aim of the protection of TK, and relevant to the Committee's work as far as it related to IP. In the context of databases of TK, the Delegation referred to the proposals by Switzerland for the establishment of an international internet portal for TK. This portal would electronically link existing local and national databases on TK, and might facilitate access by patent authorities to TK stored in such databases. For more details on that proposal, it referred the Committee to paragraphs 30 to 32 of WTO-document IP/C/W/400/Rev.1. The Delegation stated that it did not support the revised wording of policy objective (xiv). Instead, it preferred to retain the wording contained in the previous version of the policy objectives and principles, namely document WIPO/GRTKF/IC/7/5. The Delegation recalled that the Committee had discussed the policy objectives and general guiding principles of the protection of TK at previous sessions. This work, however, was still ongoing. Accordingly, Switzerland considered it to be necessary that the Committee discussed the policy objectives and general principles in greater detail and agreed upon them. Furthermore, a working definition of TK needed to be established. Only once these fundamental issues had been clarified, could the Committee take further steps with regard to TK protection. Accordingly, it agreed with those delegations who consider discussing possible substantive provisions on the protection of TK as were contained in Part III of the Annex of document WIPO/GRTKF/IC/9/5 to be premature. Switzerland did not consider the Committee's current discussions to be a futile exercise. On the contrary, it viewed them as a necessary prerequisite for further work of the Committee on the protection of TK. In light of these considerations, Switzerland considered it to be crucial that this Committee continued its work on the policy objectives and general guiding principles for 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, Switzerland supported the call for further written comments as was suggested in paragraph 20 of document WIPO/GRTKF/IC/9/5.

224. The Delegation of Canada reaffirmed its view that what the IGC needed to move forward was a more focused and substantive discussion on the text at hand. Only then would the Committee be able to state that Committee members had sufficiently exchanged views on the various elements of the text and recognize where in the text there were shared

understandings that could be harvested for recommendations to the General Assembly 2007 and where there was still a wide diversity of views that would make it premature to move forward on. Unfortunately, in its view time and process issues had contributed to there not having been a full discussion and the only way to characterize the current discussion was to say that some developing and some developed countries had provided some comments on document WIPO/GRTKF/IC/9/5. It stated that it was uncomfortable in commenting on the draft substantive provisions in WIPO/GRTKF/IC/9/5 in the absence of a substantial discussion and exchange of views. It stressed that Canada was not looking for an a priori guarantee before moving ahead in this area, nor was it seeking to exclude or preclude the Committee's consideration of any outcome that was consistent with the IGC's mandate. However, it felt that commenting on the substantive provisions at this time would be premature because it did not have a clear sense of the extent to which the drafts accurately and adequately reflected developing and developed countries' common understandings on the protection of TK. It would, however, provide comments on Objectives (iv) and (v) without prejudice to further comments that it would provide at a later date. On Objective (iv), the Delegation considered the inclusion of new language on the respect, preservation, protection and maintenance of TK to be helpful because it more accurately reflected its general view that a multifaceted approach was needed to deal with the issues relating to the conservation of TK. Nevertheless, the methodology of any such approach would require further exploration in Canada's domestic context. The information provided by the Delegations of India, South Africa and the United States of America on the development of a digital library, ethnographic thesaurus and other instruments had been most interesting and it would welcome greater details in this regard to help Canada's own domestic understanding. On Objective (v), as stated in relation to a similar objective in WIPO/GRTKF/IC/9/4, the Delegation considered it important to empower communities to exercise due authority over their TK, including appropriate moral and economic rights. It recognized that the IGC's further exploration of this objective would have to allow for maximum flexibility to take into account the diverse nature of Committee members' present and future efforts in this regard.

225. The Delegation of Russian Federation thanked the Secretariat for preparing WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/9/INF/5. It supported what was contained in WIPO/GRTKF/IC/9/5 and felt that there should be an exchange of views with regard to general Policy Objectives. The formulations in the document concerning general policy were quite acceptable and the Delegation wished to support them. It also agreed with the proposals made by other delegations in order to spell out certain terms and to provide a chapter which would be entitled terminology. It reserved the right to make suggestions to make more specific suggestions at a later stage.

226. The Delegation of New Zealand recalled that it had already offered comments on the protection of TK including the concept of misappropriation under the previous agenda item. It also expressed its support for the constructive proposal of Norway on a way forward with the Principles and Objectives. It touched on the issue of how to build greater awareness amongst domestic constituents, TK holders in particular, of the Policy Objectives and Principles. This was an important issue as it was related to levels of comfort that Committee members may have had with the documents and the pace of progress that could be made. It had thought it might be useful to share New Zealand's experience in this area and it invited others to do the same. In particular, it reported on a National Workshop on the Objectives and Principles that had been held in New Zealand on April 3, 2006. The Workshop had been hosted by the Ministry of Economic Development, the agency responsible for the development of intellectual property policy. It was a full day event that focused on the draft policy objectives and principles, and acted as a catalyst to engage stakeholders (especially

Maori, the indigenous people of New Zealand) on issues relating to the interface between IP and TK. In hosting the Workshop it had had five objectives. The first had been to inform stakeholders of the work of the IGC, particularly on the draft Policy Objectives and Principles for the Protection of TK and TCE, but also to highlight the practical tools that had been developed. Second, it had wanted to examine the application of the Policy Objectives and Principles in the New Zealand context. The third objective had been to encourage and invite submissions on the draft Policy Objectives and Guiding Principles through an open ended commenting process. Fourth, it had wanted to generate feedback and resources that could be fed into the IGC process and that could be used at the domestic level to guide policy development on the interface between IP and TK. The final objective had been to provide a springboard to discuss related international processes that were also considering TK issues. The Workshop had also brought together speakers with expertise in a range of TK-related areas. The event had attracted over 100 participants (which had been significantly more than attended the regional workshops the year before). The speakers and participants had included Maori and non-Maori stakeholders, and had come from the community, private and public sectors. The Workshop had provided an excellent opportunity for networking and free and frank exchanges of ideas. The day had started with a general overview of the history and work of WIPO and the IGC, as well as information on the Ministry of Economic Development's domestic work programme on the interface between IP and TK.

Mr. Pushendra Rai from WIPO had attended the event, and Mr. Wendland and Mr. Bhatti had provided an excellent audio-visual introduction to documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 respectively. This had been a really good way to address the problems of distance and made the most of the expertise of the Secretariat. WIPO had also provided bound copies of the draft policy objectives and principles, which had been much appreciated. During the next session a local Maori lawyer, Mr. Maui Solomon, who had attended previous sessions of the IGC, had provided a critique of the Policy Objectives, Guiding Principles and Substantive Provisions in the New Zealand context and from a Maori perspective. The afternoon presentations had been focused on specific issues relating to TK protection with a focus on the New Zealand context. These issues had included misappropriation and misuse, prior informed consent, benefit-sharing, encouraging cultural creativity and innovation, documentation and disclosure issues, and access to TK held in government archives. The final session had provided an outline of the other international fora in which TK issues were being discussed. The Delegation reported that several key messages had come out of the discussions: the draft Policy Objectives and Principles seemed to be helpful and a step in the right direction, as a resource for policy development at the national level, and as a guide for the discussions at WIPO of the international dimension of TK protection. Participants noted, however, that they had not addressed all the issues that were important from a Maori perspective, and many details, which were important from an indigenous perspective, were still to be addressed. Participants considered that information and consultation on future developments had been important. Some asked that the Ministry come to their communities to discuss the matter further, and the Ministry intended to do that. This particular feedback suggested that while the IGC had discussed the Policy Objectives and Principles over a number of sessions, there was still work to do nationally, in New Zealand at least.

Participants had thought there was a need to better define and understand the implications of certain key concepts such as misappropriation and misuse, prior informed consent and benefit-sharing in order for Maori and other stakeholders to be able to appreciate the variety of options available for TK protection. There were existing legal principles and mechanism, both statutory and in common law, that could be used to address TK issues at the IP interface. It was important to understand how these could be applied to protect Maori TK and what their limitations were in order to identify the potential areas of improvement and the issues that would require a non-IP *sui generis* approach. The presenters had noted that a number of the

WIPO policy objectives were already in practice in New Zealand, but there was room for improvement of existing policies and practices. Access policies, documentation and disclosure of traditional knowledge, and the use of customary law in the protection of traditional knowledge were identified as areas in need of further work. The last theme was that participants had noted that while protecting TK from misappropriation and misuse was important, other objectives should not be lost sight of. These included the promotion of innovation and creativity in a TK context and finding modern applications for such knowledge. This aspect had been thought to be important as it contributed to maintaining cultural identity and promoting intellectual and artistic cultural expression. There were also significant foci placed on the maintenance of the Maori institutions that transmitted TK between generations. Overall the Delegation felt that the Workshop had been a success and would be happy to provide information on the process and content to other delegations. Copies of the presentations made at the Workshop were also available on the Ministry of Economic Development website: www.med.govt.nz.

227. The Delegation of Brazil suggested that the Committee should try to capture the nuances and to understand what Committee members were trying to say. It was necessary to understand where the substance was behind the positions, so that the Committee had a clear picture of where each of the Committee members stood. It had the impression from the latest intervention from the Delegation of Canada, that Delegation had started the negotiation of some kind of draft language for a decision of the IGC. It noted that the Delegation of Canada has defined that the work of the IGC should be to look for a common understanding, so only agreements would be captured. The summary that some delegations had made some comments on some parts of the documents seemed as if the Delegation of Canada was beginning to negotiate draft wording for a decision of the IGC. It could not understand the need for the qualifier “some”, unless there were delegations who refused to be reflected in the report as being among those who actually made comments on the substantive parts. It appeared that those Delegations did not want to recognize that the Committee was holding a discussion on the substantive provisions which were contained in the Secretariat’s documents. Some countries were still refusing to acknowledge that there were substantive provisions that were being considered in this session of the IGC. In fact, for example, the Delegation of Brazil had itself made extensive comments on the substantive provisions and the Delegation did not see how the Committee could have a more substantive debate on these provisions. The Delegation did not have a recollection of ever having heard so many substantive comments on the substantive provisions of the draft texts as it had heard during this meeting. It thought it was not an adequate reflection of what happened in the session, to say that there were no substantive discussions on the substantive provisions of documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. It did not agree with this and did not think that that was a reflection of reality. It understood, however, that some countries did not feel comfortable in discussing substantive provisions and that was the bottom line. Referring to the comments by the United States of America, the Delegation had the impression that the only objective of some delegations was to remove what ever little of substantive provisions were in fact there in the provisions. It observed that words which had legal authority, such as “exercise”, “rights” and “authority”, were being changed towards words that had very little weight and meaning in the IP regime. Thus, legal text was being changed to rhetorical text, to best endeavor-type clauses. For example, “promote, preserve and respect” meant nothing and carried no weight under the IP regime. It thus appeared that some Committee members were always trying to move away from substance and always back to this type of rhetorical, declaratory language that would not provide communities with any safeguard of their TK and folklore on an international scale. It noted that the Norwegian proposal was modeled on Article 10*bis* of the Paris Convention, which dealt with remedies aimed to prevent unfair

competition. It saw the problem that the concrete definition of what constituted unfair or dishonest was left for the decision of national legislation and it therefore could not address the international dimension of this work. It added that it might lead to greater legal uncertainty because each country would have its own legal yardstick to define concretely the cases of misappropriation. It referred to the certain delegations which had defended the need for flexibility regarding TK regimes and had mentioned that “one size fits all” was not good for TK protection. It found this very interesting because in other discussions of substantive IP issues, usually leaving things to national legislation and providing countries with adequate flexibility and moving away from “one size fits all” solutions was usually not what was being defended by these countries when dealing with hard core IP issues. The Delegation saw a double standard here because when countries were discussing the possibility of harmonization of IP law in the SCP, the same countries did not accept the idea that “one size fits all” was good but wanted a singular solution for protection of regular IP rights. However, when developing countries tried to bring in the issues of TK and folklore, then suddenly referring everything back to national legislation was the way out. This was not in line with the competence of this organization, WIPO, which dealt with international rule making and treaty making. The Delegation reiterated that the mandate from the General Assembly focused on the international dimension and the non-exclusion of any outcome. The Norwegian proposal also sought to ensure that effective means were provided to guarantee that the principle of PIC applied to TK and that certain uses of TK were compensated by fair and equitable benefit-sharing. It had a concern that this kind of solution did not seem to address the international dimension of misappropriation. The international community had already identified the disclosure requirement as an adequate mechanism for preventing the grant of IP rights without compliance with the CBD requirements of PIC and benefit-sharing. The big problem that needed to be addressed was the misappropriation of TK that occurred in other countries apart from the countries where the communities were based. That was the international dimension and it could not see how the Norwegian proposal addressed this since no indication was to be found which legislation regarding PIC and benefit-sharing was to be respected: the legislation of the countries where the communities were based or the country where misappropriation may occur. The proposal also sought to ensure that certain uses were compensated by benefit-sharing but did not define what those uses were. It also appeared that the Norwegian proposal aimed to incorporate such rather vague provisions into an instrument of a legal nature, a recommendation. The Delegation referred to the experience of the Bonn Guidelines, which were recommendatory in nature and which were legally non-binding, and which had contributed very well to addressing misappropriation.

228. The Delegation of Ghana associated itself with the African Group position and the positions of Brazil and India, which wanted a holistic discussion on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 which covered all three Parts. WIPO/GRTKF/IC/9/INF/5 gave a tentative and acceptable working definition of TK. The Delegation felt that this was a very good definition and the Committee could use it for discussions. An examination of the Policy Objectives suggested that there was a serious omission, namely an affirmation of ownership. This document should affirm that TK was the IP of indigenous and traditional cultures and communities. There was a need to have a provision on collaborative research which would acknowledge the need to recognize the TK holders as research collaborators; acknowledge the source of information, either the individual or communities; acknowledge the exact nature of the knowledge of information or biological and other resource; and recognize equity and fairly play in the sharing of benefits derived from the research, discovery or invention. These were some of the rules that had been established in Ghana and they should now be established internationally.

229. The Delegation of Peru expressed its concern that the Committee should focus not on form but on substance. Document WIPO/GRTKF/IC/9/5 was a whole and it would be impossible to discuss Parts I and II separately from Part III. Basically, Delegations should give comments on the substantive provisions where there was a fairly good definition on TK, such as in Article 3.2. At the last session, Peru had made several comments on the draft text and had stated that on the whole the text seemed to follow a certain logic and there were no major differences. If Delegations did not want to discuss Part III, it was impossible to reach conclusion. The Committee had followed a certain logic in its work and the conclusion of this logic would be in the substantive provisions, which now some Delegations were refusing to discuss. The Delegation of Peru thanked Norway for its paper because to some extent it is a compromise with the subject matter and it tries to focus on concrete issues. The Delegation had some concerns namely about the international dimension. Despite all national efforts, including the Peruvian *sui generis* law, the Peruvian IP office, the training and awareness raising efforts, Peru had found that a national regime does not resolve the problem of misappropriation. What was needed was an international regime. However, there was a lack of meaningful commitment on the part of certain delegations which meant that the Committee could not have a meaningful discussion.

230. The Delegation of United States of America recalled that the Committee had a mandate from the General Assembly to not exclude any particular outcome of its work, but it did not have a mandate to reach a binding international agreement, although this was one of the possible options that the Committee might arrive at after building consensus. It noted that the Delegation of Brazil was not comfortable with some of the amendments to the texts that had been proposed by the Delegation and other delegations. It saw this as an indication that the Committee might need to do further work on the important foundational concepts that underlay its work, such as the concept of misappropriation. The Delegation supported Objective (x) and congratulated the Secretariat to recognizing the central role of education in the preservation of TK. In the United States of America, two educational programs were successfully promoting the preservation and protection of TK – the National Endowment of the Arts awarded Folk Arts Apprenticeship Awards every year to allow young people to learn from folk masters. The American Folklife Center at the Library of Congress supported three State-based heritage education initiatives to recognize and honor tradition-bearers as high school students documented their community traditions and local TK. The IGC should recognize that TK was evolving with each generation and it was important to document the continuity and innovation of TK. Regarding Objective (xi), entitled “Ensure prior informed consent and exchanges based on mutually agreed terms”, the Delegation agreed that the IGC should strive to ensure that prior informed consent and exchanges were mutually agreed and that these exchanges must be coordinated with existing international and national regimes. Moreover, it added that these exchanges should take into consideration existing customary law, *sui generis* systems and community-based norms. Access to genetic resources and TK ultimately should be determined by the TK holders and traditional communities, who might establish mutually beneficial agreements that would benefit all people. The Delegation fully supported Objective (xiii), entitled “Promote community development and legitimate trading activities” and noted with emphasis that the explanatory paragraph began with the introductory clause, “if so desired by the holders of traditional knowledge.” The clause reflected the understanding that the wishes of TK holders themselves had an important role to play in the use of TK. It wholeheartedly agreed with this proposition and recognized that holders of TK themselves should play a crucial part in the development of new policies to address TK, and should not be marginalized in either the development or implementation of new policies, whether at the national, regional or international level. Indeed, wherever possible, any regime to address TK should be compatible with the wishes of TK holders, but

should also account for the reality that these wishes would almost certainly vary from community to community. The Delegation agreed with the view that Objective (xiv), entitled “Preclude the grant of improper IP rights to unauthorized parties”, differed from other policy objectives by way of its substantive nature and agreed with others that the item should be taken up at a later time once the Committee had reached agreement on the draft policy objectives and guiding principles. It supported precluding the grant of improper IP rights and was aware of a number of initiatives at the national level that would help to address this problem. In this light it was interested to learn more about the Japanese proposal of creating an international database of genetic resources that would help to preclude improper IP rights. As it had stated in the past, the Delegation did not believe that new disclosure requirements in patent laws would help to address this problem. The Delegation also supported Objective (xvi), entitled “Complement protection of traditional cultural expressions”. It noted that the objective reflected an area of convergence between the broader disciplines of TCEs and TK. Perhaps it was fortuitous that the nature of TCEs and TK was such that in some cases they were intertwined and inseparable, such that policies designed to address one should bear a complementary relationship to policies addressing the other. This natural connection between the distinct areas of TCEs and TK should serve as a point of further discussion on objectives and principles in each of these areas that could be reconciled. Regarding the General Guiding Principles of document WIPO/GRTKF/IC/9/5, it suggested that the Chapeau of the Guiding Principles be amended to better reflect the guiding nature of these principles. It supported the suggestion that these principles be considered independently from the substantive provisions in Part III. Therefore, it suggested an alternative chapeau as follows: “These principles may be respected in order to facilitate equitable, balanced, effective and consistent protection of traditional knowledge.” The Delegation supported Guiding Principle (g), entitled “Principle of respect for and cooperation with other international and regional instruments and processes”, and reiterated that the IGC’s discussions on how best to address the issues surrounding TK should be framed by reference to existing agreements addressing IP, and other mechanisms at the regional and national level. The Delegation supported Guiding Principle (j), entitled “Principle of providing assistance to address the needs of traditional knowledge holders”, and affirmed the understanding expressed in the commentary that TK holders should be assisted in building the infrastructure needed to utilize and enjoy their knowledge, including, for example, various mechanisms for archiving, preserving, recording and managing such knowledge. This was an area where the United States had already undertaken a number of efforts at the national level, as well as at the bilateral and multilateral level to ensure the preservation of some forms of TK. It welcomed discussion of similar efforts from other delegations, as these could inform the IGC of areas where assistance activities at the national and regional level may already be sufficient under another guiding principle, in that they may be “responsive to the needs and expectations of TK holders.”

231. The Delegation of Canada emphasized that Canada had started the process with a strong commitment to engage and repeatedly made attempts to do so in this session. In Canada’s domestic interests, the protection of TK was of significant importance. It had many aboriginal communities in Canada as well as other TK holders who were seriously interested in the work of the Committee.

232. The Delegation of Mexico commented on the statement made by the Delegation of Canada. For Mexico, which was a very diverse country with major ancestral cultures, it was very important that TK, GR and folklore be dealt with to arrive to a conclusion within the framework of WIPO. This was a forum where discussions and negotiations should take place and agreements should be reached. The Delegation informed it had sent its written comments concerning all parts of the documents precisely because it wanted to hear what the point of

view of the other delegations were including the point of view of Brazil, the United States and India, which were also very important countries in this negotiation. The importance given to the content did not allow having a substantive discussion which was as soft as what was going on during this Committee. The Delegation added it would wait to speak at a later stage on item 11 of the Agenda under which it would propose a very specific and precise working plan so that the Committee could arrive at some agreements after a well-ordered substantive discussion. All the declarations that had been made the days before and the contributions which would be sent to the Member States at a later stage could be an outcome of this meeting without any prejudice of the final result. From both sides, there had been a conceptual problem which had not allowed the Committee to go forward.

233. The Delegation of South Africa believed there were two processes that were taking place in the assembly. A number of nations had restricted themselves to the principles and guidelines and a number of nations as well were looking at the entire document and proceeding with their input. This process had continued on from the day before to that same day. The Delegation believed that the position it had taken when looking at the documents holistically and all inclusively was that it was making its comments and inputs with the full understanding that these would be taken into consideration in the revision of the documents. Some input made during that day had aimed at taking away the substance of the material and reducing the rights of the knowledge holders. Hence it made input through the African Group in the morning concerning the basis of the discussion on item 10b of the Paris Convention tending to restrict the discussions to issues of misappropriation and misuse. It was of the opinion that the issues were wider than that and one of the issues it believed to be significant was the articulation of the rights of knowledge holders. It was necessary to strengthen the articulation and enforcement of the rights of knowledge holders. Hence, it proposed issues on disclosure and the like. The Delegation also had several comments to make on the documents from the objectives to the substance of the articles to be submitted in writing to the Secretariat. It stood behind the positions articulated by Brazil and Peru, that it was necessary to look at this holistically, to advance the rights of the knowledge holders and to confront the issues. Although points had been raised, there was no agreement on substance. The discussions had not come forward with what those issues were and how the Committee needed to address them. Rhetorical statements were being made on what was not being agreed upon. To engage in a discussion, these issues needed to be put on the table and interacted with instead of just declaring without engaging in them.

234. The Delegation of the Islamic Republic of Iran commented on the proposal made by the Delegation of Norway. It had participated in personal capacity in the informal seminar in Norway and appreciated the Norwegian Government's hospitality. Keeping in mind the atmosphere of that session that was the merit of this proposal, working on common grounds was a good idea but clarification was needed on the approach of this proposal. The proposal was that the Committee would sort out the IP issues of a non-IP topic and then find common grounds among all this material to solve the problem of TK and folklore at an international level. The substance, the argument, and the procedure should all be consistent and support this idea. The second alternative approach was that if the Committee wanted to sort out the material at a national level, then there would be some material at an international level which would lead to some declaration or recommendation. This concept—a common ground—was the collection of all the discussions during the eighth sessions. First this was a prejudice as the Committee did not know if it would be a declaration or not. Secondly, this was not a common request. During the week all developing countries stated they wanted a legally binding instrument. The Committee did not know if it was a step forward or backward. With all this, the difficulty at an international level remained. The Committee should find a solution to

solve the problem. Ultimately, it should be an international instrument regardless of the status. It added that this international instrument was to tell countries what to do at a national level. First, this was not consistent with the mandate of the IGC and, secondly, the nature of the work at an international level. Regarding the content, if the method was to work on common grounds, the approach of paragraph 15 and 16 would not lead the Committee to common grounds but rather to diversity of views. There was no balance between the international and national level. For example, the collective management societies had difficulty at a national level in solving problems. For TK, the holder, the owner and the nature were different. Regardless of these issues, it was also a new phenomena even in industrialized countries. It welcomed any suggestions and was ready to discuss it in a constructive manner.

235. The Delegation of India recalled its first intervention made at the beginning of this meeting, with respect to some comments that had just been made, in which it noted that much progress had been made till date in the deliberations of the IGC. The substantive aspect of these deliberations till date must be preserved and further built upon. The discussions were useful and needed to be carried forward in the interest of holders of TK, TCEs and GR in every country.

236. The Delegation of Kirghizistan stated that a process within the framework of WIPO had started in its country. They became aware of these problems not more than ten years ago. Therefore, a lot of the questions were new and very interesting for Kirghizistan. Kirghizistan had quite a rich heritage which could be called a TK heritage of local communities and therefore had a lot to defend. The situation was such that until now they had not had any major problems. Other delegations seemed to be very concerned with such problems. It also noted that the third part of WIPO/GRTKF/IC/9/5 was similar or had similar provisions to those to be found in an international treaty and was happy to see this. But there was also a group of countries which defended a position quite different from the one advocated in the document. It was very important for the Committee to have mutual understanding. That was why it was important to have good relationship and for the Committee to go forward in a fair and equitable way. In addition, in view of the fact that there were about 300 million Russian speakers, this was an international language. They did not always understand all the linguistic nuances in the documents, as these were only in English, French and Spanish. It asked the Secretariat to have the documents translated into Russian as well as they did not understand all the detailed use of the meaning of these documents. Kirghizistan already had a draft legislation on the protection of TK, which was before Parliament at the moment. It was in the first reading. All the nuances and all the potential risks of the different questions that were being examined had to be understood clearly as this would help Kirghizistan understand and improve its draft legislation. That was why WIPO needed to have these consultations. It understood that in the framework of national legislation this could not be regulated because piracy did not stop at the borders of a country. All the subjects of international intellectual property including TK had to be protected. It asked the Secretariat to take all the necessary measures so that the UN languages were to be used in this Committee and asked for the documents to be translated into Russian. It asked for the help of OAPI, as there were already a number of recommendations in English with regard to the exercise of rights in the field of GR, TK and folklore.

237. The representative of the Tulalip Tribes stated that, as a technical note, the phrase in Policy Objectives paragraph 9 should be amended to render it more consistent with the formulation most commonly used in the CBD: “particular regimes that regulate access to and benefit-sharing from GR and associated TK.” This reflected the understanding of indigenous

peoples that their TK and GR could not be disassociated. Regarding more general issues regarding Objective (ix) and General Guiding Principles, sections (f) and (g): they believed that the concept of respect for and consistency with existing regimes of national and international intellectual property law was not sufficient as an unqualified principle to provide guidance that would fully protect indigenous rights and interests. International intellectual property law had its origin in case law of the 17th and 18th centuries that codified primarily English common law and the development of the late 19th Century international agreements. While these had been enriched by the international framework of other legal traditions, it may still be argued that these had largely been negotiated at a time when the recognition and respect for indigenous customary law, legal traditions and rights were not taken into account. While they recognized that this forum could not construct such rights, the international intellectual property system should respect indigenous rights where they were recognized, and should not be prejudicial to the future recognition of such rights. They should also be flexible enough to be modified as these rights are recognized. They were not here promoting large-scale changes in the international IPR system. Any such changes would be addressed in other forums, and they were here neutral as to the scope of such changes. But they did believe that to the extent that international intellectual property law failed to take fully into account existing recognition of indigenous rights, or was prejudicial to the future recognition of such rights, it must be changed. This seemed fundamental to the very existence of the IGC, and was a core principle in the development of sui generis mechanisms for the protection of TK. These were not general rights that could destabilize the international regime, but were aboriginal rights that could not be compromised without the free, prior informed consent of indigenous peoples. Where such rights were currently recognized, conflicts of law could not be resolved by simply referring to existing national and international arrangements. Conflicts of law regarding TK must be resolved by principles of community, the negotiation of issues between national sovereigns and indigenous peoples within the spheres in which they are sovereign, and reciprocity, in which these agreements are only implemented on mutually agreeable terms. While some parties had suggested such recognition held international intellectual property law subservient to indigenous rights, the adoption of such language without qualification could have the same impact on the recognized rights of indigenous peoples, and it was necessary to find a mutually agreeable solution. The economic tail should not wag the human rights dog. These comments also applied to similar principles and objectives in WIPO/GRTKF/IC/9/4, and they would be submitting their detailed comments on these issues to the Secretariat. They made the following comments on behalf of the Asociación Andes, the Canadian Indigenous Biodiversity Network, Call of the Earth, the Creators' Rights Alliance, Kaska-Dena Council, and the Tulalip Tribes. They also commented on the issue of TK registers as it had been raised by a number of parties, and remained an item of strong concern to indigenous peoples. Indigenous peoples were very concerned that their knowledge and associated GR were being misappropriated into the patent system. This violated indigenous rights to deny consent for access to them. Where indigenous peoples might be willing to give consent, they were concerned about unjust enrichment when indigenous peoples shared no benefits from use of their knowledge and genetic heritage. But these were not their only concerns. Indigenous peoples were also concerned about the possibility that the compilation of such knowledge could lead to non-monopolistic markets that could lead to overharvesting of their traditional resources. Such registers or databases could also lead to unintentional disclosure into the public domain, which indigenous peoples had largely rejected as applying to their TK. Such registers may also make it easier for third parties to access and use this knowledge outside of the normal controls exercised by TK holders within their communities. Furthermore, the storage of knowledge in these databases may violate customary law regarding the fact and form of storage. They also reminded parties of the burden, mentioned in the opening presentations,

that this kind of documentation placed on indigenous and local communities. They recommended that the Committee continue work on how to deal with those concerns, including through the development of a practical toolkit. They stressed that any international law for protection of TK should promote the rights of indigenous peoples over TK and not induce indigenous peoples to relinquish those rights. Accordingly, databases or registers of TK should be developed for management and use by indigenous communities and not by national and international intellectual property organizations. The primary objective of recording or registering TK was to ensure its protection. Such a protection could only be achieved through local management of databases and registers and bottom-up control over access and use of TK. Furthermore, TK documentation and registration may run contrary to the objective of protection unless traditional models of data record keeping were employed that responded to the dynamic nature of TK and reflected indigenous worldviews. This included regulating access and use of registered TK using customary law and practice that ensured time-honored and effective management of TK adapted to local cultural and ecological contexts. In fact, a number of indigenous and local communities were developing their own registers for the registration and protection of their knowledge, such as a local TK register being developed by Asociación ANDES for the Potato Park in Cusco, Peru that fully defended the rights of Quechua peoples over TK using a model based on the khipu record keeping device of the Incas and customary law and practice associated with TK. Similar systems had been developed by the Tulalip Tribes and the Kaska-Dena council. The hallmark of all of these registers was that third party users, such as corporations or patent officers seeking prior art, must register in the system and agree to accept rules based on customary law for the use of the knowledge. These systems were also multilevel, providing differing degrees of information depending on the identity of the user. The representative added that they would submit more detailed descriptions of these issues and initiatives. They referred delegates to the information document prepared for the CBD that provided an overview of many of these issues: UNEP/CBD/WG8J/4/INF/9, Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities: The Advantages and Limitations of Registers. Note by the Executive Secretary. Finally, the Tulalip Tribes renewed their call on behalf of numerous indigenous peoples' representatives and in support of the Norwegian Delegation, that the Committee developed an international declaration on the Principles and Objectives for the Protection of TK through intercessional processes, in order to present the General Assembly with a substantive product of the Committee. They did not believe that the development of Principles and Objectives as a stand-alone declaration delinked them from the substantive measures, any more that the Development of Agenda 21 de-linked any of the substantive measures of the Convention on Biological Diversity. Such a declaration could only reflect current consensus, and would necessarily not be as elaborate as any final instrument or instruments that came from this process, that may be binding or non-binding, or with or without substantive provisions. By moving this work to an intercessional working group, he added that the development of a declaration could be moved partially outside of the important discussions on these issues so as to reduce interference with continuing on with substantive discussions here. They did not believe that this declaration would be devoid of value. The representative could provide important preliminary, interim guidance for nations wishing to begin planning and integrating these measures. More importantly, it would give indigenous peoples a signal that the parties had seriously begun to address their concerns, and guide economic actors, professional societies and citizens in building their awareness and voluntary compliance with principles for TK protection in advance of an elaborated regime. He further added that if the Committee failed to set up a process to complete this work at this meeting, he did not believe there was time to complete this work before the next meeting of the General Assembly for adoption, and considered the development of a statement on

consensually agreed upon principles should be priority work for this forum. And, as was made clear by presentations made by the opening panel, many indigenous peoples' cultures may not survive the wait for a substantive regime.

238. The representative of the Saami Council recalled that, as with WIPO/GRTKF/IC/9/4, he had previously commented extensively on the Policy Objectives and Core Principles contained in WIPO/GRTKF/IC/9/5 and referred to his intervention on the Policy Objectives and Core Principles for the protection of TCEs. To the extent previously expressed concerns applied also to the draft TK Guidelines, he would not necessarily repeat those concerns in this intervention. The Saami Council was largely in agreement with the Policy Objectives. Yet, they had concern with that, compared with the TCE Guidelines, the TK Policy Objectives were ambiguous as to who were actually the holders of TK. They would like to see it clarified that the right-holders to TK were the people from which the TK originated. Further, compared to the TCE Guidelines, the TK Policy Objectives placed less emphasis on the importance of respecting the rights of the TK holders. They wished this be corrected, as well. They joined the African Group and others, and firmly objected to the suggestion that references to “protection” should be deleted. They were generally in agreement with the General Guiding Principles. However, in para. (b), they suggested the addition towards the end of the phrase “of indigenous peoples and local communities and other TK holders”. Further, in para. (f), after the reference to “legal systems”, they suggested the inclusion of the term “including customary legal systems”. With regard to the Commentary to the General Guiding Principles, they agreed with most parts of these as well, and particularly appreciated the highlighting of the importance of respecting the rights of TK holders, including the right to consent or not consent to access to TK as well as of indigenous customary laws pertaining to such issues. As they had done at previous IGC sessions, the Saami Council had to reiterate its strong objection to para. (f) of the Commentary. Section (f) simply misrepresented international law on this area and, would, if implemented, violate the UN Charter, which both WIPO and its member states were bound to abide to. They did not challenge the fact that states as sovereigns had rights to genetic and other natural resources within their national borders. Equally clear was, however, the existence of competing rights to natural resources, such as indigenous peoples’ right to self-determination and land and resource rights, well established under international law, and that clearly sometimes took precedent over the principle of sovereignty. It was consequently simply a misrepresentation of international law, to single out the principle of sovereignty, without any references to the competing rights. Either para. (f) needed to be deleted from the Objectives and Core Principle or the paragraph needed to be redrafted to accurately reflect international law on the area. Further, the Saami Council strongly objected to para. (h), suggesting that indigenous peoples’ customary laws should be recognized only subject to national legislation. The representative commented that this must have been a drafting mistake, since it should be clear to everyone that the laws of one people cannot be dependent on the will of another. Para. (h), as currently drafted, recalled the phrase “*par in parem non habet imperium*” — “an equal cannot determine over an equal”. This principle, formulated centuries ago, still made up a fundamental principle in international law. Indeed, it constituted *jus cogens* — a pre-emptory norm. It was not within the mandate of this body to adopt any language with legal implications that contradicted pre-emptory norms. The Saami Council was looking forward to present their comments on Section III of the Annex at a later stage, in order to assist the Secretariat to update also that part of the document prior to the next IGC session, as requested by the mandate given to the IGC by the WIPO General Assembly. Turning to the Substantive Provisions, they registered their concern with the drafting of Article 1 — “Protection against Misappropriation”. Generally speaking, they thought the scope of protection was too limited, and would leave a substantial part of TK that conventional IPR-regimes considered to be in the so called public

domain, continuously without protection. He agreed with Article 2 — “Legal form of Protection”, Article 3 — “General Scope of Subject Matter”, Article 4 — “Eligibility for Protection” and Article 5 — “Beneficiaries of Protection”. They accepted Article 6 on Benefit sharing too, provided that para. 1 was clarified to express that benefit sharing could only take place following a correct application of the principle of free, prior and informed consent. Further, in para. 2, they suggested that “if appropriate” be inserted after the word “need”. As to Article 7 on Prior and Informed Consent, the Saami Council accepted this Article only if the phrase “subject to these principle and relevant national laws” was deleted from para. 1 and the phrase “as provided by applicable national legislation” from para. 2. The concept of free, prior and informed consent could be described as a bundle of rights, many of them human rights, such as, again, indigenous peoples’ right to self-determination and land and resource rights. Obviously, human rights could never be subject to national legislation, so Article 7, as currently drafted, contradicted basic international legal principle, and had thus to be corrected accordingly. Moreover, it was their understanding that the aspiration was that the international regime should be legally binding. Obviously, to render provisions in a legally binding international legal instrument subject to national legislation, constituted a contradiction in terms. Turning to Article 8, they had concerns with para. 1. (ii) and in particular with para. 2. Certainly, indigenous peoples generally were positive towards sharing their medical practices to the benefit of humanity. Still, they found it unbalanced that para. 1. (ii) granted an open-ended license for all government hospitals to freely use and dispose over and use TK. Even more problematic was, however, para. 2, which allowed states to exclude from the principle of prior and informed consent, all TK which conventional IPR-regimes perceived to be in the so called public domain. This provision excluded from protection a substantial bulk of indigenous knowledge, and thus to a large extent rendered the Guidelines meaningless. The representative supported Article 9 — “Duration of Protection” and Article 10 — “Transitional Measures”, provided that the last sentence was deleted. With regard to Article 11 — “Formalities”, they supported para. 1. Para. 2, however, needed to be modified to clarify that no registration took place without the consent of the TK holders. They believed this to be in line with international law on the area, including a recent similar decision by the CBD COP 8. They would like to see Article 12 — “Consistency with the Legal Framework” deleted. As explained earlier, the Article as currently drafted contradicted well established international legal principles as well as violated the UN Charter. Indigenous peoples had rights to TK and natural resources that could, per definition, not be subject to national legislation. They could support Article 13 — “Administration and Enforcement of Protection”, provided that at the end of para. 1. (a) (i) — (v) was added the phrase “in accordance with these Objectives and Core Principles and international law”. With regard to Article 14 — “International and regional protection”, their comments were similar to those on the TCE document. They thus believed that this issue demanded some further consideration, but emphasized the importance of recognizing the role that indigenous customary legal systems must play also in cross-boundary protection of TCEs.

239. The representative of IFPMA noted that his organization represented the research-based pharmaceutical industry in over fifty developing and industrialized countries. Regarding xii of the Policy Objectives to “Promote equitable benefit-sharing”, IFPMA’s governing Council, made up of company CEOs and leaders of national industry associations, was officially on record as stating that, “IFPMA was against taking GR without proper authorization”. Further to their Council’s decision, the IFPMA Membership had approved “Guidelines for IFPMA Members on Access to GR and Equitable Sharing of Benefits Arising out of their Utilization” which demonstrated their industry’s commitment to equitable benefit sharing, including obtaining prior informed consent. These guidelines showed their support for xv of the Policy Objectives, regarding “Enhancing transparency and mutual confidence” between TK holders

and users of TK and xi, “Ensuring prior informed consent and exchanges based on mutually agreed terms”. He emphasized the importance of PIC being in coordination with international and national regimes. Likewise, he strongly supported Paragraph (g) of the General Guiding Principles, that protection of TK should be consistent with the objectives of other relevant international and regional instruments and processes, etc. He fully agreed with and supported the comments made by the distinguished delegate from Australia regarding the importance that existing international regimes should not be weakened or be made subordinate to regimes protecting TK. He appreciated the clarification made by the distinguished delegate from Brazil that such subordination would not take place. One way of ensuring that existing systems would not be weakened would be to greatly revise or delete xiv of the Policy Objectives which mandated a broad disclosure requirement. This disclosure requirement would open up a broad and ill-defined avenue of attack on the validity of all patents, not just those involving TK and associated GR, as it would apparently require patent applicants who were not using TK to prove that they did not use TK and associated GR in their invention. More expensive litigation and disincentives to innovation would result. It was not accurate to say that the international community had accepted disclosure requirements, as asserted by the distinguished delegate from Brazil. A proposal for having such a requirement in the TRIPS Agreement had been put forward in WTO discussions, but it had not been accepted and there were strong arguments against such a requirement. In particular, such a disclosure requirement would not achieve the intended purpose of promoting access and benefit-sharing. Most alleged instances of “misappropriation” in the medicines sector involved over-the-counter and/or nutritional supplements, not patented medicines. Thus, a patent disclosure requirement would have no impact on such non-patented products. Also, in a study conducted by the US Biotech Industry Association and PhRMA involving cases of alleged biopiracy involving GR claimed by Peru and cited in existing patent applications, it was found that these materials had been purchased legally on the international market. Assertion of “reach through” rights claiming ownership of commodities in international commerce which had been modified in innovative and novel ways by others would have a dramatic and inhibitory effect on innovation worldwide. Finally, what would be the impact of such a disclosure requirement? If it meant that missing or insufficient disclosure of origin would be grounds for revocation of the patent, this would not bring any benefits to the original rights-holders of the resource, as the invention would fall into the public domain and there would be no obligation by any users of the invention to pay anything to anybody. That was why countries, including developing countries, used other approaches. For example, Peru supported a contract-based approach in its free-trade agreement with the USA. Finally, he stated that clarity from the delegates regarding many of the terms used in this debate would be appreciated. As they were engaged in high-risk R&D, certainty was important to them. Thus, further work needed to be done regarding concepts such as “misappropriation”, “local community”, and others. For example, they were concerned about the apparent discrepancy between paragraph e) of the General Guiding Principle which seemed to give traditional rights-holders power over access to their resources, and paragraph f), which apparently gave that right to national governments. With whom should they negotiate? What happened when the national governments and the traditional rights-holders did not agree? As the representative of the Saami Council noted, they needed clarification as to who were the legitimate rights-holders and what powers they had regarding access to resources? If disclosure requirements and similar requirements were badly drafted, this would inhibit local innovation. For example, in the context of a workshop held during the last WIPO Development Agenda meeting, a leading Brazilian academic expert noted that Brazilian researchers did not know if they were in compliance with Brazilian law regarding the use of GR due to serious ambiguities in the law. He finally welcomed the opportunity to work in collaboration with WIPO, its Member States, and other responsible stakeholders to promote

the use of bio diversity resources for the benefit of the entire world while also protecting the rights of the owners of such resources.

240. The representative of the World Trade Institute was of the view that the protection of TK could not be limited to existing intellectual property rights given by the fact of emergence of biopiracy under the existing IPR regimes. She believed that substantive provisions in the document went into the right direction of protection of TK through international dimension. However, she noticed that some distinguished delegates expressed their concern regarding the substantial provisions which led the way forward to the establishment of *sui generis* regime for TK. As IPR regimes were evolving rather than static system, she suggested the distinguished delegates looked back to the origin of *sui generis* regimes and how those *sui generis* regimes had been integrated into intellectual property regimes. In the early stage, patents, copyright and trademarks were the major pillars of the international law on intellectual property rights. However, as technological developments were blurring, a one-size-fits-all approach for IPRs protection did not work and some *sui generis* systems were emerging. The rather elastic concept of IPRs thus stretched to include other forms, i.e., undisclosed information, plant breeders' rights, geographical indications, patenting of animals and DNA sequences and the *sui generis* protection of integrated circuit layout-designs. Noticing the fact of the evolution of the *sui generis* regimes, it demonstrated that all *sui generis* systems were the outcomes resulting from the increasing importance to the relevant subject matter and inadequacy of existing IPR regimes. It complied with the situation of TK under the current TRIPS framework. By looking into WIPO/GRTKF/IC/9/5, she believed article 1.1 that "TK shall be protected against misappropriation" was based upon the protection from unfair competition. In fact, the concept of unfair competition had already formed part of the TRIPS Agreement by way of incorporation of Article 10bis of the Paris Convention, which was used as a basis for protecting test data in Article 39 as well as geographical indications in Article 22.2.b. Protection of unfair competition included remedies against the appropriation of efforts and works undertaken by others. In many ways, it was at the roots of more specific rights. It would therefore seem that a positive entitlement of *sui generis* rights to TK holders could be built and introduced in a similar manner like other *sui generis* regimes into the disciplines of the TRIPS. In terms of definition of misappropriation, she reiterated that "against misappropriation" should not only mean to prevent granting patent wrongfully, but also expand the concept of misappropriation of any commercial use without benefit-sharing. In terms of registers and databases, while the digital library was fairly interesting, a public database seemed not sufficient to protect TK holders especially for those undisclosed TK in the indigenous community. In this respect, she suggested to insert some sentence in para 2 of Art 11 of Part III that "such a register may be both public and *confidential*", depending on the ownership form of TK. In fact, Peru had already put in place two databases and both public and confidential databases were implemented. In terms of form of ABS, it was noted that the inherent difficulties in attaining fair and equitable benefit sharing in indigenous community was apparent in situations where the indigenous people and the local communities were in an unequal negotiation position. It was therefore recommended to introduce a legal-based contract arrangement instead of commercial contract arrangement.

241. The representative of the Kaska Dena Council thanked the Secretariat for its customary preparation of a document that not only provoked vigorous discussion but did so in a constructive, tactful and respectful manner. This said, he made some specific notations that he submitted for the continuing development of these evolutionary draft provisions. He noted that the draft provisions used the term "TK holders" and that often this was distinct to references to indigenous and local communities. As per his previous submissions regarding

the application of Aboriginal law as interpreted by the Supreme Court of Canada, Aboriginal peoples' TK had been acknowledged as an integral right of every constitutional right and that such rights were collective, not individual, in nature. A more thorough legal analysis was set out in the discussion paper presented at during the Indigenous Peoples Panel beginning this session, which he had submitted to the Secretariat. The KDC submitted that these two points raised a prospective omnibus amendment and that all references to TK holders should more properly read "Indigenous Peoples' TK-holders" given that individual holders may have pivotal custodial roles and responsibilities but they were not the collective rights-holders to TK. This submission was particularly applicable to Policy's Objectives (i) and (vii), (xii)–(xv). Regarding the balanced treatment of Indigenous Peoples and stakeholders, he did not disagree with a balance or equity. Of course, they acknowledged that Canadian Aboriginal relations with their Governments and stakeholders had not been equitable on too many occasions. Too often, their rights were reconciled to the detriment of their prior rights status. This historical inequity and unequal bargaining power had dramatically been changed by section 35 of the *Constitution Act, 1982* that affirmed that Aboriginal peoples were rights holders not stakeholders. He noted that the Chief Justice of the Supreme Court of Canada had stated that: "the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from... [stakeholders] in Canadian society and which mandates their special legal, and now constitutional, status." Therefore, he rejected any interventions that characterized stakeholders on par with the rights of Aboriginals. This comment was clearly applicable to General Guiding Principle (b) – Recognition of Rights. With respect to a number of delegations, particularly Australia, regarding the relationship between Indigenous Customary Law and National Law, the Kaska Dena Council refuted the presumption that National law, including intellectual property law, would necessarily supersede Indigenous Customary Law. This interpretation was not consistent with Aboriginal law from the Supreme Court of Canada. In short, European settlement had not terminated the rights of Aboriginal peoples arising from their historical occupation of their lands and their prior social organization and distinctive cultures on that land. To the contrary, Aboriginal interests and customary laws had been presumed to survive the assertion of sovereignty, and had been absorbed into the common law as rights, unless (1) they had been incompatible with the Crown's assertion of sovereignty, (2) they had been surrendered voluntarily via the treaty process, or (3) the government had extinguished them with clear and plain intention, which had not occurred in Canada. Barring one of these exceptions, Indigenous Customary Law that defined the various Aboriginal self-governing societies continued as part of the law of Canada. He generally supported the intervention of Nigeria that the IP system should not be prejudicial to Indigenous Customary Law systems. If the Committee had to strike a more equitable balance, all treatment and respect for Indigenous and Non-Indigenous must be treated equally. This general comment was particularly applicable to objective (ix) where the Kaska Dena Council would suggest the addition of "international customary law" after the words "international and regional instruments and processes". It was also applicable to the General Guiding Principles (g) and (h). With respect to para (i) of the Objectives, the Kaska Dena Council had listened attentively to the concerns of the delegation of Canada regarding the term "equal scientific value" of Indigenous Peoples and western scientific sources. As stated under the Kaska Dena intervention under Item 8 of WIPO/GRTKF/IC/9/4, the representative was very supportive of equality. In Canada, the historic experiences of Aboriginal peoples had too often been unequal treatment of their knowledge systems. More commonly, western science had been given greater weight and balance had not been achieved. In Canada, there was a more equitable reconciliation of the perspectives of Aboriginal peoples. On this point, to address

Canada's concerns, he drew the Committee's attention to some Canadian statutes that reflected this equal weight on the inclusion of Aboriginal science, in particular the *Species at Risk Act*, *Canadian Environmental Assessment Act* and the *Yukon Environmental Socio-Cultural Assessment Act*. These were not protective legislation per se but they were informative examples for his Canadian colleagues. Finally, as noted in the opening statement of the Tulalip Tribes of Washington, which he fully affiliated himself, an approach forward such as the Norwegian proposal of WIPO/GRTKF/IC/9/12 was constructive. In his opinion, a draft political declaration was not mutually exclusive of further development of the draft provisions. He fully supported the further development of the draft provisions of the Annex, including Substantive Principles. Such an evolution was delegated to this Committee's obligatory mandate and a prospective legally binding regime must be considered as an end. Similar to the distinguished delegations of Brazil and South Africa on behalf of the African group, he submitted that it was absolutely necessary that the draft provisions represented the discussions of this Committee. A well annotated, footnoted and amended new draft would accurately reflect which countries agreed and disagreed with this text. Without this amended version, this would be willful blindness. The Kaska Dena Council was particularly interested in further development of these provisions. Certainly in Canada, where there had been little to no effort to develop legislation, policy or other measures by the provincial, territorial and federal government to protect their TK-related rights, these draft provisions may serve as a stimulus to Aboriginal peoples in receiving some progressive consultation and accommodation on TK protection in their domestic context. The representative concluded that he would submit further comments to the Secretariat.

242. The representative of Tupaj Amaru commented on the statement made by the Delegation of Austria on behalf of the European Union. He regretted deeply that they continued to be so intransigent by insisting on non-binding sui generis provisions and that since the outset they had opposed preparing and adopting a binding international instrument. This was a cause of great concern to him as the mandate of this forum was not just to deal with this sui generis aspect which would have to be taken into account but to draw up an internationally binding instrument that would establish the provisions to govern this sector. This Committee had been set up at a time when liberalization of markets and capital was giving access to natural resources. He could not agree with the US proposal to delete the word "protect". The delegate wished to remove any legal content from this international instrument. The Committee was talking about the legal protection of the cultural and intellectual heritage of indigenous peoples and communities. If the concepts of protection or promotion were to be deleted, it would be devoid of meaning. He therefore supported the proposal of the Delegation of Nigeria that was against the deletion of the word "protection". He commented on the Norwegian proposal which was in favor of non-binding sui generis norms and that the Committee should focus on drafting recommendations or a non-binding declaration for the protection of cultural expressions or TK. This exercise was carried out in the 80s. WIPO had had various ideas on model laws and this had not produced positive results. The international community was meeting to elaborate international standards for the protection of natural resources, cultures and TK which were disappearing. There had been about 80 resolutions issued by the UN General Assembly which focused on sovereignty over the natural resources of people. Their sovereignty was being violated because their irreplaceable natural resources were being plundered by multinational companies. Novartis had increased its profits by 18 to 20% whereas the holders of the knowledge that had been patented lived in dire poverty, on 1 or 2 dollars per day. The president of Novartis was receiving a huge salary. Therefore, he could not accept the Norwegian proposal. With regard to the question of objectives and principles, it was necessary to recognize the basic right and change the concept of value. The western concept meant it was a commercial object, an

object of use, one that could be exchanged. Whereas indigenous peoples were aware of the material and spiritual value. When speaking of policy objectives, in paragraph 2 the collective right for the self-determination of indigenous peoples should be stated instead of promote respect because this was a legal notion and was recognized in international law. Respect was like a moral concept but the Committee was talking about legal concepts and therefore he suggested these principles of law and legal obligations be spoken of. Paragraph 3: It was necessary to respond to the real needs when there was TK. He suggested inserting “guarantee their rights” instead of “respect their rights”. Paragraph 4. Promote and support the conservation and preservation: “and ongoing development of TK” should be added. In paragraph 5, where “empower” was mentioned, perhaps it should be replaced by “encourage holders”. In the same paragraph, it should be mentioned “ensure holders” and “undue” instead of “illicit appropriation”.

243. The representative of Indian Council of South America (CISA) conveyed a few ideas from its community to the IGC. States did not have the necessary balance for making headway in the work. There had been a repetition of what had already been said in the past. These articles were also being discussed elsewhere as they focused on the self-determination of indigenous peoples. The representative congratulated the Delegation of Mexico for having said, the day before, that it recognized the self-determination of indigenous peoples, if this was true. He stated that he was representing the Aymara community of Bolivia more specifically. The TK, music, dances of the Aymara community had a ceremonial nature and were done in the communities only on certain occasions that were related to the farming calendar. He had been very worried for years about the protection of their TCEs in the Andean region in general. They were commercially very successful as they had been considered as the public heritage and they did not have any protection against misuse or use out of context. The Aymara people lived in four different states, Bolivia, Peru, Chile and Argentina. Their TCEs should not be used for some kind of exotic performance by groups that did not belong to their community as these belonged to their rights and ceremonies. Therefore, he was following the work of this Committee with a lot of interest. An interesting proposal would be to have an instrument, an international declaration in which the proposals of indigenous peoples would be included for them to be able to defend their own interest and define their own cultural values. They were the only ones who knew the deep significance of these expressions. The Aymara community of Aricaja were developing archives of their dances and music but they needed funds for this as they had not been able to complete this task and include other values to be put on the Internet. He hoped more indigenous people would be able to participate in this meeting in order to make their TK and TCEs known.

244. The representative of CPTech discussed briefly a proposal that had first been developed in a November 20-25, 2002, Rockefeller Bellagio meeting (Collective Management of Intellectual Property, Tackling the Anticommons) and presented most recently by Dr. Manon Röss at the previous week’s meeting at Yale on Access to Knowledge (A2K). The issues of access and misappropriation, as relating to both TK and GR would be examined. His starting point was not about fairness, but rather, what was in the self-interest of developing countries? He considered this question both for countries that were rich in TK or GR resources, and countries that were not. His proposal did not deal with many important issues, such as privacy, dignity, respect, identification of owners of TK or GR, or many other important topics. It was a narrow proposal. It drew from the experience of the free software community, and had implications for a wider set of problems that concerned misappropriation, including important cases involving modern biomedical research. This was a community of persons who created software code, and who collaborated in software development, and also freely shared the code with others. They were confronted with a

problem of misappropriation. Companies were taking code that was in the public domain, making changes, and creating new commercial versions that were protected by copyrights, trade secrets and patents. The community that created the initial code did not have access to the new products. The response by the free software community to this problem was interesting, because it was novel, controversial, and very successful. It was also very relevant to the WIPO discussions over protections for TK. The free software community, led by Richard Stallman and the Free Software Foundation, created a new copyright licensing strategy, around the GNU General Public License (GPL). This license gave anyone the right to use GPL'd code, for any purpose, including for commercial purposes, at a zero royalty. In return, however, the user of the GPL'd code had to provide the free software community royalty free access to the new product, including the new source code. Moreover, the new product would also be protected by the GNU GPL license. The "reach through" or "viral" aspect of the GNU GPL was quite important and effective. Today millions of lines of software code and thousands of important software programs were protected by the GNU GPL. In the beginning, the GPL was attacked as "communitistic", anti-capitalist, overly restrictive or impractical by a legion of critics. But over time, many software and computer companies began to see the GNU GPL as a very useful device to ensure that collaboratively created knowledge goods continued to be resources that were widely available. Today IBM, Oracle, Sun and many other major corporations used the GNU GPL for important projects. The representative returned to the focus of the meeting, the protection of TK or GR resources. What was the relevance of the GNU GPL story to TK or GR resources? The free software community was, in many respects, similar to a community that created TK resources. The difference was that the software programmers had an automatic intellectual property right — copyright, which was easy to get (there were no formalities under the Berne Convention), and which they could license, under a variety of terms. If a developing country created a sui generis TK or GR intellectual property right, it could be done in many different ways. If the sui generis right asserted exclusive rights over TK/GR resources, it may provide some opportunities for rent seeking when people used those resources, but this approach could also create or lead to monopoly controls over knowledge, which could be a bad outcome if everyone did the same thing. He added that most developing countries were net importers of TK and GR resources, so they needed to consider the regime both as owners and as consumers. And, if other countries did not recognize a country's sui generis TK/GR regime, one was only hurting its own consumers. The Bellagio/Yale/A2K proposal focused on a different strategy for the sui generis TK/GR intellectual property regime. In this proposal, the TK/GR right would not apply to any use of the TK/GR resource that was not patented. But when there was a patented invention that used TK/GR resources, there would be an obligation for the patent owner to obtain a license to the TK/GR resources. But to avoid monopolies and promote innovation, there would be a mandatory compulsory cross-license on both the patented invention and the TK/GR sui generis right. The patent owner would have guaranteed access to the TK/GR resource, but the TK/GR owner (or owners) would also have guaranteed access to the patented invention. Under the cross-licensing approach, there would be less monopoly power for the patented invention than would be the case if the TK/GR resource had been in the public domain. This was because the TK/GR owners would have the right to directly compete against the patent owner, if they choose to. There was a precedent for this, in Europe. The European Directive on the Protection of Biotechnological Inventions provided for a mandatory cross-license between owners of patented inventions and owners of improvements in seeds protected by plant variety rights. Article 12.1. Where a breeder could not acquire or exploit a plant variety right without infringing a prior patent, he may apply for a compulsory license for non-exclusive use of the invention protected by the patent inasmuch as the license was necessary for the exploitation of the plant variety to be protected, subject to payment of an appropriate royalty. Member States shall provide that, where such a license

was granted, the holder of the patent would be entitled to a cross-license on reasonable terms to use the protected variety. The European Commission adapted this approach because it wanted to weaken the monopoly power in seeds enjoyed by two US patents owners, Monsanto and Dupont. In subsequent reviews, the mandatory cross-licensing program had been found to promote access to innovations. A similar approach could be used for TK/GR resources. Because it was required by the TRIPS, there would have to be remuneration from the TK/GR owner to the patent owner, to use the patented invention. But there could also be remuneration from the patent owner to the TK/GR owner. This could provide a useful framework for meeting CBD obligations on benefit sharing. This would clearly work to the benefit of a developing country if applied solely within its borders — it would receive royalties from the patent owners, and it would also have the right to use the patented invention under the mandatory cross-license. But would it also be something that other countries would recognize? Again, it would depend upon the implementation. But one approach involving cross-border pooling of TK/GR resources might be particularly effective in promoting recognition of the regime. If a country (community) that “owned” TK/GR resources was willing to pool its resources with another country (community), the new co-owner in the TK/GR resources would have an incentive to recognize the cross-licensing scheme, because it would provide them with greater access to the patented invention. A country (community) with few TK/GR resources would benefit from both greater access to the patented invention, and also from the reduction in patent monopoly power. A country (community) with an abundance of TK/GR resources would benefit from greater acceptance of its sui generis right, including the receipt of remuneration for the use of the TK/GR resources in the larger market of countries (communities) that join the pool. As a thought experiment, supposed every country in Latin America joined the pool. If the “ownership” of the TK/GR resources were everyone in Latin America, then everyone in Latin America would have the right to exploit any patented invention that relied upon any TK/GR resources in Latin America. This was a big benefit. It was easy to consider this thought experiment with Africa or Asia, or even the entire developing world. If the whole world entered the pool, you would move towards a global system of non-exclusive remunerative rights (liability rules) for many inventions. The representative added that, because of limited time, many details could not be discussed that day, which were important, and worth thinking about. One was that the Bellagio/Yale proposal could be a model, or a basis, for thinking about a wider range of cases where public or community resources were misappropriated, including for example, cases involving important publicly owned biomedical databases, such as the SNPS, HAPMAP or Human Genome Projects, where issues of licensing and misappropriation had been problematic. There were also an interesting discussion over optimal remuneration policies. One might think of GNU GPL software as a special case of cross licensing at a zero royalty. The free software movement clearly put the premium on access, rather than on remuneration. One wondered if programmers would have freely donated code to collaborative GNU GPL'd projects if there were issues over who would receive and control royalties. For some problems, a zero remuneration might be the best. But for other cases, non-zero remuneration may lead to better development of patented technologies, and greater incentives for developing countries to protect, document, disseminate and share knowledge. In closing, it was appropriate to note that many persons had provided helpful ideas and insights which had been shamelessly exploited, and criticisms may had been unfortunately ignored. Without implicating anyone in any aspect of the proposal, the representative was particularly grateful to the participants of the 2002 Rockefeller Bellagio meeting on collective management of intellectual property rights, Professors Peter Drahos, Ruth Okediji, Jerome Reichman and Carlos Correa, Tim Hubbard, Julia Oliva, Chee Yoke Ling, Martin Khor, Sisule Musungu, Tony Taubman and Richard Stallman for their insights into various aspects of this problem.

245. The Delegation of Brazil commented on the statement of the representative of IFPMA. It took note of the emphasis he had attributed to the issue of disclosure among all the issues the Delegation had spoken about. In fact, the disclosure issue was not really the focus of its discussion as it had been considering items 8 and 9 of the agenda which addressed the broader issues of TK. It was very interesting to see how under the perspective of the pharmaceutical industry disclosure seemed to be the greater concern for them regarding any possible changes to the IP system to accommodate for the interest of indigenous communities to provide some means of an international solution to the protection of TK and TCEs. This greater concern regarding disclosure was because disclosure was a clear and enforceable procedure that could be easily mainstreamed into the IP system through a simple solution such as an amendment to the TRIPS Agreement which was a proposal supported by Brazil. There was greater concern regarding disclosure requirement vis-à-vis other broader discussions that were being dealt with which the representative of IFPMA did not really address. There was no international agreement regarding disclosure of origin of GR as a means to facilitate the protection of TK and folklore and as an instrument to assist countries in actually implementing the CBD — those who were members. When it referred to that, the Delegation mentioned the Bonn Guidelines. It did not state that there had been an agreement in the Doha round to adopt an amendment to the TRIPS Agreement on disclosure. What it referred to was that there were the Bonn Guidelines, the decision taken by the members of the CBD which “invites parties and governments to encourage the disclosure of country of origin of GR in application for IP rights where the subject matter of the application concerns or makes use of GR in its development as a possible contribution to tracking compliance with prior informed consent and the mutually agreed terms on which access to those resources was granted”. Within the context of an international treaty there was a guideline that invited countries to encourage the disclosure of country of origin. This was an important step towards international recognition that disclosure requirements provided a basis for implementation of the objectives of the CBD as they related to ensuring protection of TK and TCEs. There was little anyone could say against this. Obviously, there were those countries who were not members of the CBD but the Delegation referred to those who were members and who had adopted this decision. So there was an international recognition that disclosure requirement was an important step. Regarding the Brazilian legislation referred to by the representative of IFPMA who mentioned Brazilian researchers did not know whether they were complying or not to the Brazilian legislation, the Delegation did not understand exactly what he meant by that and whether this was a criticism of Brazilian law. However, the legislation was made public, it was the democratic manifestation of the will of the people in Brazil to have this legislation adopted and enforced in the country. It was adopted as a means of application of the provisions of the CBD in Brazil which referred to access and benefit-sharing. The legislation also included the contractual approaches to access and benefit-sharing which meant that the legislation in Brazil also went along the line of suggestions made by the Delegation of the United States according to which countries should adopt national approaches to the issue of access and benefit-sharing which was what Brazil was actually doing. What was lacking was the international dimension. The Delegation agreed with the representative of IFPMA to the point that a national legislation was not a sufficient solution to the issue of biopiracy and misappropriation. Finally, it referred to the issue of legally purchased GR referred to by the representative of IFPMA. These GR may be eventually legally purchased even though they may have been misappropriated because there was no international norm that would apply to TK in the same way that there was an international IP system that applied to other objects such as CDs, DVDs, etc. When one purchased a pirated DVD it was illegally purchased because there were rights that could be exerted by the right holder on that particular object of protection. If one purchased a TK that had not complied with PIC and ABS in the country of origin, it may not be illegal because there was no treaty that would apply to that. This was

why it was necessary to build a system that would make it illegal for such a misappropriation to actually be acceptable in some countries. It was important to make this distinction as the representative was raising an important issue, the issue of the legality of purchases. If many GR had been purchased without compliance to PIC and ABS in the countries of origin, there could be legal purchase of misappropriated GR. It was a situation that had to be prevented for the future through a legally binding international treaty.

Decision on agenda item 9: traditional knowledge

246. The Committee took note of the extensive comments made on the contents of document WIPO/GRTKF/IC/9/5, and the indications of a number of delegations that they would be submitting written comments to the Secretariat. It was agreed that the question of subsequent steps would be taken up under Agenda Item 11, Future Work.

247. The Committee also took note of documents WIPO/GRTKF/IC/9/8, WIPO/GRTKF/IC/9/11, WIPO/GRTKF/IC/12 and WIPO/GRTKF/IC/9/INF/5.

AGENDA ITEM 10: GENETIC RESOURCES

248. At the request of the chair, the Secretariat introduced documents WIPO/GRTKF/IC/8/9 and WIPO/GRTKF/IC/9/9.

249. The Delegation of Japan introduced its proposal in document WIPO/GRTKF/IC/9/13. It explained that the CBD and the patent system were mutually complementary because the patent system was expected to function as an important factor for the technology transfer and a patent is a tool that might accrue benefits to be shared from inventions utilizing GR. Patents were granted only for inventions that met certain requirements like novelty, inventive step and industrial applicability and were not granted for material in the public domain which for TK and GR may be the case. In order to accomplish the objectives of CBD, Japan had established biotechnological strategies and conducted various activities such as the preparation of guidelines on access to GR for users in Japan in May 2005, to promote the idea of the Bonn Guidelines. The other activities of the Japan Bioindustry Association (JBA) and the National Institute of Technology and Evaluation (NITE) were outlined in the paper. With regard to its proposal in the paper to establish a database on GR and TK, in order to prevent erroneously granted patents, building a database of GR and TK with easy accessibility by any examiners would be effective. This paper highlighted points like language, information gathering and searchability by examiners from each country. Concerning language: a database to be created should be easily utilized by examiners in each country. One suggestion was that the summary with familiar language is attached to the document in indigenous language. As to information gathering, it would be efficient that each country will gather information on their own GR and TK for the database. Regarding searchability, the database might well be the one which examiners from all countries could utilize on a one-stop-research basis. Disclosure of origin, PIC or access and benefit sharing (ABS) was not an effective tool to prevent erroneously granted patents. The Delegation took a hypothetical case in which the claimed invention was a synthetic resin in which the juice of GR A was mixed with the raw material. Novelty and inventive step were not associated with the information like the country of origin or evidence of PIC or ABS. The technical information related to GR A was relevant and to be searched. Even if a GR had its own specific characteristics by its origin, an applicant was required to specify it by technical matters rather than just its location. The Delegation expressed hope that the paper helped the Committee's discussion to move forward constructively.

250. The Delegation of Austria, on behalf of the European Communities and their Member States and the Acceding States Bulgaria and Romania supported the ongoing work on defensive protection and disclosure requirements and recalled the proposals contained in WIPO/GRTKF/IC/8/11. It reiterated the key issues of the EU proposals tabled at the last Committee: a mandatory requirement should be introduced to disclose the country of origin or source of GRs in patent applications; the requirement should apply to all international, regional and national patent applications at the earliest stage possible; the applicant should declare the country of origin or, if unknown, the source of the specific GR to which the inventor had had physical access and which was still known to him; the invention had to be directly based on the specific GRs; there could also be a requirement on the applicant to declare the specific source of TK associated with GRs, if he was aware that the invention was directly based on such TK; in this context, a further in-depth discussion of the concept of ‘traditional knowledge’ was necessary; if the patent applicant failed or refused to declare the required information, and despite being given the opportunity to remedy that omission continued to do so, then the application should not be further processed; if the information provided was incorrect or incomplete, effective, proportionate and dissuasive sanctions should be envisaged outside the field of patent law; a simple notification procedure should be introduced to be followed by the patent offices every time they receive a declaration; it would be adequate to identify in particular the Clearing House Mechanism of the CBD as the central body to which the patent offices should send the available information. These proposals attempted to formulate a way forward that should ensure, at global level, an effective, balanced and realistic system for disclosure in patent applications. Consideration of this issue was an important task for this Committee and such a serious proposal was entitled to proper discussion within the body where the proposal was made.

251. The Delegation of Indonesia expressed the need for the Committee to work toward an international legal instrument for combating the misappropriation of GR and TK associated with these resources. As one of the megadiverse countries, Indonesia was deeply concerned about continuing cases of bio-piracy, which had in some ways hampered development. Bio-piracy was indeed a global problem requiring the establishment of effective global measures to stop it. Although the role of national legislation in preventing bio-piracy was quite instrumental, it would not be able to provide adequate legal protection for GR. As maintained by some delegations, national laws were not the only panacea for this global problem, since the current practices of bio-piracies had very strong elements of an international dimension. The Delegation advocated the establishment of international legally binding measures, which could effectively contribute to combating the misappropriation of GR and the TK associated with these resources. Disclosure of origin, PIC and fair and equitable benefit-sharing (BS) should be mandatory norms provided by an international treaty. As recognized by the Bonn Guidelines, the disclosure of origin requirement for IP applications was an important element of the CBD ABS regime. A mandatory disclosure of origin requirement would assist countries providing access to GR to monitor and keep track of compliance with national access and benefit-sharing rules.

252. The Delegation of New Zealand stated that document WIPO/GRTKF/IC/9/9 asked to provide direction on future work on GR. The Committee should devote more attention to the GR issue. The Committee should resume its consideration of two streams of work, namely disclosure of GR and associated TK in patent applications and IP issues in agreements for access to GR and BS. Both disclosure and contractual approaches should be considered. On the disclosure issue a number of proposals had been presented to the Committee, including

those by the EU, Switzerland and Norway. At this session, Peru and Japan presented papers. The Delegation showed interest in exploring the disclosure question further, including questions about erroneously granted patents and whether the patent system could play a supporting role in relation to CBD objectives, and alongside national ABS laws. The Committee should create a work plan that would enable it to work through the technical questions raised in these proposals, along with issues identified in the technical studies prepared by WIPO for the CBD. The Committee had the necessary expertise to perform this task, but that should not exclude consideration of disclosure in other WIPO bodies such as the Standing Committee on Patents and the PCT Working Group. The outcome of the Committee's work in that area could constitute recommendations to these committees. Technical work on disclosure in the Committee would be complementary to the discussion of disclosure in the TRIPS Council as it could help understand more clearly how disclosure might work in practice. The Delegation acknowledged the database proposal from the Delegation of Japan. While the Delegation supported further consideration of that proposal alongside the disclosure proposals, the risks of such a database should be considered carefully, including the greater accessibility of TK by third parties that could result. Erroneously granted patents, the issue that the proposal focussed on, was not the only reason advanced for disclosure requirements. The Delegation thanked the Delegation of Peru for its paper, and its efforts to identify actual patent applications. The demonstration of factual examples was essential to the disclosure discussion. Concerning IP issues in contracts for ABS, the work on guide contractual practices should be progressed. The guide would be particularly useful for parties with little awareness of the potential IP issues that might arise when access was granted to GR and TK associated with its use. The development of the guide did not limit the Committee's ability to consider other approaches, such as disclosure. The last version of the guide had been substantially complete, and the Committee should support its completion, as part of the attempt to ensure results during the period of the extended mandate. Continued delays on the guide, while talking about the contractual versus the disclosure approach, would not assist indigenous and local communities and others being asked to enter into ABS arrangements and who needed assistance to make informed decisions.

253. The Delegation of Norway noted that the COP8 of the CBD invited relevant forums to address and/or continue their work on disclosure requirements in IPR applications, taken into account the need to ensure that this work was supportive and did not run counter to the objectives of the CBD. The Delegation expressed hope that the Committee further continued its work on that important issue and welcomed the proposal made by the European Communities and their Member States in WIPO/GRTKF/IC/8/11 on disclosure of origin or source of GR and associated TK in patent applications. A mandatory requirement to disclose in all patent applications the origin of GR would be an effective means towards achieving the aims of the CBD in relation to the equitable sharing of the benefits of exploiting GR and to help ensure compliance. The European Communities and their Member States had suggested in WIPO/GRTKF/IC/8/11 (at 8(e)) that a requirement to declare the specific source of TK associated to GR could be introduced. The Delegation considered that a mandatory requirement to disclose TK should indeed be introduced irrespective of whether the relevant TK was related to GR or not related to GR. The EC proposed (8(d)) as a criterion that the invention had to be directly based on the specific GR. This limitation was too restrictive. Norway intended to present its proposal in more detail and in writing before the next session. The Delegation thus proposed that the Committee recommended that a binding international obligation to disclose the origin of GR and TK in patent applications should be introduced in the relevant treaties under the auspices of WIPO, namely in the PCT and the Patent Law Treaty.

254. The Delegation of India believed that the time had come for drawing up a substantive and focussed action plan for considering the international dimensions of GR and related issues so as to establish norms. Three core issues were of concern to India: Disclosure of source and country of origin of biological resources and associated TK, PIC of owners using the same and ABS. It had been consistently arguing for an inclusive approach on these issues in the interest of a robust IP system that addressed current and emerging concerns. It was necessary to do so to address issues of biopiracy and misappropriation in a consistent manner. Applicants for patents had to disclose the source and country of origin of any biological resources and associated TK used or involved either directly or indirectly in the invention and to provide evidence about compliance with the legal requirements for PIC and fair and equitable BS in the country of origin. Such an approach would bring more transparency and coherency to the IP laws.

255. The Delegation of Brazil welcomed the engagement of Japan, but felt it was a partial misrepresentation of the proposal for the adoption of a disclosure requirement to the IP system. According to the Japanese paper, the objective of introducing a disclosure requirement would be to address the problem of erroneously granted patents. That was only one of the objectives. A disclosure requirement was necessary to incorporate within the patent system concerns that came from the CBD. Apart from erroneously granted patents, another objective for introducing a disclosure requirement was to make the IP system encompass CBD requirements of PIC and BS. This issue was not addressed by the Japanese paper. The Delegation also recognized the efforts made by the EU, but found some shortcomings. According to the EU proposal, a patent applicant would be required to disclose the country of origin or source of GR in patent applications. But the EU did not address the problem of incorporating into the patent system the requirements of the CBD, PIC and BS. That shortcoming rendered the EU proposal insufficient. The proposal aimed at amending the PCT and the PLT. These treaties dealt with procedural aspects of the patent law. But the idea of requiring evidence of compliance with PIC and BS did not always deal with issues of procedural nature. Sometimes it might tackle issues of substantive nature. The idea of introducing a mandatory disclosure requirement to PCT and PLT was not that mandatory if one did not address substantive issues that might be present when discussing disclosure. Another insufficient aspect of the EU proposal was that the disclosure requirement would apply where the subject matter of the patent application was directly based on a GR. This trigger was insufficient as it left outside many of the cases where an invention was not directly based on GR. This could apply to most of the cases where the disclosure of the country of origin, PIC and BS, were required. The EU proposal did not address the important issue of sanctions for lack of compliance adequately. The Delegation invited all interested to consult the documents Brazil had submitted to the TRIPS council where substantive discussions were taking place on this issue. A mechanism addressing CBD concerns should be effectively mandatory, address the international dimension of the problem, adequately incorporate the CBD requirements of PIC and BS and provide effective remedies to induce compliance.

256. The Delegation of Switzerland stated that reference had been made to new disclosure requirements on the patent law. Switzerland had made proposals to the WIPO working group on a reform of the PCT with regard to disclose the source of GR and TK in patent applications. Switzerland recognized the importance of transparency with regard to ABS and it was interested in a patent protection for biotechnological inventions which was fair and balanced for all those who had contributed to the invention which was ultimately patented. Switzerland was not a demander with regard to the issue of the disclosure of the source. Drafting these proposals, due consideration had been given to the following points: the

measure should be practical and workable in practice and burden the entities involved, in particular the patent applicants and the patent offices, as little as possible. This notwithstanding that the measure should increase transparency in ABS. The proposals were characterized by a number of elements. The proposals to WIPO explicitly enabled the national legislator to require patent applicants to declare the source of GR and TK in patent applications. This was to be achieved through an amendment of the regulations of the PCT. The disclosure requirement should be applied also to international patent applications. Patent applicants could fulfill this requirement already in the international phase. Additionally, Switzerland proposed to include the declaration of the source in the international publication of the patent application containing such a declaration in order to render the declaration accessible to the public at an early stage. In order to further strengthen the effectiveness of the requirements to disclose the source and to facilitate its working it proposed an online list of government agencies competent to receive information about the declaration of the source. Patent offices, which received patent applications containing a declaration of the source, should inform the competent government agency about this declaration. The term source was chosen to ensure consistency with the three international agreements on ABS, namely the CBD, the Bonn guidelines and the international treaty of FAO. Those three instruments foresaw a multitude of different entities to be involved in ABS. More limited concepts such as the origin or the country of origin did not cover all entities potentially involved in ABS. The national legislator should be able to introduce the disclosure requirement at the national level. This optional approach had at least four main advantages: a much faster progress could be expected than from any mandatory approach. Considering the widely diverging positions of states on this issue, it seemed the only approach with a potential to be accepted. An optional introduction of the disclosure requirement would allow the national governments and the international community to gain experience with the disclosure requirement without prejudice to further international efforts. Moreover, an optional approach would not oblige developing countries, especially least developed countries to change their national laws. In contrast, a mandatory approach would create a new obligation to all countries. It was crucial to keep in mind, that once the disclosure requirement was implemented at the national level it was mandatory for patent applicants to disclose the source of patent applications. More information on these proposals could be found in the communication just submitted by Switzerland for the next meeting of the working group on reform of the PCT to be held between May 8 and 12, 2006. This communication was contained in document PCT/R/WG/8/7. That document summarized the proposals and contained references to submissions by Switzerland on its proposals to various international fora and the specific wording of the proposals. The proposals would present a simple and practical way forward that could be introduced in a timely manner. They would remedy the real problem and would not require extensive changes to the provisions of the relevant international agreements.

257. The Secretariat addressed some questions in relation to the proposal made by the Delegation of Japan for the establishment of a database relating to GR. If there was interest in such a database being maintained by WIPO, one way of approaching the question would be for the International Bureau to present to the next Committee a brief exploratory paper covering some of the issues. The issues were the scope of the database, whether it would relate simply to GR or also to disclosed TK and if so whether it was disclosed associated TK. Another question was whether it would be a distributed database in the nature of a portal linking to other databases which was suggested by Japan in its paper or a centralized database or both and what would be the relationship of this database to other databases in this area that did exist. The Secretariat referred those interested to paragraph 43 in WIPO/GRTKF/IC/8/9 where there was some discussion on the subject and in particular on the SINGER database that was maintained by the International Plant Genetic Resources Institute. The Secretariat

raised the question what would be particularities or the specificities of any database that was maintained by WIPO and what sort of safeguards would need to be put in place to ensure that there was no undesired dissemination of TK that was either not disclosed or not wished to be communicated to unauthorized parties. If there was interest, these issues could be explored in a brief paper for the next Committee.

258. The Delegation of the United States of America thanked the Delegation of Japan for its valuable contribution to the discussion on GR. The Delegation was not convinced that a new disclosure requirement in the patent laws would promote access to GR and equitable BS or would prevent invalid patents. There were concerns that a new disclosure requirement in the patent laws would add uncertainty to the patent system and would discourage innovation. The examples in the Japanese paper helped to highlight many of the problems that were inherent in a new disclosure requirement. Japan's proposal for the development of a database of GR and TK, which would be available to patent examiners throughout the world, was constructive. The Delegation showed interest in further exploring the idea and supported further work by the International Bureau including the development of a paper. It might be helpful to start with a portal and continue to explore the idea of a centralized database. With a portal system, India and other delegations that had national TK databases would be free to have their databases linked to such a portal. Regarding protecting standards for the protection of TK in that database, it would be important to allow delegations in consultations with their indigenous people to decide what content would be acceptable to be linked to the portal. The Delegation welcomed the comments made by the Delegation of India about its experience with such databases and looked forward to hearing more about India's work. The Delegation supported the invitation by the Delegation of Brazil to review TRIPS Council papers on GR and asked that delegations considered several recent US papers on GR that had been tabled in the TRIPS Council including IP/C/W/434, IP/C/W/449 and IP/C/W/469. The United States of America had recently established a working group at the USTPO, which included representatives from the Examining Corps, the Scientific and Technical Information Center (STIC), the Search and Information Resources Administration, the Office of Patent Classification, the International Liaison Staff, and the Office of International Relations. The working group would address TK and GR issues, assess examiners' resource needs and promote examiner awareness of TK/GR information and databases that were available to them, as well as to engage with other national patent offices to share information on the same. The United States of America planned to begin an educational outreach program to explain to owners of TK/GR steps that they could take to bring information material to patentability to the Office. The Delegation supported further work on GR by the Committee.

259. The Delegation of Syria stated that it was at WIPO for protection and justice. It hoped that the Committee would do a neutral work and that it could have all the documents necessary for GR, TK folklore and pharmaceuticals. These products should not be used by third parties, as they thought fit. If the rights of others were infringed or if there was a breach and the holders were indigenous people there should be some kind of action. The Delegation refused an unfair system. It was preferable to classify GR or TK so that a country did not breach the knowledge of another country. Visits could be made to the country and the region to list everything that was there and that could be of benefit to everyone. If there was TK a country wished to benefit from this should be done with prior consent of both parties.

260. The Delegation of Australia welcomed the proposal from Japan in document WIPO/GRTKF/IC/9/12. The Delegation suggested further practical steps to prevent erroneous patents being issued while recognising some of the sensitivities of indigenous communities not wanting to make their TK public. The Delegation had not had sufficient time to consult

on the Japanese proposal to comment further but would welcome further elaboration of the proposal as suggested by the International Bureau. The contribution of the EU in WIPO/GRTKF/IC/8/11 also provided at least a thought through proposal on how to implement the disclosure of GR in the patent system. The Delegation noted the extension of this thinking suggested by Norway and acknowledged the proposals put forward by Switzerland. The Delegation stated that Australia had not yet finalised its views on disclosure of GR in the patent system and looked forward to continuing exploration of the issues. At this stage the Delegation remained unconvinced that the potential benefits outweighed the costs of the disadvantages. The Delegation also noted the contribution by the Delegation of Brazil that morning. Brazil had raised the issue of including PIC and ABS into the patent system. According to the South African presentation the day before the implementation of PIC and ABS had been achieved outside the patent system with only disclosure of PIC and ABS in the patent system. The South African approach seemed more practical and capable of being implemented than the position put forward by Brazil.

261. The Delegation of China referred to WIPO/GRTKF/IC/8/9 and WIPO/GRTKF/IC/9/9. With regard to GR, the Committee had already done quite a lot of work on disclosure of source and that it had also already been discussed in other fora e.g. the working group on the reform of the PCT and in the SCP on the SPLT. Furthermore, in this connection a certain basis for discussion had already been acquired in WIPO itself and other countries and territories had practices in this area so that it was a good foundation for further discussion. As regards GR, the Committee had a great advantage: it had a mandate and on the basis of the work it had already done, it was able to strengthen its work in that area. As regards disclosure, the Delegation believed that there should be discussion on under what conditions applicants should be asked to disclose the origin of TK and GR that covered definition and scope of the related TK and GR. What sort of TK and GR had been used in the invention for which a patent was claimed. What would be the legal consequences if the applicant had not been able to satisfy the disclosure requirements. The Committee, when it discussed disclosure should not confine itself with what had been said in the past. It should ensure that the discussion complemented discussions going on in other fora. The Committee should provide solutions and make concrete proposals to achieve operational results.

262. The Delegation of Austria on behalf of the European Communities and their Member States stated that regarding the comments by the Delegation of Brazil on their proposal, it had heard that the accents of a mechanism regarding PIC and ABS were deemed to be insufficient and that the question of sanctions had not been properly addressed. The Delegation said it had addressed the very important question of sanctions if the disclosure of origin was not properly done, both in paragraph f and g, a concrete sanction within the patent system as well as sanctions outside the patent system. As far as PIC and ABS were concerned, the main solutions of these very important problems lay outside the IP system, which could just form a factual basis to solve those problems. The European Communities and their Member States had carefully reflected the possibility to implement disclosure of origin of GR in the patent system without making it more complicated by bringing in additional legal burdens. It shared these views with numerous delegations, e.g. in the CBD and legal publications in that field. At this stage it would be the wrong way to go any further with that subject matter.

263. The Delegation of India attached considerable importance to the need to address the issue of misappropriation of GR and associated TK in the existing international IPR system. An applicant for a patent relating to biological materials or TK should provide as a condition to acquiring patent rights disclosure of the source and country of origin of the biological material and associated TK as well as evidence of PIC through approval of the authorities

under the relevant national regimes and evidence of fair and equitable BS under the relevant national regime. The Committee had succeeded in generating extensive awareness creating literature, studies, tool kits, etc. which were of great value, but there had been no matching progress towards establishing a framework for the effective protection of the rights of owners of biological material and associated TK. Some countries had argued for a solution outside the patent system, for contracts between users and suppliers of biological material and associated TK. There were others who had recognized the need for a mandatory disclosure requirement on patent applicants where there were yet others who talked of optional disclosure requirements. The Committee process had to be complementary to the ongoing efforts in the TRIPS Council or the CBD. There had to be a seamless effort in this direction. Even within WIPO, the disclosure issue could not be restricted just to the Committee. The issue of disclosure should at the very least form part of a program of work of the SCP. When selecting areas for the future work of the SCP, the different demands of all member states had to be respected and there was a need to be conscious of the development dimension and to be supportive of the objectives of other international conventions. In developing potential solutions to this the objectives that the IP system should be supportive of and not run counter to sustainable use of biological resources. That could only be done by the patent system recognizing the ownership of these resources and knowledge with the right holders in the respective sovereign domains, particularly in megadiverse developing countries. Provisions for national ABS regimes in such countries should be accommodated within the patent system to the extent necessary.

264. The Delegation of Japan thanked the Secretariat for the clarification. It was open for all the items raised as long as such a database was effective to address erroneous patents. Within the constraints like costs, existing laws, customary law, these items were just adequate to be addressed and discussed and deepened in this Committee. The Delegation was also open as regards to the second item, a distributed or centralized database, but its image was a one-stop database so that the examiner could search once and comprehensively through a one search screen where he could put one search inquiry and then he could search through every connected database. It was useful compared to when the examiner utilized each database separately. Regarding the comments made by the Delegation of Brazil, the Japanese paper addressed clearly the relationship between the patent system and the CBD. In paragraph 4 it was apparent that the existing patent system was not being changed due to the provisions of the CBD and it was not expected to have such changes. Japan recognized the principle of disclosure of origin and ABS of the CBD. More awareness should be raised. Measures should be taken to address CBD principles whether within or outside the IP system. The requirement of disclosure of origin or ABS within the IP system was not effective. The Delegation responded to the WIPO/GRTKF/IC/9/10 submitted by Peru, which was calling for the review of TRIPS agreement. Certain specific points about the database of Japan's patent office and Japanese patent applications had been cited as potential biopiracy. The Delegation said it appreciated this kind of technical contribution, helpful to deepen the discussion in the Committee. The document had mentioned problems concerning English translations of Japanese applications or patents provided through the database of Japan's patent office, publication of original documents only in Japanese and cost and time required to analyze Japanese applications or patents due to language. Japan had a right to publish Japanese patent applications or patents in its own official language. Understanding the importance of information dissemination however, English translation by machine was provided by the Japanese patent office via Internet on its own initiative. The importance of quality of such machine translation was well recognized. As regards the six listed applications on "camu camu", the current status of this applications was: the second cited application had been granted as patent number 3431383, the third cited patent application had been rejected after

examination, the other four patent applications had not yet been examined. Reviewing the examination of the second cited application, the application had been granted through the appropriate examination process. It was duly adjudicating substantive patentability requirements. In addition it should be noted that there was an appeal examination system, where any party could challenge the validity of a patent. Therefore sharing the view that prior art systems should be improved in the technical areas including biodiversity and believing that Japan had been making and would continue to make efforts to such improvement, the Delegation was not convinced that the elaboration in this document showed good reason for review of the TRIPS agreement.

265. The Delegation of Canada thanked the Secretariat for its excellent work on the GR documents. Although succinct, WIPO/GRTKF/IC/9/9 represented a milestone in the Committee's work in this area because it sought directions on a path forward on this issue, a matter of great importance for Canada. The Delegation welcomed all of the various proposals on the issue of disclosure of origin or source of GR and associated TK in patent applications which had been put forward by Member States for discussion in the WIPO-Committee. WIPO/GRTKF/IC/8/9, and by extension WIPO/GRTKF/IC/9/9, served as excellent templates of the salient points that both holders and users of GR and associated TK could contemplate when including IP elements in relevant access and benefit-sharing contracts. The Delegation encouraged further exploration of these documents, especially their consideration of operational principles; development of model provisions; and further revision and elaboration of the draft Guide Contractual Practices. The Delegation thanked Japan for its presentation of a new paper on the disclosure of origin of GR and associated TK in patent applications. Many of its elements were a most helpful contribution to the disclosure aspect of the Committee's discussion on GR. The Japanese proposal on the establishment of interoperable databases related to GR and associated TK merited further discussion by the Committee. The Delegation supported the Secretariat preparing an exploratory paper on key issues. Canada needed more time to fully assess the contents of this new proposal, but the Delegation expressed the preliminary view that interlinked databases could technically improve prior art searches in the patent granting process. A number of patent offices worldwide, especially those in least developed countries, had experienced some issues in the past in accessing prior art databases. Thus, it was possible that the Committee may need to consider further capacity-building mechanisms to help ensure the efficient and proper use of any possible interlinked databases. The Delegation's other preliminary comment on Japan's database suggestion related to their comment that the creation of any interoperable international prior art database should be done under the initiative of WIPO. The Delegation agreed with the Japanese statement that the expertise and administrative capacity of WIPO lends itself to this kind of work. The Committee's further consideration of this suggestion should be closely collaborated with the WIPO's Standing Committee on Information Technologies (SCIT) to help ensure, from a technical perspective, the feasibility of developing an interoperable international database on prior art related to GR and associated TK. In an earlier session of the Committee, the Committee heard from the Asian Group about another method of enhancing existing prior art databases. The suggestion was to create a system of multiple, interlinked prior art databases that could provide national IP offices and organizations with the capacity to facilitate the proper exchange of related information. This suggestion, as well as any others presented by Member States, deserved further consideration by the Committee alongside with the Japanese proposal. The discussion of the GR-related issues in the Committee needed more time and more work. These technical IP issues uniquely belonged in WIPO, and not in the WTO or the CBD. While it was true that discussions on some aspects of GR issues were ongoing in other fora, the reality was that only WIPO had the international mandate, expertise and capacity to give GR-related issues the full and substantial hearing they

merited. The Delegation made two suggestions that could help the Committee better realize its renewed mandate in the area of GR in the next biennium: It was Canada's understanding that the current order of topics for discussions in Committee being: 1- TCEs, 2-TK and 3-GR was the result of a change made during an earlier session of the Committee to reflect a then need to give more time for the Committee's discussion on TCEs. The re-ordering of the agenda items on substantive issues had remained unchanged since then. And, recently in Committee sessions, including this one, this has meant that the Committee had spent very little time on the issue of GR. To give more time to discussion on GR, the Committee should consider re-shuffling the agenda once again so that GR was moved to the front, ahead of TCEs and TK. The Delegation also encouraged the Committee to consider devoting a specific amount of time to the GR discussion early on in the next Committee session. The Delegation further stated interest in helping ensure that the Committee's work on GR continued in an organized fashion. This type of organization required a clearer work plan, and Canada encouraged the Committee to consider developing one prior to the next session of the Committee. The primary intent of this GR-related work plan would be to assist Member States in determining further which GR-related issues should be explored in the Committee, what objectives the Committee would like to achieve regarding those issues, and finally, what timelines and deliverables would be considered reasonable in this area.

266. The Delegation of Kyrgyzstan mentioned Kyrgyzstan was investigating TK including TK related to GR. Kyrgyzstan was going to set up a database for TK. The volume of knowledge that should be published about TK including traditional uses of GRs would be regulated depending on what the applicant wished. If he wanted to keep something secret, that would be covered. The creation of a TK database was first and foremost for patent examination. Experts would have access to the full volume of TK. But the publication would be submitted to the inspection of the applicant first of all so as to avoid misunderstandings. It needed help from WIPO and from the experts from the other countries to see how they would work on material that had not been disclosed fully.

267. The Delegation of Brazil explained why the proposals by the EU and Japan were insufficient. A mandatory disclosure requirement introduced in the patent system regarding GR was necessary not because of a concern with the quality of patents granted as such, but to give countries an instrument to track appropriation of GR through patenting internationally and to verify whether such appropriation complied with the objectives of the CBD which was to ensure whether there was PIC from the communities that were the original owners of the GR on which the invention had been based and to allow the countries to ensure that ABS arrangements satisfactory to the original owners of such GR were complied with. The issue was compliance with the objectives of the CBD, not strictly an issue of patent quality. When speaking of a mandatory disclosure requirement, it meant the disclosure in the patent application not only of the origin, but also of evidence of compliance of PIC and ABS arrangements, because it did not ensure that there had been not misappropriation. The issue of erroneously granted patents did not solve the problem, because even if one misappropriated a GR including associated TK and filed a patent, if that person proved that there was an inventive step, novelty and industrial application, according to current IP treaties and laws, any patent office would grant the patent. It would not be an erroneous patent even if there had been misappropriation. Creating a database that would contain all the TK that was held, produced historically by different indigenous communities, without any safeguards would actually facilitate misappropriation of TK, because of facilitated access to a range of information. Unless one changed the IP system to prevent the granting of patents on misappropriated GR and associated TK, it did not support the database that would expose globally all information that existed in the world regarding TK. As long as there were no

safeguards, the Delegation would be interested in a database on all patent applications that concerned or made use of GR in all member countries of WIPO. That would facilitate the tracking of appropriation of GR including TK and would give countries the opportunity to monitor the appropriation of GR by the patent system and to take action.

268. The Delegation of Bolivia repeated its request that, notwithstanding the documents submitted by the Secretariat, all deliberations of this and other bodies of WIPO be analyzed in the light of the decisions of Member States. It restated its broadest and unfailing support to the papers submitted by the friends of development on the development agenda and co-sponsored the requirements and needs that should be member driven. It also endorsed WIPO/GRTKF/IC/1/4. This international organization should act by taking account of the guidelines and directives of its members. Therefore it was somewhat surprising to see that documents were submitted without a specific mandate of the Committee to cover this situation. It briefly referred to the deliberations of the previous agenda item. It gave its support to what had been said by Brazil, South Africa and India on the way of promoting the deliberations on texts on TK and TCEs because it was necessary and relevant to have an in-depth discussion and not just a formal and superficial discussion. It added that Bolivia was living a democratic revolution which had started in January 2006. This change was due to the maturity of the social conscience of the majority of people in Bolivia including indigenous peoples and persons. They were committed to the building of a new country. The components of this majority would be drafting a new constitution and it would be one of the main outcomes of this new leadership. This would also be seen in the positions to be adopted by Bolivia on the subjects of TK and TCEs including GR. But here and in other fora, the Delegation considered that previous governments did not safeguard properly the interests of Bolivia with regard to GR as well as the other subjects discussed in this Committee as they had been party to the undue granting of patent and had only helped industrialized countries that were usurping their natural wealth. It welcomed the contribution of Peru in the form of WIPO/GRTKF/IC/9/12. The analysis of Andean products that was given in that document was very useful and therefore Bolivia was also encountering similar problems. On several occasions the Delegation had expressed its disappointment at the slow pace of the work in this Committee. It was only in 2003, that is to say 500 years after the plundering of their wealth, that the international dimension was included to the Committee. It was surprised that it was only in 2004 that a document covering the main concerns had been produced. Once again, the Committee was facing a situation where there had been no progress not because of the lack of political will on behalf of the vast majority of the membership because if it were for that membership, there would already be a legally binding international instrument. In the light of this situation, the Delegation considered the Committee should start thinking of alternative subjects.

269. The Delegation of South Africa thanked WIPO and the Director General for allowing them to showcase their new patent legislation. Briefly, it highlighted what the patent legislation required. It basically combined some of the elements of the CBD with TK protection. For example, the aims of the CBD in terms of conservation of biological diversity, the sustainable use of its components and fair and equitable benefit-sharing arising out of GR was combined with that of TK. Before a patent could be granted in South Africa, the patent application would be required to show that the patent was derived or not from a GR or TK. There would also be a requirement of origin of source of the GR or the TK. The application would also have to show PIC from the traditional or indigenous community for the resource as well as evidence of benefit-sharing arrangements. This would basically cover all the aspects that were being debated during the Committee and particularly addressed Article 16 of the CBD which left open to national legislation whether they disclosed source of

origin or not. The Delegation did not agree with the suggestion made by the Delegation of Canada on the reshuffling of the agenda in terms of putting GR at the top of the agenda. There were other fora that were undertaking complementary work and were making more progress in this regard. The discussions should continue as they have been and continue to allow for written comments in this regard.

270. The Delegation of the Russian Federation supported the creation of a database. It added that what had to be included in it or not was the decision of the holders of TK as regards disclosure. This was being examined in a multilateral way and it should be defined how the aims of tracking GR would be achieved and what price would have to be paid for that. It would be necessary to examine what technical, technological and administrative resources would have to be involved in this process. Work should continue in that direction and the Delegation supported the idea of a plan of work for the next session.

271. The Delegation of Peru responded to the proposal by the Delegation of Canadian regarding the change of order of discussions and the comment made on WIPO's experience in continuing to deal with this subject. WIPO did have experience in all these areas related to IP, but the problem of the explosion of various fora dealing with these matters was that it was being used to delay any concrete action. Unfortunately, the Committee had been used to delay discussions when concrete proposals were made in other fora. Peru had made proposals in these fora together with other countries such as Brazil and India to adopt immediate actions and decisions. That helped developing countries, especially megadiverse ones, to undertake action to change the patent system and in this way to enable them to confront the difficulties that existed. In addition, each forum had its own particular features. The WHO was currently considering a report on public health, innovation and IP rights, concerning patents and public health. This also referred to TK, a database and disclosure of origin, and to many of the issues discussed in the Committee with a different perspective and a different approach which was perfectly valid. So this was not the only specialized forum where these could be discussed. It would be more appropriate to discuss patents from an internationally binding perspective in the WTO. The idea that the Committee was the best place for such discussion was one more excuse to further delay work. Regarding WIPO/GRTKF/IC/9/10, the Delegation stated that it had submitted Peru's position to this Committee as well as to the WTO. It was wise for people in this forum to be aware of the concerns of a country like Peru, what difficulties it was finding with the present patent system and why it was proposing changes. Some of the proposals made in this forum such as a database or other did not in fact adequately tackle the problem of biopiracy or misappropriation. The Delegation was grateful for the comments from FAO, Bolivia and Japan. The is document had been prepared by the Biopiracy Commission of Peru which had been set up precisely to carry out studies on possible patents and cases of biopiracy that could be found with patents granted in industrialized countries in particular. It analyzed one particular case for which the Commission had spent more than a year. The Delegation was grateful for the comments of the Deputy Director General. It had used patent databases to carry out a first analysis so as to get a clear idea of which patents might have been used in GR and what might constitute potential cases of misappropriation of Peruvian GR. A specific case was the case of Camu Camu. It was a plant growing in the Andean region and in the Peruvian jungle which had various properties, for example, a high vitamin content. It had between fifty and a hundred times more vitamin C than oranges. It had various uses in medicine, pharmacy, in the cosmetic industry and so on. Peru had engaged an expert in order to look at patents on the Japanese database to see what patents had used this resource. Camu Camu had been used but under another name which made the investigations more difficult. It did not know whether it came from Peru or not. When it was known, the requirements of patentability had to be

analyzed as to whether they had been complied with and whether the patent had been correctly granted or whether it was a so-called erroneous patent. In addition, and this was something that could not be done at present, Peru had to analyze whether this Peruvian GR which had received a patent was acquired legally by the company or the person applying for the patent. As the patent system worked, it was impossible to check such information. It was a very long and difficult process of determining which patents used a resource. The Biopiracy Commission found more than fifty Peruvian GRs that could have been misappropriated and genetic material that could have been used in patents granted in other countries. Furthermore, it believed that disclosure was not such an onerous requirement, it was not going to hold up investment. It was not true that it was going to be impossible to find where the resource came from or where it had been misappropriated. It would not lead to the elimination of biopiracy but it would be a tool that would help track these resources and see in which cases they were being misused and GR had been misappropriated without the status of sovereign owner of the resources and without the indigenous communities having benefited from the many economic benefits deriving from the monopoly granted by an international patent. Peru had made quite a lot of efforts and had presented in the Committee, WTO and other fora various proposals that clearly set out the problems and possible solutions. Although it would not solve all the problems, this would be a commitment to help mega diverse developing countries to at least have an instrument that would help them to track when a GR had been misappropriated. There had to be evidence of PIC and equitable benefit sharing as stated in the CBD. The vast majority of member states of the United Nations had committed themselves to the CBD. Disclosure of origin did not appear to mean much but it would even out the imbalances that existed in the patent systems as designed at present. This was the priority for Peru in trade negotiations in WTO. Disclosure was one of the few things it believed could really help the patent system. There were many interests involved in the patent system; much money was at stake. There were many companies, associations, pharmaceutical companies and others connected to biotechnology that had taken fright and had said that this was not feasible and practical, that this would prevent continuing investment in R&D. From the technical and legal point of view and, above all, ethical and moral these arguments were completely refutable and should not be put forward in any type of international forum. A true proof of political commitment to these issues would be a proof that the industrialized countries were prepared to help developing countries get out of their backwardness and make a real step forward. This was one of the various subjects. The Delegation informed that there would be an issue raised by an observer concerning technologies restricting use of GR and requested that a paper on the issue be prepared for the Committee. It believed that disclosure of origin should be discussed at least. From a personal and professional point of view, it referred to the number of experts working free of charge in Peru in many cases to solve these problems and produce ideas. It added that it was very frustrating to find delegations who thought that these discussions could go on for years.

272. The Delegation of Ghana took note of WIPO/GRTKF/IC/9/9, especially paragraph 4. It acknowledged with appreciation the efforts to protect GR by other UN bodies in collaboration with WIPO as outlined in WIPO/GRTKF/IC/8/9. The Committee had a specialized role to play in the protection of GR in the face of increasing biopiracy and other illicit use and application of GR. The Delegation urged the Committee to seriously consider the proposals in part 3 of paragraph 47 to 52 of WIPO/GRTKF/IC/8/9 with regard to alternative activities to be carried out by the Committee during the period when WIPO was collaborating with other UN bodies on the work on GR. It reiterated the previous statements made by other distinguished delegates regarding patents granted to persons who based their inventions and discoveries on TK without acknowledging the contribution of TK in those inventions and

discoveries. The Committee should make all efforts to provide an international instrument in the near future to protect the IP rights of the holders of the TK in GR.

273. The Delegation of Mexico observed that it was necessary to continue work under this agenda item. It restated the importance that it attached to WIPO as being the Organization that should lead the analysis and negotiation on disclosure requirements within the patent system. This work would ensure consistency between the proposed requirements and the maintenance of a sound and strong patent system with effective benefit sharing. Mexico had been working for many years to create its institution in the Institute for Industrial Property. It had to make sacrifices, financial inputs and also social efforts. It therefore had to protect its own system of industrial property but also participate in the international fora which dealt with industrial property in order to reach an international agreement which would enable Mexico to distribute benefits properly and fairly. It repeated that Mexico had other facets, mega diversity and age-old ancestral cultures. The Delegation was also very interested in the subject of the database. It would continue to work constructively within WIPO to continue analysis of disclosure requirements as a valuable component of an international regime on access and benefit sharing and also wishes to ensure that it represents a viable solution in a system which would share out benefits and whether it was technologically speaking appropriate. Finally, GR in the context of the Committee should continue to be given very high priority in order to see the balance struck between a robust patent system and equitable benefit sharing.

274. The Delegation of the United States of America supported the constructive proposal put forward by the Delegation of Canada to restructure the agenda to address GR first in future meetings so that this particular agenda item could get its due attention. It welcomed the most recent submission by the Delegation of Peru which had identified its experiences and concerns. Further analysis of this document was required. A major premise of this submission was that patent applications that directly or indirectly incorporated GR and TK had been obtained illegally, irregularly or questionably. It was not clear how the mere fact that a pending patent application or granted patent that referred to GR or claimed an invention that may have some relation to these resources could lead to a conclusion that the GR or intellectual knowledge had been obtained illegally, irregularly or questionably. Many of the resources cited by Peru and other Member States were grown in many countries throughout the world, including in many of those countries in which the patents were filed. This would include Camu Camu which was grown in at least a number of Amazon countries. Furthermore, many resources of Peruvian origin had been exported and sold as raw material for direct consumption or industrial processing with a view to immediate economic benefits. Peru itself acknowledged that these issues were major problem in looking at biological resource, GR relationships and identifying illegal access. Additionally, a review of several of the patents listed in the Peruvian submission revealed that the inventors of several of these patents did in fact disclose the source or origin of the GR related to the invention. Similarly, the patent on turmeric as cited by the Delegation of Brazil mentioned the source of origin of the GR. Many of the issued patents involving GR cited by Peru and others did in fact disclose source and/or origin of the biological material. It was clear that the proposed new disclosure requirements would not attain the purported goals. Rather than advocate burdensome remedies that would not in fact address the underlying problems, members should inquire as to how existing ABS systems dealt with GR, exported as raw material for direct consumption or industrial processing or otherwise traded as commodities. Peru's concept of biopiracy appeared to be limited solely to the context of pending patent applications and granted patents. As discussed previously, patenting in itself did not amount to misappropriation. The analysis presented by Peru may provide useful information considering prior art to help

understand whether or not a patent should be or should have been granted in these cases. However, there was nothing in those experiences that suggested that the proposed new disclosure requirement of source or origin would have been relevant to these determinations. The proposed new disclosure requirements would not have addressed these past perceived instances of misappropriation. In the absence of evidence to support the assertion that these new proposed disclosure requirements would achieve the stated outcomes it was all the more problematic for members to consider such requirements in light of the disincentives that they had on innovation. The patent system was a critical incentive mechanism for promoting the research and development of new inventions of legally obtained or accessed material. This was what ultimately resulted in new inventions that enhanced living conditions including life saving medicines, higher crop yields and better treatment for diseases. All members had at stake of encouraging not discouraging this process.

275. The Delegation of Switzerland listened with interest to the proposal by Canada to reshuffle the ordering of the three agenda items GR, TK and folklore. It considered WIPO to be the primary international forum to deal with IP issues related to GR. Accordingly, this agenda item should receive the proper attention also in this Committee. In its view, this had not been the case at least at the ninth session. The proposal by Canada to reshuffle the three agenda items would help to remedy this.

276. The Delegation of Nigeria placed great importance to the protection of GR and associated TK. Despite the overwhelming evidence of biopiracy and the continuing plundering of GR and associated TK, it was a source of concern that there had so far been little progress in formulating an international framework to safeguard and protect GR and associated TK. It wished to see an IP system that took cognizance of the concerns of source communities and the interests of States by providing for appropriate safeguards as well as adequate and legally enforceable provisions on disclosure of source, evidence of PIC and evidence of benefit sharing. There was need for transparency, fairness and balance in the patent system and while the various national initiatives, particularly the ones that had been shared with delegations at the Committee, may be effective to some degree, it was clear that these were not sufficient. The Delegation proposed that the discussions on this subject be kept going within the Committee forum. On the creation of a database of TK, the implications should be considered further. Sufficient safeguards had to be built into such an initiative, including sanctioning the misappropriation of such GR and associated TK. The technical possibility of linking existing databases as against the creation of a single database should be subject to further study. The interests of the holders of such information should also be borne in mind and for this reason any database that was being developed should be with the consent and cooperation of the holders. The Delegation stated that it understood the concerns to see more exhaustive discussions on this agenda item and that it shared these concerns not only on this agenda item but on all the other substantive agenda items including agenda items on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. It cautioned against a galloping approach to the Committee's work and did not see the need for a reordering of the agenda for the next session at this point. The Delegation found itself unable to support the proposal of Canada in this regard. It encouraged considering other option including the encouragement of delegates to continue to submit written comments during the intersessional period.

277. The representative of UNCTAD stated that the CBD COP had issued an invitation to UNCTAD to address a number of issues related to the subject of disclosure, the identical invitation that had been addressed to WIPO. In response, the Secretariat commissioned a study analyzing options for implementing disclosure of origin requirements in intellectual

property applications. This study expressed the views of its authors and not necessarily the views of the UNCTAD Secretariat. It was intended to make a thorough, practical and substantive contribution to the discussions on the topic. The study's principal finding included that there was a need for an international system of mandatory disclosure of origin requirements, that such a system may reduce uncertainties in the current system and improve the substantive evaluation of patents and that the TRIPS Agreement was the most appropriate treaty regime in which to adopt mandatory disclosure of origin requirements. She also mentioned that the study included a section on terminology which may provide some useful inputs to the discussions on definitions which kept coming up again and again. The bulk of the study analyzed different options related to disclosure requirements including the identification of some options that would be not so burdensome to patent applicants. UNCTAD had made available other publications related to this subject as well as to the previous item on TK including a report of a joint workshop with the Commonwealth on the preservation, protection and promotion of TK.

278. The Delegation of Kyrgyzstan stated that in the seminars held in Kyrgyzstan for inventors, the participants examined the economic progress made by Japan after the Second World War. Japan was enjoyed a spectacular economic take off to reach today the forefront of economic powers. The Delegation was mentioning this because of a case that was submitted by an inventor because loss of the invention from the former Soviet Union had been inspired by Japanese inventions, such as scientific publishing company had been sponsored by Japanese. The activities of the companies had led to multi-billion profits. It was very happy that Japan supported inventors in the Soviet Union, but there were also examples from Canada and China. However, the proposal from Japan to have to have one or several databases of GRs. Perhaps WIPO should think of setting up a huge centralized database that should have binding legal provisions accompanying it, so that any information gathered in that database on GRs would be considered non-authorized for commercial use.

279. The Delegation of Canada stressed that the suggestion of a reordering of the agenda to bring GR item forward was not an attempt to prioritize the substantive items on the agenda of the IGC. The Delegation had simply put it forward because it recognized that GRs, TK and TCEs were all part of the Committee's renewed mandate. The Delegation agreed with the Delegations of Brazil, Nigeria and South Africa that further work on TK and TCEs needed to continue going forward in the Committee, but it also recognized that there were three substantive items before the Committee and all three deserved equal treatment, time and work by the Committee. It also thanked the Committee members who supported the suggestion and the Delegations of Mexico and the Russian Federation who had supported the work of the Committee on GR.

280. The representative of the FAO stressed that there had been a very close and fruitful cooperation between WIPO and the FAO, which had emerged initially during the negotiations of the International Treaty on Plant Genetic Resources for Food and Agriculture, when WIPO had provided support to FAO in its negotiations by providing technical information whenever required for the progress of FAO's work. Given this long-standing cooperation, FAO's activities with WIPO continued to develop across a broad front of issues related to GRs in mutual respect for mandates. The FAO was happy to note that the work of the FAO and the role of the International Treaty on Plant Genetic Resources was being increasingly recognized in various WIPO fora because of the complementary mandates of the two organizations. Much of WIPO's work on PGRFA had been undertaken in response to direct requests, especially from FAO's Commission on Genetic Resources for Food and Agriculture. The first request of the Commission was made at its ninth session and requested WIPO to

cooperate with FAO in preparing a study on how IP rights might affect the availability and use of material from the International Network of *Ex Situ* Collections Under the Auspices of FAO as well as the International Treaty. The first results of this Study had been submitted by WIPO subsequently to the second meeting of the Commission acting as the Interim Committee for the FAO International Treaty. In essence, the first step taken was to conduct a preliminary survey of patent data relating to four representative crops. The Interim Committee welcomed this Preliminary Report which was of considerable value to the agricultural community and looked forward to receiving the report of the next stage of that work, in line with the follow-up activities identified in the Preliminary Report. FAO had always maintained the position that if and when a Certificate of Origin for GRs was agreed upon, it should be consistent with the International Treaty. In exercise of their sovereign rights Contracting Parties to the Treaty – 99 as of present – had established the Multilateral System of Access and Benefit-sharing as a pooled good regulated by the Standard Material Transfer Agreement, which was also being negotiated at the time of the present Committee session. Access to genetic material in the Multilateral System was not to be negotiated with the provider country and there was to be no tracking. Benefits were accordingly to be shared multilaterally through the Treaty's Funding Strategy and not with an individual provider country. The FAO had therefore repeatedly stated that only the Multilateral System should be cited in any Certificate of Origin as a source and origin of materials from the Multilateral System. It had also noted in paragraph 7 of the EU proposal, contained in document WIPO/GRTKF/IC/8/11, which, in regard of exchange of information, that on the same grounds as stated earlier, should information provision be made as part of disclosure measures, information on declarations related to GRs from the Multilateral System should also be provided to the Multilateral System or any other institution that the Governing Body of the International Treaty might set up for the implementation and governance of the Multilateral System.

281. The representative of the Call of the Earth, speaking also on behalf of the Asociación Andes in Cusco, referred to paragraph 2 of WIPO/GRTKF/IC/9/9, in which instructions were sought with regard to future work to be done under the present agenda item. He requested that the Committee start a study on the patents for genetic use restriction technologies (GURTS), which could have adverse impacts on indigenous communities and small holders and farmers. He informed that the Andes were the Center of Diversity from which potatoes and at least 90 other important crops originated and that the indigenous communities of the Andes were very concerned about patenting of technologies which had an adverse impact on their way of life, such as the patents US 6700039 and a similar patent held by Syngenta on the genetic method to control sprouting in potatoes. As a result of this more than 3000 varieties of potatoes were endangered. This patent was a special risk to the livelihood of the Andean communities which depended on the genetic diversity which was the result of thousands of years of cultivation. In preventing indigenous farmers from reusing their seeds, the Syngenta technology could have a lot of negative impacts such as the loss of traditional varieties, on the loss of biodiversity, the loss of traditional knowledge, food sovereignty and food security, self-determination, cultural and spiritual values, the collective property of seeds and the traditional role of women in the society. The study should build on deliberations of the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions of the CBD, which had met inter-sessionally earlier in the year, and a related request for studies on the relevant patents, as well as the report given by the FAO on its work with WIPO about patents and food security. He requested that FAO hold this committee at its seventh meeting. This study would strengthen cooperation between this Committee, the CBD and the FAO. The Call of the Earth supported Brazil's earlier comments regarding databases of TK.

282. The representative of INBRAPI observed that the discussions over the past few days had been very complex as to whether indigenous rights were being respected with regard to TK, TCEs and folklore. He agreed with the position put forward by the Delegation of Brazil, which had stated that progressed needed to be made and concrete results reached. He was concerned that mention had been made in this Committee of access in such scant terms and the conservation of TK and TCEs. In 2003 INBRAPI had created a group that was working on the interests of indigenous peoples in Brazil and in 2005 it had created the nucleus of five lawyers in Brazil who were holding consultations with more than 200 indigenous peoples, to listen to their positions and document them, so that there could be a sui generis system that would respect the cultures, traditional customs and laws. He hoped that INBRAPI would be able to submit to the next session of the Committee the outcomes of all these consultations. He expressed his concern about that indigenous peoples were being driven from their land and their GR and TK were being exploited without their permission being sought and they were neither being given recognition nor were they being equitably compensated. The Tupicami were some of the poorest people and because of this they were seeing more and more suicides and the young were not interested in learning the TK. They were also seeing that the youngsters, infants and children were dying because of malnutrition and diseases.

283. The representative of the Tulalip Tribes commented on WIPO/GRTKF/IC/9/13 referring to his intervention under Item 9. He stressed that indigenous peoples did not generally believe that their TK was in the public domain. He referred to the intervention of the Tulalip Tribes at the fifth session of the Committee which noted the wide-spread view of indigenous peoples that this knowledge had been, was and would always be regulated by customary laws. Its existence in the public domain had not been caused by their failing to take the steps necessary to protect the knowledge in the Western IP system but a failure by governments and citizens to recognize the customary laws regulating its use. If registers were to be created, they should be assembled only with the prior informed consent of indigenous peoples, who should be free to decide where the databases would reside - under their direct control, situated in designated institutions, or in governmental or intergovernmental agencies. The Tulalip Tribes and other indigenous peoples had also proposed that for preventive measures, these databases did not necessarily have to be made public. The parties interested in prior art issues only concerned patent officers and corporations seeking evidence of prior art, and perhaps government officials providing oversight. Rather than developing open access databases, databases could be constructed to be secure and require registration and access that could be protected by non-disclosure requirements. This would create a protected disclosure system that could conform to indigenous customary laws related to access to information. Distributed databases could be linked together over the Internet to appear as a single large database. Searches could be made from a single query, so that those seeking review would not have to visit multiple sites. The underlying linked system of interoperable databases could be under the control of indigenous communities or their designated organizations. Indigenous control of access to registers and databases would not preclude the development of international standards to be incorporated in such databases in order to meet patent review standards. He referred Committee participants to a review of TK registers prepared for the 4th Meeting of the Ad-Hoc Working Group on Article 8(j) and Related Provisions of the CBD in January 2006 and to a UNU/IAS report on registers that discussed numerous legal and cultural issues that should be considered in any proposal to create such registers. He noted that the CBD at COP 8 rejected a suggestion to create an international register of TK and adopted the standard of prior informed consent for their creation. A great number of barriers existed to implement the ideal kind of distributed register system under indigenous control with their prior informed consent proposed. He agreed with the Delegations of New Zealand and Brazil that the creation of TK databases should be

approached with great caution. These concerns should also be taken up in full and good faith in similar proposals being made at the TRIPS Council. He supported further work by the Secretariat on this issue, and recommended that this work be forwarded to the TRIPS Council and the CBD, since both were also having discussion on this issue.

284. The representative of Tupac Amaru suggested the Committee should analyze all the aspects of GR on the basis of the CBD definition. The CBD preamble recognized the close and traditional dependence on biological resources of many indigenous and local communities embodying traditional lifestyles, and the desirability of sharing equitably benefits arising from the use of TK, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components. This principle should guide the analysis of GRs by the Committee. In the concept of indigenous peoples biological and genetic resources that had developed an infinity of different life forms over four million years were the collective heritage of aboriginal nations, local communities and the collective heritage of mankind. Consequently the IGC should examine GRs not only in terms of market, commerce, yield and investment of the global industrial complex but also in the spirit of their conservation for the survival of human kind. Although the document had a purpose to see that contractual practices would help parties to prepare a model law on access to GRs and benefit-sharing and the drafting of contracts, it did not really look like biopiracy which was being practiced with total impunity by the neo-liberal policies. The formulation of principles defined in docs concerning the preparation of guide contractual practices seems to be a technical legal matter that is very simple, but in view of indigenous peoples who did not even have a telephone or electricity these techniques and legal terms were too complex. The CBD stated that there should be sovereign control over access to GRs and biological resources in order to ensure fair and equitable sharing of benefits arising from their use. Therefore the CBD Ad hoc Open-ended Working Group on Access and Benefit-sharing, held in Bonn in 2001, recommended rule-making on access to GRs and benefit-sharing. He thought that since then there had been no tangible progress due to the lack of the political will of certain States. The document WIPO/GRTKF/IC/8/9 on guide contractual practices was good but contained only options for clauses and non-binding contractual practices which were not binding. They were just guidelines and model clauses which were not binding and were therefore not of legal value. He was of the view that the mandate of the Committee was for proposing an international legal instrument on requirement of disclosure of information about GRs. Therefore he supported the proposals made by the Delegations of Brazil, Bolivia, Indonesia and South Africa.

Decision on agenda item 10: genetic resources

285. The Committee took note of the extensive comments made on the contents of documents WIPO/GRTKF/IC/9/9 and WIPO/GRTKF/IC/8/9, and the indications of a number of delegations that they would be submitting written comments to the Secretariat. It was agreed that the question of subsequent steps would be taken up under Agenda Item 11, Future Work.

286. The Committee also took note of documents WIPO/GRTKF/IC/8/11, WIPO/GRTKF/IC/9/10 and WIPO/GRTKF/IC/9/13.

AGENDA ITEM 11: FUTURE WORK

287. The Delegation of Norway voiced absolute support for further work on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 in their entirety and for intersessional possibilities to comment on the documents. Time restraints should not be holding back from finding a viable way forward. The Norwegian proposal (WIPO/GRTKF/IC/9/12) had received considerable support. The Delegation apologized for the late submission of that document and noted that not all delegations might have had sufficient time to consider it. The document could benefit from further discussion and clarification. So as to avoid misunderstandings, the Delegation would be happy to engage in such discussions whenever there is an opportunity. It welcomed the comments and pointed out that the proposal was intended to be a focused starting point with regard to a deliverable, and could and should be refined as well as having other elements incorporated. The Delegation did not exclude any outcome including a possible legally binding instrument. These were complex issues and a step by step approach would make the road easier. An intersessional meeting could be a way forward in the process of capturing the agreement, which in our opinion also included capturing nuances. The decision to this end could be taken at this meeting.

288. The Delegation of Mexico observed that one of the most severe criticisms that had been made of the Committee's work was its excessive emphasis on technical analysis without that so far having led to a negotiating process aiming at adopting concrete measures. Substantive progress has been made on TK and folklore towards the identification of general principles and objectives and a discussion had started on measures including reforms and international instruments for the protection of TK and TCEs/EoF. The Delegation had agreed to promote a possible binding instrument, but had also shown flexibility in following the discussions to work on a general approach to minimum standards of protection for TCEs/EoF and TK against misappropriation, which opened up the possibility of implementing these provisions in line with national legislation in such a way that its contents or those of international instruments provide enough flexibility to be applied at national level in the light of each country's needs. Regarding the legal status of the Committee, the debate should not become over political and should constantly recall that the work is aimed at protecting IP, TCEs, and TK. There were other issues of equal importance, such as the disclosure of origin,. The Delegation had not committed itself on issues such as databases, noting that it would be essential to consider whether the proposed databases were feasible and practical. Suitable processes could include intersessional consultations and plenary debates which would guarantee the participation of NGOs, IGOs and representatives of indigenous and local communities. This could include putting into order the information the Committee had received, including the substantive discussions reflecting the various viewpoints of delegations and written comments to be submitted to the Secretariat within a deadline. The Secretariat could then compile this information. This would avoid any foregone conclusions on any of the issues. This information could be set out as comments from specific Member States, without referring to any particular list of issues. This would produce an organized compendium of information within a specific period of time. Then informal consultations could be held at an informal open-ended intersessional meeting before the next Committee session in December. Alternatively, an electronic forum could provide access to the positions of other countries. WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 would remain in their present state as a basis for discussions, and could be enriched with all the views of Member States. The documentation and informal consultations would mean that at its next session, the Committee would be in a position to identify points of agreement and disagreement on the contents of the documents. This could perhaps also consider GR, although that issue had had less discussion. One possibility would be to identify on three different levels the point of

agreement and disagreement. Those parts of the documents that did not require further negotiation would be given a green light; an amber light would indicate the need for further work to seek resolution the next session of the Committee; and a red light would indicate issues that were critical for one of two reasons: first, because there was no consensus on their definition and their linkage with the IP system, and second, because the nature of differing views and political divergences meant that further consultations would be required after the tenth session of the Committee. In this ongoing exercise, the Committee should not distinguish between the first, second and third parts of the documents, in line with the view of many delegations. This comprehensive exercise could continue in the intersessional period up to the next session. Such a programme of work would ensure progress on all issues. The Delegation proposed this roadmap for the Committee's work and called for the views of other delegations. It suggested that in place of a political debate, there could be a discussion on the kind of concrete steps that had been outlined by the Delegation

289. The Delegation of Indonesia noted that despite some common grounds emerging in previous sessions, some delegations were also concerned about the sluggish progress of our discussion on the issue of protection of TCEs/EoF. The Delegation appealed to all delegations to devote their creativity and flexibility towards achieving middle ground. Creativity was the best tool for negotiation to reduce chances of stagnation by expanding the possibilities for a solution. Furthermore, flexibility was the heart of negotiation that encouraged agreement on the differences which exist through compromise. This would enable advancement of the Committee's work in an exemplary manner. Some delegations had also pointed out that the slow progress had resulted from lack of discussion or focussed discussion in the Committee. The Delegation emphasized the value of exploring any option for the Committee to move forward. Taking into account that WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 may provide a greater opportunity to achieve common ground, there was one option that might be pursued to accelerate the work of the Committee. More focused and structured discussions on the draft provisions for the protection of TCEs/EoF need to be conducted. It would be useful for the Committee to draw a roadmap, guiding future works to a concrete outcome. Many delegations were willing to submit written comments on the two drafts. Therefore, upon conclusion of the session, the Secretariat should open the commenting process. All interested Member States would then submit their written comments to the Secretariat before August 2006. Based on these comments and observations, the Secretariat should then update the two drafts. The Delegation also suggested an intersessional meeting of the Committee, as proposed by the Delegation of Mexico. The intersessional meeting may only focus on discussing, in a more detailed manner, all parts of the two documents and all comments on the documents. All Member States could be requested to bring their respective experts to join this meeting. The intersessional meeting could allocate two days of discussion in more detail for the respective drafts. The Delegation also emphasized the importance of discussing the two documents in their entirety, in an holistic and comprehensive manner. All parts of the documents should be treated equally. Intersessional meetings should not exclude any part of the documents since this would prejudice the outcome of the work and would be inconsistent with the Committee's mandate. No single part of the two documents had greater weight than another, all parts having an equal status and had no formal character. They only reflected the perspectives and approaches of all delegations that were guiding the Committee's work.

290. The Delegation of South Africa, speaking on behalf of the African Group, commended the Chair and the Secretariat for the progress made on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. Those who had wished to comment on objectives, guidelines and principles had done so without the relatives of all any encumbrance and those who called for

commentary and discussion on the entire document and done so without any impediment. The process had been unusual nonetheless. It had culminated in groups pursuing their objectives with some qualified success. The African Group welcomed the proposal to use the intersessional period for members to forward their comments on the documents for the purpose of allowing the Secretariat to update the documents in preparation for the next session. The Africa Group position was that all comments on the entire WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 would be incorporated and updated and will be tabled for discussion at the next session. The African Group would not accept exclusion of any comments that had been submitted to the Secretariat. It would not make sense after agreeing to discussions of the entire WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 not to accept the comments updating the documents for their further discussion. Having received more comments on these documents, the Africa Group wished to recommend that the Committee should devote more attention to the substantive provision of the document with a view to addressing the international dimension of its work during its tenth and possibly eleventh sessions. It further recommended that the intersessional period be used to update the documents on objectives, principles and the substantive aspects. The African Group observed that discussions on the objectives and principles and guidelines had been going on since the sixth session and there was a need to make progress beyond the objective principles and guidelines in the next session. In view of the fact that the TCEs and TK are intrinsically linked to GR, the African Group called for attention to be given to GR particularly in regard to the disclosure requirement in patent procedures, PIC, and ABS. However, the agenda for the tenth session should remain as for the ninth session. The African Group urged WIPO to continue its legal and technical assistance to enable Member States to develop the necessary institutional mechanism to facilitate the updating and commentary on the documents in preparation for the tenth session.

291. The Delegation of India commented that that the deliberations in the current session had contributed to better understanding of the issues before the Committee and the respective positions of various countries on these issues. The Delegation was in favor of carrying forward these discussions in a more positive and accelerated way as to arrive at legally binding international instruments. It emphasised that the substantive aspects of the discussions in this and previous sessions of the Committee must be preserved and further built upon in their entirety. Looking forward to the tenth session of the Committee, the Delegation noted the references to organizing intersessional consultations. This possibility could be explored with the understanding that the consultations would be inclusive and open to considering the documents before the Committee in their entirety as a composite whole without excluding any outcome. The Delegation favoured enhanced frequency of the discussions on the Committee's agenda items. This would be in tune with the decision of the General Assembly to accelerate the work of the Committee.

292. The Delegation of Japan recalled its view, stated before, that it was uncomfortable with the revision and updating of Part 3 in WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. There was still much more discussion needed to come to agreement on objectives and the general guiding principles before it was possible to revise Part 3 of the two texts. The Committee still had far to go in clarifying basic concepts such as the meaning of rights, or the meaning of misappropriation, before it could go on to discuss further details. It was not because there were things the Delegation did not support in Part 3 of the two documents that the Delegation did not support updating of that Part 3. It was because the Delegation wished to follow the natural logic of orderly discussion, that whatever mechanism the Committee wished to establish in the very end, it was necessary to start with the objectives of what was about to be done and to set the guiding principles for detailed deliberation. Only then could

the Committee discuss the substantive mechanism of what it had set out to do. The Delegation reaffirmed that it could not support the updating of Part 3.

293. The Delegation of the United States of America shared the view of the Delegation of Japan that the Committee had conducted fruitful work on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. It supported further elaboration and updating of the draft objectives and principles that contained in Parts 1 and 2 of the annexes to those documents. Agreed objectives and principles would guide the Committee in selecting an appropriate way forward. The Delegation remained open to the form or legal status of the ultimate outcome of the Committee's work. However, it preferred an approach that built upon successful national experiences. The discussion of successful national experiences may form the basis for further work and facilitate progress particularly where these experiences are aligned with agreed objectives and principles. After reaching sufficient convergence on objectives, principles and successful national practices, the Committee would be in a position to consider next steps. For reasons that stated in the past, the Delegation believed that it would not be productive to continue work on or to update the draft substantive provisions contained in Part 3 of the annexes to the documents and therefore could not support an update to those portions of the documents. The Delegation supported the Committee's work in its current form, but could not support the creation of subsidiary bodies or the holding of additional meetings particularly as they may preclude the full participation in the discussion and may require additional travel costs.

294. The Delegation of the Islamic Republic of Iran sought clarification from the Secretariat concerning intersessional meetings, including on the procedure, the way of work, the outcome the interrelation with the next session of the Committee.

295. At the request of the Chair, the Secretariat indicated that the intersessional meeting could be anything that the Member States should decide that it ought to be. There was no particular formula. On the assumption that this would be an option that was chosen by the Committee, decisions would need to be taken about a number of matters. First, on timing, the only available time slot would appear to be July, since after the summer holiday season, holding a meeting in September would leave too little time for preparing revisions in advance of the next formal session of the Committee, due in December. Second, on duration, it would be necessary to consider whether, for example, three days would be sufficient, or whether five days would be necessary. Third, concerning the budget, the program and budget agreed by Member States was reasonably fluid in respect of the program for the Committee in the current biennium. It was adopted contemporaneously with decisions about the Committee's future mandate. It was therefore deliberately kept reasonably fluid, and did not specify that there would be a set number of meetings to take place in the biennium. Of course there was a limited amount of resources available and it would not be possible within those resources for the Organization to finance the participation of as many participants from developing countries as are financed to the ordinary sessions of the Committee, which usually amounted to five representatives per region. On examination of the current budget for this biennium and looking at other activities that could be curtailed within the same program, it might be possible to finance, for example, two representatives per region to an intersessional meeting in July. It may not be possible to do the same if it were decided that there should be an intersessional meeting between the tenth session, scheduled for December, and the eleventh session, likely to be held in mid-2007.

296. The Delegation of Germany spoke in favor of the procedure of submitting written comments. It was not in favor of another intersessional meeting because it was not

convinced that a proliferation of meetings would entail a great deal of progress. Concerning the scope of updates, the Delegation reiterated its view that it was wise to focus on objectives and principles first. This was a question of logic: one simply had to agree on objectives and principles first before one can sensibly address the question how to implement those objectives.

297. The Delegation of Brazil observed that during the five days of the current session, some delegations had said that it would be premature to discuss the substantive provisions in WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. The Delegation believed that it was premature not to discuss that material. It would be premature to take a preliminary decision that the Committee should simply set aside the substantive provisions contained in those documents. At the current stage, on the final day of the session, it was not only premature to take the decision to leave aside the substantive provisions, but it was also not correct with many delegations having borne travel expenses and having engaged constructively in the session, making contributions and putting forward comments on all parts of the documents including the substantive provisions. Just as it had been correct and within their rights for other delegations to present proposals and circulate papers, for instance the Delegations of Norway and Japan, the Delegation believed that as it had presented comments to all the three clusters of both documents, it was within its rights to see those comments reflected and to see all three parts of the documents updated. The Delegation had an open mind with regard to the proposal for an intersessional meeting. It could be useful to have this intersessional meeting as long as it was guaranteed that this intersessional meeting would be a full meeting, with the participation of all the stakeholders, including the civil society, and that it would have the same fruitful and democratic discussions that had been undertaken in the five days of the current session. It had been proposed that the Committee could also try to classify or label, clusters within WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, to identify clusters that were near consensus or far from consensus. It would not be acceptable to the Delegation, to label or classify such clusters. The best approach would be to move to an intersessional meeting or directly to the next session with all documents updated in their entirety, including the substantive provisions. Delegations which wished to submit written comments later on should also do this. The Delegation would also itself submit written comments to the Secretariat. The proposal tabled by the Delegation of Norway contained very interesting aspects but its main problem was not what it contained but what it left aside, namely a mechanism to address the international dimension of the problem regarding the protection of TK and folklore. It also proposed an outcome of non-binding status. The Delegation was in favor of a legally binding solution to the TK and folklore issue.

298. The Delegation of Mexico confirmed that the ideas that it had earlier outlined were totally flexible and sought to include in its proposal ideas from subsequent interventions. It had proposed that there be one open ended informal meeting of an intersessional consultation group, or consultations through an electronic forum with a web site that could sum up the points of view which had been expressed orally in the Committee together with the points of view to be submitted in writing by Member States. If there was no agreement for an intersessional meeting, the work could still continue electronically, so that informal consultations could continue during the intersessional period. Member States who could not participate in consultation is due to budget restrictions could still consult electronically. A basic document would set out what had been expressed in the Committee's meetings and had been submitted in writing. August would be a suitable deadline for written submissions, which could be made electronically. An additional day could be set aside prior to the commencement of the Committee's next session, to enable analysis and review of the document that had been distributed electronically. This should not have serious financial

implications for the Member States. So the question of whether intersessional consultation should be conducted through a physical meeting in Geneva, or through electronic consultations, should not pose a problem. The question of whether the document should be discussed comprehensively, or whether only parts one and two should be resolved before moving to the parts three was to consider the matter in a very linear fashion. When a doctor was considering whether or not to undertake an operation, a decisive factor is whether there were means available to cure the disease. Once intersessional process had made available a revised document and members of the Committee were able electronically to make informal consultations on it, and an additional day were set aside before the next meeting to start looking at the document, then the issue of the intersessional process would be resolved. This would also enable the Committee to consider whether it should proceed in part, or whether it could take up the documents in their three parts, so as to begin to take positions. The Delegation would submit written comments on the third part during the intersessional period. It was not possible to do this beforehand because it was not clear what was going to be involved in the discussions of principles and objectives. So the whole discussion about the respective parts and that the entirety of these documents becomes irrelevant if this could be considered as a continuous process from this session to the next, and with further work from that point onwards. Eventually, the Committee would have to conclude its discussion on objectives and principles and reach the point where it could decide on dealing with part three. The Delegation clarified that there was not an issue at stake regarding the continuation of work; it was merely a matter of the form of that work. It would be a very simple decision to agree to have a paper that summarized all that has been said and then to agree upon positions, through the kind of intersessional electronic forum and preliminary consultation prior to the next Committee session that the Delegation had proposed. Noting the reservations of the Delegation of Brazil regarding the proposal to classify elements of the working documents according to the level of agreement on them, the Delegation withdrew that proposal, suggesting that this process could begin at the tenth session. The proposal had been submitted as a preliminary approach to facilitate work, but was withdrawn if it created a problem.

299. The Delegation of Peru indicated that it could work with proposals such as those made by the Delegations of Norway, Brazil and Mexico. The problem with intersessional meetings without adequate funding would be that they would be effectively limited to delegates based in Geneva. It should be possible to consider financing participation from developing countries. Adequate financing of delegations from developing countries was a point raised in the statement on behalf of GRULAC, and would continue to be emphasized by the Delegation. For the regional group to be limited to five experts only from capital was too restrictive. The Delegation considered that it would be a better course of action to have a seven-day session, with the first two days to be devoted entirely to the review of comments made on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. The Delegation voiced support of the emphasis laid by the Delegation of Brazil on maintaining the integrity of the documents. It wouldn't be logical to separate or break up the three parts of the documents. Delegations such as those of Japan, the United States of America, and Germany had pointed to the same kind of problems with issues such as the definitions in the third part. However, if there were no opportunity for them to specify the problems they had, and to explain why they did not understand what the rights regarding TK and other matters of definition, then those delegations who were proponents or sponsors would have no opportunity to explain why they felt that these definitions were necessary. So it would be contrary to logic to take such a position. In a serious international negotiation, it was necessary to explain the nature of the problem of dealing with part three of the two documents. On the other hand, as the Delegation of the United States of America had pointed out, it was possible to look at the national systems which had been successful. The Delegation of Peru was not alone in

pointing out that there were many countries which had national systems which had taken a successful approach to misappropriation. They were at least successful to the extent possible in the absence of an international system on this matter. Countries had developed many national legislation is on the misappropriation, and had well-established definitions, which had been shared in many of the Committee's meetings. So it was not possible to prevent delegations such as that of Peru from making comments and providing definitions and other points of view on the substantive parts of the working documents. This was so problematic that the Delegation had to appeal the disposition to be reconsidered. On the one hand, the Delegation had to know what other delegations thought on these subjects, and to know the problems that they had with the definitions, so that they could contribute to the clarification of these definitions. The Delegation noted also that other delegations expressed problems with the definitions of rights. 'Right' was a term that had many definitions in many existing legal dictionaries, and it was necessary to consider what approach to adopt. If other delegations did not indicate the problems they had with the definitions of right in the third part of the documents, then others could not seriously provide answers in a frank and serious manner. The Committee was involved in a negotiation for discussion process which deserved full seriousness. This was a very important topic for Peru and similar countries. The African Group had stressed this quite clearly on several occasions. It was not a serious process to prevent attention the fruitful work on the three parts of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. Regarding the priority allocated to the agenda items and the system of classifying elements as proposed by the Delegation of Mexico, this would depend on each delegation. Each delegation needs to know what the main points under discussion are. This included points on which there were no problems at all, on which there were some difficulties, and which could not be negotiated at all. It was necessary to know this information, through discussion and debate. It was not enough simply to point out that a certain topic faced a red traffic light, because the discussion had to be an holistic discussion of the whole document. The Delegation supported the Chair proposal for a seven-day meeting which would be able to work towards more specific and conclusive, concrete results.

300. The Delegation of Austria associated itself with the intervention of Germany, while expressing its openness to compromise proposals from the Chair. It favored an intersessional process for the submission of written comments, and the focusing of discussion on those areas where agreement could be easily reached. The Delegation expressed its full respect for the differing views of other delegations, and had noted carefully the comments made on the working documents. However, it felt that a more structured discussion would bring the Committee further in a faster way, and had a better chance of success. When constructing a building, or one started with the cellar, and not with the second floor, even if later generations felt that the second floor was the more important one. On the issue of GR, the proposal by the European Communities in WIPO/GRTKF/IC/8/11 deserved further attention as very concrete, balanced and practical proposal which should be analyzed through an in-depth discussion. The Delegation also agreed with the proposal to restrict the duration of the opening statements, possibly by limiting them to statements made on behalf of regional groups.

301. The Delegation of Nigeria expressed support for the statement made by the Delegation of South Africa on behalf of the African Group, and commended the Chair's creativity in finding a way for us to make some concrete gains in the next session. The Delegation supported the proposal for an extended session of the Committee. Whatever approach was adopted for further work on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, it should not undermine the integrity of these documents. It supported the proposal for an intersessional commentary procedure. The comments from the ninth session should enrich the existing documents, particularly WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. Compared to

previous drafts, these documents had already been enriched by comments received from the various delegations. It was important to keep these documents alive even as analysis of the various substantive issues moved forward. Regarding electronic forms of intersessional consultation, the Delegation pointed out that these methods may be cost-effective only for some delegations, while posing additional challenges for other delegations, particularly those from developing countries. A Nigerian folksong recalled that a man however strong cannot clap with one hand. Similarly, very little could be achieved on the agenda items eight and nine, unless the documents could be considered in their entirety. The integrity and coherence of these documents should not be undermined by pulling them apart and working on the various components separately. The Delegation nonetheless understood that some delegations had reservations on the possible outcomes of the current work of the Committee. Even so, the mandate of the Committee as set by the General Assembly did not preclude any possible outcome. To this end, the Delegation would aim to engage in the most constructive, transparent and flexible manner with the work of the Committee.

302. The Delegation of New Zealand considered that an incremental approach was appropriate and realistic for the work on protection of TK and TCEs, and the draft objectives and principles. It felt the Norwegian proposal for moving forward was sensible and considered that the Committee should aim to reach some form of international understanding, not necessarily based on any particular part of the document, on the policy objectives and principles during the period of the extended mandate. Such an understanding could form the basis of further work including work on substantive protection. Intersessional work to consider this further would be a good idea, and this might be electronic, as suggested by the Delegation of Mexico. A key step in working towards such an understanding would be to explore in more detail some of the key themes that arise from WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, including the question of misappropriation. As noted by the Delegation of Norway, the principle of misappropriation would seem to lend itself more to substantive protection than any other principles. It agreed with others that it made sense to first make consensus on policy objectives and principles of protection before trying to reach agreement on more substantive protection. That said, a number of Committee participants had expended considerable effort considering the substantive provisions and their comments should be collated along with comments on the first two parts of the documents. The Delegation agreed with the suggestion of the Delegation of Mexico that these comments could be collated into a stand-alone document that is generated or built from the electronic submissions or submissions sent in writing. In this way all Committee participants may have the benefit from the comments made during the ninth session and during the intersessional commenting period that had been proposed by a number of delegations. These views, and WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 themselves, would provide an excellent basis for the development of a shared international understanding during the period of the extended mandate. The Chair's idea of extending the next session a further two days was a good one. This would give an opportunity to consider the collation of submissions on the various documents and any comments that people might like to make on the Norwegian proposal. Responding to the comments of the European Union about opening statements, it may be brash to go a little further and perhaps suggest that the Committee could even dispense with such statements for the next session.

303. The Delegation of Thailand expressed support for the Committee progressing its discussion of the key working documents. There were many advantages in certain elements of the proposal made by the Delegations of India, Mexico and Peru. Bringing those elements together, the Delegation expressed support first for intersessional discussions electronically, in written form, in an open ended and comprehensive manner. The comments should

continue in an holistic fashion on all parts of the key documents, documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. Second, the tenth session of the Committee could be convened as a seven day session so that the two extra days can be devoted to the discussions and the comments that had been sent in, particularly on substantive and detailed technical points. Third, the Delegation supported the proposal by the Delegation of New Zealand for the time devoted to national statements at the next meeting to be shortened so as to leave greater room for the discussions.

304. The Delegation of South Africa, speaking on behalf of the African Group, consented to the Chair's proposal regarding the meeting in December. It would be concerned if a meeting were to be held in July with limited representation that would limit the regional representation to a small number. The proposed December meeting, by the African Group perspective, should consider all the issues in their entirety. The Delegation pointed out that, looking at the integrity of the working documents, and especially their substantive parts, the contribution was notable of the number of countries that were objecting to the discussion of the same documents. The United States of America, Australia and the European Union had made substantive contributions to the substantive parts of WIPO/GRTKF/IC/9/5. It was bewildering, having made such contribution to the documents not to engage with the documents. The commentary on the objectives, principles and guidelines, was undertaken to cover all the articles that cover those issues. Therefore, the discussion had run its full strength, so that it was up to the Secretariat to update that and for the Committee to go beyond the discussion of principles and guidelines, as it had been doing from the sixth session. The Committee had to go for progress, and progress had been achieved in the current session on guidelines, principles and objectives as they had been discussed in their entirety by the Committee. Concerning the way forward, there was a logical and sensible way to proceed. The Delegation of Nigeria had drawn on African wisdom to point out there was a lot of logic and sense in discussing principles and guidelines in relation to the substance they concerned. If they are discussed in their absence of the substance, there was no sense or logic of the proceedings. The African Group did not support the Norwegian position as expressed in WIPO/GRTKF/IC/9/12. The African Group noted that the Norwegian position was premised on the Paris Convention Article 10*bis*, which narrowly focuses on misappropriation. While it agreed that misappropriation was a serious problem that needed to be addressed urgently, the African Group had difficulties with focusing only on misappropriation at the expense of the issues such as reflected in the substantive parts of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5.

305. The Delegation of Switzerland joined other delegations in stating that written comments should be submitted in the intersessional period. As stated in discussions on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, it was necessary to discuss and agree on objectives and general guiding principles before taking any further steps. It was premature to amend the substantive provisions in part 3 of the documents. The Delegation was open to the proposal of the Delegation New Zealand, was not convinced of the need for a intersessional meeting, and was open to the Chair's suggestion of an extended period for the next session. It recalled its proposal to reorder the order of agenda items in order to better balance the time and resources dedicated to each of the three substantive agenda items, and supported proposals of the Delegations of the European Union and of New Zealand regarding opening statements.

306. The Delegation of Canada agreed with the Delegation of Mexico that it was necessary to proceed with discussion on future work in a nonpolitical manner, and welcomed the discussion. A focus on consensus was essential in advancing the work of the Committee.

Regarding TCEs and TK, the Delegation was supportive of Member States providing their written comments on the documents as a whole in a reasonable timeframe. This may help in the continued further elaboration of the common ground in an incremental but significant way. This was important for Member States in these two areas, as this could be the basis for Member States forwarding an outcome from the Committee to the 2007 General Assembly. Canada was not tied to any one suggestion already one expression on the deadline for written comments on these two documents but encouraged that these documents comments be submitted to the Secretariat in sufficient time to allow for the appropriate compilation and to allow them to be posted to the WIPO web site with enough time for review by Member States and others. Mexico's idea of an electronic forum had merit especially if it was possible to include the view of all interested parties. Regarding and is a sessional meeting, Canada like Brazil was open to finding ways of considering this idea. It had to be financially and structurally feasible. The Delegation sought clarification as to whether the extended session of the Committee would be a separate ad hoc meeting preceding the session, or part of the formal session. It was important that the issue of GR not be left behind in the work of the Committee. It pointed to the need for both at a clear work plan for the Committee and enough time to discuss this critical issue. The Delegation supported the search for creative ways of making more time available for substantive work, including reducing the time for opening statements. It would be a novel step to impose time limits on interventions in the Committee, but there was a common view in the Committee that substantive progress had to be made in the coming two years and novel approaches may be necessary.

307. The Chair clarified that the proposal was for the tenth session to have seven working days.

308. The Delegation of Columbia expressed its flexibility and preparedness to go along with any format that would facilitate the work of the Committee, including an electronic forum, so as to complete the tasks given to the Committee by the Assembly, as well as informal intersessional sessions and a seven-day session. Any approach would be acceptable if it accelerated the work of the Committee. Regarding scope, the Delegation remarked that the work on the Committee should cover in a comprehensive way the content of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. There had been enough contributions made on these documents to reflect the true feeling of progress in the Committee. The three components - policy objectives, general guiding principles and substantive provisions - should continue to be the focus of discussions. Any future meeting should leave States free to make substantive contributions on these three components, as the three components were interlinked. It had been evident over the past five days that there had been important contributions by Member States, including the Delegation of Columbia. Not to update the substantive part of the documents, including the interventions made during the current session, would be a real step backwards and a denial of the urgent need to make progress in the Committee's work and to fulfill a clear mandate given to the Committee. The Delegation had great expectations and hopes to take to the Assembly in 2007 - which would have to assess the two years work of the Committee - a substantive and concrete result, so that a prompt international solution could be found to the protection of TK, folklore and the GR

309. The Delegation of Kyrgyzstan supported the opinions of those delegations who called for intersessional consultations, pointing to the need of its own region to undertake consultations. There was a raise of issues which had not been explored thoroughly. The delegation supported any kind of regional delegations that consultations, including regional workshops or expert missions. The form of consultations was not important. It was necessary to get information on all the issues being considered by the Committee. Regarding

the intervention by the Delegation of Peru, the Delegation suggested there may be different interpretations of what is fair or equitable, as what some considered equitable may be in equitable for others. Consultations on that issue may be useful, as this may raise philosophical issues.

310. The Delegation of the United States of America supported the Chair's proposal for an extended period of the next session, but expressed reservations about the possibility of increased costs and it remained unconvinced this additional time is necessary. One alternative would be to allocate specific time for the next session to consider documents four and five. The Delegation supported the proposal of the European Union to limit opening statements, and was open to different possibilities for achieving this, including the proposal by New Zealand to eliminate opening statements. Responding to the intervention of the Delegation of Peru regarding Part III of the documents, the Delegation pointed out that definitions were only one part of its concerns. As many delegations had pointed out, only by evolving and converging understanding of the policy objectives and guiding principles would the Committee be able to decide collectively on the appropriate way forward. The Delegation supported the statement of the Delegation of Switzerland that the issues of TK, TCEs and GR should be given equal time in the work of the Committee.

311. The Chair clarified that the third, fourth and fifth sessions of the Committee had each run to seven working days.

312. The Delegation of China advocated and constructive approach to future work, including a seven-day session for the next meeting. It supported continued discussions on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 comprehensively, without excluding any part of them and expressed the hope for substantive results. The Committee should maintain an open attitude on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, continuing to consider all comments, whether oral or in writing. These should be put on the website of WIPO, so that they could be discussed by all. This could be put into practice by the next session. The Delegation called for texts to be available in Chinese, to facilitate the participation of Chinese in this work.

313. The Delegation of Japan pointed out that there was convergence on the idea of an intersessional electronic submission of comments, and on a seven-day period for the next session. The sole area of divergence was the holistic treatment of the three parts of the substantive documents. The Delegation was pleased, in order to promote a cooperative and productive approach to the Committee's proceedings, and not to waste the time and effort that had gone into this text, to support the proposal made by the Delegations of the Mexico and New Zealand. Submission of comments on all these three parts could be compiled into a stand-alone document, along with the current text of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. This would provide a fruitful basis for discussion in the next session of the Committee.

314. The delegation of Brazil reiterated its position that it was necessary to update the three parts of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 , along with the African group and many other delegations.

315. The representative of the World Trade Institute addressed the question of the lack of clear definitions in the draft provisions, and recalled that international patentable does not specify the subject matter of patent protection, and that the definition of undisclosed information covers all forms of information. It was therefore not necessary for international

binding individual property instruments to define content in order to protect subject matter. The same approach would be logical for TK protection.

316. The representative of the Tupaj Amaru withheld support for the proposal for an intersessional meeting, since they did not have the resources to return every three months, and there were other United Nations meetings, including the Working Group on Indigenous Peoples. He did, however, support the chair proposal to hold a seven-day meeting in December, even ten days, to discuss the issues in depth. Delegations should move away from rhetoric and comment on substance. Delegations had said that they could not address the substantive part of the documents, leading to deadlock. It was not clear how they could reach an agreement, but it was important to agree on future work.

317. The Delegation of the Islamic Republic of Iran noted a change of list of participants for the eighth session, and that it would submit comments under agenda item 10.

318. The Delegation of Brazil believed that for consistency and fairness, item 10 should follow the same pattern and exactly the same language that was adopted for items 8 and 9. There was a substantive discussion regarding WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, but with a view to achieving a consensus decision, the Committee had decided to say only that it had taken note of the extensive comments made on the contents of those documents. On Item 10 in the view of the Delegation the discussions had been less substantive than on items 8 and 9, it is said in the draft decision that the Committee undertook substantive discussions on this item. The Delegation proposed that the decision on this item should also say that the Committee took note of the extensive comments made on the contents of the documents, as for the previous two items. The remainder of the draft decision should be deleted and substituted with the same phrase that appeared for the previous items, i.e. 'it was agreed that the question of subsequent steps should be taken up under item 11'. There was no agreement concerning the other elements, and for the sake of brevity it would be easier to follow the same language that was adopted for the other items. On item 11, future work, the Delegation could not accept paragraph 2, which prejudged the outcome of the Committee. The mandate from the General Assembly was already sufficient for the work of the Committee. The issue of agreed interim outcomes from the Committee's work was not discussed, and there was no agreement to working towards an agreed interim outcome at the eleventh session of the Committee. For the sake of brevity, paragraph 2 should be deleted.

319. The Delegation of Honduras indicated that the proposed text on items 8 and 9 did not indicate what was agreed and not agreed on these documents. On agenda item 10, taking account of the comments of Brazil, the Delegation considered that the same language be used for agenda items 8, 9 and 10, as the three decisions should be expressed in general terms, or else it would be necessary to return to discussions about the nature of the substantive agreements on these items.

320. The Delegation of India queried why it was not possible to follow the same language as for the decisions on the previous agenda items, and why the possibility of submitting written comments should be excluded. On the issue of data bases, the Delegation did not think that there had been enough discussions on the issue to warrant its inclusion under the decision on item 10. If there was a need felt as a response to requests by some delegations for the Secretariat to undertake some kind of study, the Delegation would have no problems with that, but this should be without prejudice whether and how it should be discussed in the Committee. On the language regarding the work plan, it should not focus not just on disclosure of source, but should also focus on origin, and PIC, as well as associated TK. That

said, the preference of the Delegation would simply be to follow the same language as had been adopted under previous agenda items. On Item 11, the Delegation understood the reference to acceleration in terms of enhanced frequency of discussions in an inclusive manner, but did not understand the reference to an agreed interim outcome, and would be more comfortable with the deletion of this phrase.

321. The Delegation of the Islamic Republic of Iran proposed that the same language be used for agenda Item 10 as for the previous two agenda items, in view of the fact that there had been the same level of discussions on these three items. Regarding future work, the Delegation queried whether in view of the fact that much of the week had been spent discussing what could be included and what could not in the Committee's working documents, there could be an agreed outcome before 2007, and supported the deletion of paragraph 2 of the proposed decision, which prejudged the outcome. Concerning paragraph 3 of the proposed decision, there was a need for clarification that the two days of reviewing the materials received were not a separate or extra part of the meeting, but dealt with the documents integrally.

322. The Chair clarified that the two extra days would be equivalent to the five working days.

323. The Delegation of South Africa took note that the use of 'undertook substantive discussions' departed from that in agenda item 8, and concurred with the proposal of the Delegation of Brazil that the same language be used. Also in agreement with the Delegation of Brazil, the Delegation suggested that anything after "it was agreed that the question of subsequent steps would" should be deleted, as there was no substantial agreement or discussion on that issue. The Delegation concurred with the dropping of paragraph 2 in its entirety. On agenda item 11, regarding the compilation and circulation of comments prior to the tenth session, the Delegations suggested a small change which would provide that the comments could be incorporated into WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 and circulated prior to the tenth session.

324. The Delegation of the United States of America recalled that it and many other delegations had stated that they were uncomfortable with the evolution of part three of the documents in question. Accordingly it could not accept the proposal of the Delegation of South Africa to amend the draft decision on agenda item 11. In addition, if the proposal of the Delegation of Brazil to delete paragraph 2 and the associated work program were accepted, then the Delegation saw no need for the additional two days work proposed in paragraph 3.

325. The Delegation of Mexico suggested that the sense of the meeting, on agenda item 10, was that the Committee took note of discussions on this item, so that language should be left as it is, to be followed by the simple statement that the Committee considered it should continue its work on GR. This would be without prejudice to the different views expressed in the Committee as to the priority of this item. What really happened was that the Committee took note of the documents, and considered its work plan on GR. On agenda item 11, the Delegation considered that the final consensus was that paragraph 1 should remain as it was, paragraph 2 should be deleted and paragraph 3 should be retained. Some delegations wanted more concrete references, but this proposal reflected the state of the discussions as they were, and at the late hour, it would be difficult to accommodate any further changes.

326. The Delegation of South Africa reiterated why it sought amendments to the decision paragraph on agenda item 11, namely that if comments were compiled, they could be compiled separately from other documents, as if they would have no legal or other effect whatsoever on the Committee's future work. This is why the comments should not be compiled but should be incorporated into the work of the Committee. Regarding future work on GR, the Delegation could concur with the proposal of the Delegation of Mexico, provided the paragraph would end at that point.

327. The Delegation of Argentina said that the draft decision should reflect honestly the discussions that have occurred and what was truly agreed to. For that reason it commented that the proposal of the Delegation of Brazil was absolutely consistent with what was discussed under agenda item 10. The Delegation also agreed that paragraph three should be deleted, as this had not been agreed nor fully discussed, nor had the Committee asked the Secretariat for a document. There had even been delegations that opposed the proposal of the Delegation of Japan, or said that they needed more time to understand or study it. On agenda item 11, the Delegation did not recall any suggestion nor any proposal from any delegation along the lines proposed; in particular, during a long exchange of points of view, there were no suggestions for the submission of proposals for preliminary outcomes to be submitted before the next session. Accordingly the Delegation supported the Delegation of Brazil's proposal.

328. The Delegation of Brazil voiced support for the drafting proposal of the Delegation of South Africa. The only way to move forward would be for the views of Member States to be incorporated by the Secretariat into the documents under discussion. Regarding the proposal of the Delegation of Mexico to the effect that the Committee decided to continue its work on GR, the Delegation suggested that this was to state the obvious and only to mention this regarding agenda item 10 would create an imbalance vis-à-vis agenda items 8 and 9. Either the same phrase could be used for all three items, or there could be no reference to item 10. It would not make sense to state that the Committee's work would continue on GR if this would give the impression that the work would not continue on TK and folklore. Either the same sentence should be used on all three items, or there should be nothing on all three items.

329. The Delegation of Mexico clarified that it did not want to create an imbalance. It would be acceptable to have the same reference on the three items, but it was important that it should remain on the decision concerning GR and in the same place in the decision paragraphs on the other agenda items.

330. The Delegation of New Zealand raised concerns over the proposal to delete paragraph 2 of the draft decision. The sentiment contained in the paragraph was very important. All would agree that there was a need for some sort of result at the end of the current mandate. It would seem, necessarily, that this would be an interim outcome and that it would not be possible to complete all of the Committee's work in the next year. The Delegation respectfully ask the other delegations to reconsider their submissions on this point, so as to accommodate the sentiment in this decision that the Committee could expect an outcome and that electricians could make proposals on what the outcome could be.

331. The Delegation of Australia agreed to the proposed changes by the Delegation of Brazil, with the understanding that the same sentence regarding future work would need to be used for agenda items 8, 9 and 10. An inclusive sentence could be placed on top of the decision paragraph on future work. The Delegation supported the intervention by the Delegation of New Zealand, recalling that throughout the Committee's discussions a number of delegations

on a number of occasions raised the issue of trying to find some outcome could be taken to the General Assembly in 2007 at the end of the Committee's current mandate. The Delegation had itself made this point on several occasions particularly in relation to paragraphs 14, 15 and 16 of the Norwegian proposal (WIPO/GRTKF/IC/9/12). The proposed words for the decision paragraph did reflect that discussion. These neutral words were essentially saying that we don't know what the outcome is, but as delegations had already raised it, they could raise it more formally for discussion at the next session. This was a fairly bland way of putting the question, which did not commit the Committee to anything. It would be disappointing if it were not possible to reflect somewhere that a number of delegations, including with the support of representatives of several indigenous groups, observed that some form of outcome, even an interim outcome, for the General Assembly in 2007 was highly desirable. The Delegation recognized the issue behind the textual change proposed by the Delegation of South Africa and the response by the Delegation of the United States of America, and pointed out to all delegations that there was a balance in the existing wording which could be the best compromise that could be achieved. There was not agreement that all those changes could be incorporated in the documents. Some delegations definitely wanted it; some delegations said they definitely did not want it. The decision paragraphs suggested that all this information should be compiled so that it was now captured, and this will be brought together with WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 to the next session, when the two sets of materials would be put together. It would not be possible to ask the Secretariat to put those materials together in the meantime because no agreement had been reached on this. It would be misleading to suggest that agreement had been reached on this point, when in fact it had not. The current proposal captures the possibility of continuing the work on the basis of all the comments and all the proposed changes to WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 being brought together, with the possibility of two extra days for discussion at the next meeting. The Delegation felt that this was a relatively sensible and practical way forward given that agreement had not been reached on the critical point.

332. The Delegation of Japan strongly opposed the insertion of the word "incorporated" in the decision paragraph on item 11. It recalled that the Delegation of South Africa had suggested that without this incorporation, the document would have no legal effect. The Delegation pointed out that it had never agreed to give any legal effect to the document or to any of the changes that were proposed during the current session of the Committee. Since there was no agreement on giving legal effect to this document, nor any agreement on creating a legally binding document, the argument that the word 'incorporated' is necessary to give the document legal effect does not hold. Moreover, the Delegation did not support dividing comments into bits and pieces to incorporate them into the document and preferred a country-by-country compilation of comments because many of the comments made during the meeting did not relate to specific elements of the text, or particular wordings, but related to the overall context of the documents and could not be broken into pieces and allocated to specific parts of the text. Other comments related to the whole structure of the documents, even before going into the specifics. Even the specific comments cannot be understood correctly if they were off from such preambular comments which explain the basic philosophy of the comments. As the comments cannot be divided up and in the absence of a philosophical convergence, the comments should be taken in their integrity. There was also no consensus on giving legal effect to the comments. It therefore opposed inclusion of the text on incorporation on the comments into the working documents.

333. The Delegation of Norway addressed the second paragraph of the decision on agenda item 11, commenting that it had been noted on a number of occasions that it was important

that the Committee should reach an outcome. This was a helpful suggestion in order to be able to reach that outcome. The Delegation was flexible on the exact wording, however.

334. The Chair invited the Secretariat to propose a drafting solution. The Secretariat pointed out that many delegations had requested that the same language be used for the three agenda items. On that basis, the Secretariat suggested that the decision on agenda item 10 should consist of two paragraphs, which would be exactly as the same as the corresponding paragraphs for the agenda items on traditional culture expressions/folklore and on TK. It would therefore say that the Committee took note of the extensive comments made on the two documents cited on the agenda item on GR, namely WIPO/GRTKF/IC/8/9 and WIPO/GRTKF/IC/9/9, and indications of a number of delegations that they would be submitting written comments to the Secretariat. It was agreed that the issue of subsequent steps would be taken up under agenda item 11, future work. The second paragraph could refer to the other documents relating to GR that were tabled and discussed, notably the documents submitted by the Delegation of Japan, and the document from the preceding session referred to by the Delegation of Austria on behalf of the European Union, its Member States and acceding states. On future work, it was suggested that paragraph 1 of the decision be amended to refer to WIPO/GRTKF/IC/8/9 and WIPO/GRTKF/IC/9/9 in addition to WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. No suggestion was made regarding the proposal of the Delegation of South Africa, in view of the fact that several delegations had supported it and several delegations had opposed it. In line with the proposal of the Chair, it was suggested that the third paragraph should read “the Committee requested that its tenth session be extended to seven working days.”

335. The Chair proposed that the paragraph regarding future work on substantive documents be limited to a factual statement.

336. The Delegation of Mexico recalled that comments would include both the comments made in the course of the current session of the Committee, as well as comments submitted in writing before the proposed new deadline of July 31, 2006. For its part, the Delegation had indicated several times that it wished to hear the full range of comments during the meeting, and then submit its comments and position on the documents. An equitable solution would be to incorporate what was said during the session, but also to take into account what would be submitted in writing. That was the purpose of inviting written comments: the time limitations on the discussions meant that it was impossible to react to comments made by other delegations, unless there was the possibility of written comments being submitted before the proposed deadline. The Delegation would have no problem if both sets of comments were incorporated.

337. The Chair clarified that the current proposal on decision on item 11 included deleting the last phrase of paragraph 1 beginning with “so that...”; adding documents WIPO/GRTKF/IC/8/9 and WIPO/GRTKF/IC/9/9 in paragraph 1; paragraph 2 being deleted in its entirety; paragraph 3 being corrected to refer to the tenth, not the ninth, session, and ending with the words “seven working days”.

338. The Delegation of the United States of America indicated that it had no problem with the proposals by the chair, but referred to comments made by itself, the Delegation of Japan and a number of other delegations about not being able to accept any evolution of Part III of these documents. On that understanding, the proposals were acceptable.

339. The Delegation of Brazil reiterated its position that it would only accept evolution of all parts of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, not their partial evolution. Comments received from members had the meaning of an evolution of the integrity of both documents. On the proposal by the Chair, the Delegation was surprised by the proposed deletion of part of paragraph 3, and considered that the paragraph should remain as drafted, with correction of the reference to the tenth session.

340. The Delegation of Canada expressed concern that retaining the full text of paragraph 3 would mean that in the course of a Committee session an inordinate amount of time would be dedicated to two particular issues, and not to GR. Paragraph 1 now dealt with all three issues on equal basis, and the same should apply to the third paragraph. It would therefore make sense to say simply that “the Committee requested that its tenth session be extended to seven working days.” The Committee could then appropriately decide how it wanted to allocate its time depending on the issues before it.

341. The Delegation of Brazil indicated it could not accept that solution.

342. The Delegation of the United States of America sought clarification of the deleted language of paragraph 1, clarifying that it would not be able to accept the documents being updated or revised by including these comments. It supported the proposal of the Delegation of Canada on paragraph 3.

343. The Delegation of Canada recalled its understanding that there was no agreement on paragraph 2 as it stood; some delegations had supported its inclusion, and others had indicated it was not appropriate in this context. The Delegation therefore sought the chair is clarification of the status of this paragraph.

344. The Chair proposed that all these comments simply be reflected in the report, in view of the time constraints, and asked that the decision paragraph as proposed be adopted. Paragraph 3 would then read “the Committee requested that its tenth session be extended to seven working days, to enable two extra days of review of the comments received on documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5, WIPO/GRTKF/IC/8/9 and WIPO/GRTKF/IC/9/9.”

345. The Delegation of Brazil indicated that paragraph 3 as it stood only referred to WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, which were the documents that it had been agreed to comment on and to submit written proposals on. It had not been agreed to do this with the other documents. The proposed change would not reflect what had happened and the debates that had been held during the current session. The Delegation did not accept the inclusion of references to other documents. It had agreed to submit comments and to review comments at the tenth session only on those particular two documents.

346. The Delegation of South Africa expressed the view, in line with that of the Delegation of Brazil, that there had been no agreement to submit written comments on document WIPO/GRTKF/IC/9/9. The purpose of deciding on the two extra days of work had been to consider the comments that have been made extensively on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. The wording as stated, with the correction to “tenth”, would be more acceptable. All of the items suggested in paragraph 2 would now be addressed by the revised paragraph 1, so the Delegation could not accept the retention of paragraph 2. In particular, the Delegation objected strongly to the reference to an agreed interim outcome, which was not language it could accept at that time.

347. The Delegation of Canada indicated that it was trying to reflect the discussion that had been held during the session. It took the point of the Delegation of South Africa that there may not have been fulsome agreement to provide written comments on the GR document, but indicated that this was implicit in the desire to continue work on this agenda item even if this exact point was not explicitly made. As a compromise, therefore, the Delegation should read “the Committee requested that its tenth session be extended to seven working days, to continue work on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, as well as to continue further discussion on intellectual property issues relating to GR. This would cover all three aspects of the Committee’s renewed mandate when discussing a process to enable further discussion.

348. The Delegation of Brazil indicated that it could not accept this proposal, because it would change the meaning of the paragraph which reflected an interest in meeting to review the comments of members. The Delegation did not wish to meet to review the same documents for a third time at the tenth session. Seven working days were not necessary to review WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 for a third time. Either the Committee would meet to review the comments of members, or it did not need to meet. The proposed change was therefore not acceptable to the Delegation.

349. The Delegation of the Islamic Republic of Iran sought clarification regarding the relationship between the decisions under consideration and the mandate of the Committee that was extended by decision of the General Assembly.

350. At the request of the Chair, the Secretariat clarified that the decision of the General Assembly regarding the mandate of the Committee would continue, and the Committee would continue its work. Even if the Committee could not agree on the precise details of its workplan, there would be a further session of the Committee at the end of 2006, and there would be a report setting out the proceedings of the current session.

351. The Delegation of France underscored that multilingualism within the United Nations system was a very serious concern for its country. It recalled that the Committee was facing difficulties in determining its future work and suggested firstly that the Committee should decide to convene its next meeting for seven working days, and at the beginning of that meeting to discuss more precisely hard to manage its work, dedicating an agenda item for that, possibly replacing the usual general statements, or at least prior to the general statements; secondly that the last part of the first paragraph should read instead of “so that the comments could be compiled” the phrase “so that a compilation of the comments could be annexed to the documents”, as a proposal for a compromise, all delegations being able to understand the advantages of this wording; thirdly, regarding the third paragraph, the proposal of the delegation of Canada would be acceptable -- the two days under consideration would just be an extra period for discussion, and there would be no need for a separate agenda for those two days. What was important for the Delegation was the agenda for the whole seven days.

352. The Chair proposed that paragraph 3 be as factual as possible, referring to the fact that the tenth session would be held on the proposed dates.

353. The Delegation of Brazil pointed out this proposal would effectively omit the agenda for the next session. Its agenda had been to review the comments received on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. If this was omitted, there would no longer

be any agenda. The Delegation would have great difficulty in going along with the suggestion. The Delegation also could not accept the proposal of the Delegation of France that a compilation be produced that would be annexed to the documents. It could, however, accept removing the word “compiled”, so that the sentence would simply read “so that comments could be circulated prior to the tenth session of the Committee”, if that would be of any help. The delegation could not accept the word “compiled” nor the mention of annexes.

354. The Delegation of South Africa accepted the proposal that paragraph 1 of the decision should indicate that the comments would be circulated prior to the tenth session.

355. The Delegation of the United States of America accepted the proposal of the Delegation of Brazil, on the understanding that there was no mandate to update the WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 nor to integrate the comments in those documents.

356. The Delegation of Mexico commented that the suggestion of Brazil on paragraph one solved the problem and was a very good suggestion. It also agreed paragraph three should read “the Committee requested that at its tenth session be extended to seven working days, to enable review of the comments received on the documents”, without prejudging the exact amount of time to be dedicated to particular documents. It would be up to the Committee at the outset of its next session to determine how to allocate its time, without prejudging the timing. But it was necessary to mention the review of the comments received on those documents. The proposal by the Delegation of Brazil was a very interesting compromise solution and helped the current process.

357. The Delegation of Brazil noted that one delegation had qualified its support for its proposal and requested the Secretariat to take note that in the understanding of the delegation of Brazil, the Secretariat did have a mandate to update the integrity of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5.

358. The Delegation of the United States of America indicated that it could not agree to the revised paragraph 1 until there was a clarification. It had made it clear from the beginning of the current session that it would not be able to accept any incorporation of comments into part three of the relevant documents, and it maintained that position.

359. The Delegation of Japan supported the wording proposed by the delegation of Brazil, on the understanding that the comments would not be incorporated and the documents would not be updated. On paragraph 3, the Delegation sought clarification of the proposal by the Delegation of Mexico.

360. The Delegation of India noted the common understanding within the Committee that the next session should be held on the proposed dates in December.

361. The Delegation of Honduras requested clarification of the proposed outcome on this agenda item.

362. At the request of the Chair, the Secretariat expressed its understanding that decisions are to agenda item 11 had provisionally been agreed, with an identical pattern being applied to agenda items 8, 9 and 10. On item 11, the current proposal for paragraph 1 was that the words “compiled and” be deleted and the paragraph then read “on the basis of the indications of delegations ... so that the comments could be circulated prior to the tenth session of the Committee.” The report would reflect the interventions made by delegations regarding their

understanding of what this decision meant as to the incorporation of comments. There was no agreement on the incorporation of comments, and there were different understandings that would be reflected in the report. The Chair then put this paragraph for decision and it was adopted by the Committee.

363. The Chair then proposed that paragraph 3 refer factually to the proposed timing of the next session, with the understanding that the provisional agenda for the tenth session would be similar to the agenda of the ninth session.

364. The Delegation of Brazil referred to the proposal by the Delegation of Mexico, which it understood to be to retain paragraph 3 as it stood, but to remove the reference to two days, so that it did not prejudice how many days would be dedicated to the review of comments on the two documents referred to in this paragraph.

365. The Delegation of the United States of America indicated that it could not accept the most recent proposal. It could accept the proposal that would delete everything after the reference to “seven working days”, or the proposal that the paragraph be deleted altogether. It was open to additional suggestions as well, but could not maintain a focus only on reviewing the comments on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5.

366. The Delegation of Canada, continuing along the lines of what had been discussed on paragraph 3, proposed that the paragraph could end “to continue work in accordance with its renewed mandate on all comments received on the documents discussed at the ninth session.”

367. The Delegation of Brazil indicated that the proposal of the Delegation of Canada was constructive and could be built upon. It recalled that the Delegation of Canada had itself recognized that when agreeing during the session on the submission of written proposals and suggestions, the Committee was referring to the two documents mentioned in paragraph 3, namely WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, so that if that part of the agreement or common understanding of what had actually happened could be maintained in the paragraph, it would be possible to arrive at some kind of convergence by merging the language just proposed by the Delegation of Canada but retaining the reference to those two documents.

368. The Delegation of Mexico thanked the Delegation of Canada for its constructive proposal, and expressed its agreement with the Delegation of Brazil that the reference to the documents should be maintained, leading to convergence on a good solution. It would be acceptable to the Delegation to use the proposal by the Delegation of Canada, but leaving the reference to the two documents.

369. The Delegation of Nigeria expressed its optimism and indicated that it could consider seriously the proposal by the Delegation of Canada. Much as it would prefer to see a reference to WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, it queried whether the adoption of paragraph 1, which included reference to the three documents, did not presuppose that comments would be received on these three documents, so that it would be harmless to do refer to the three documents again in paragraph 3. The Delegation understood that according to what was adopted under paragraph 1 was that comments would be received on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, as well as the documents on GR. Otherwise, paragraph 3 was acceptable to the Delegation. The Delegation clarified that it was considering a suggestion to include in paragraph 3 an open-ended reference that would enable the Committee to consider the three substantive issues (TK, folklore and GR). The

recollection of the Delegation was that the Committee had agreed, under paragraph one, to bring in comments under other documents, including those on GR. Paragraphs 1 and 3 should therefore line up.

370. At the request of the Chair, the Secretariat clarified that the decision on paragraph 1, as adopted, referred only to WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5.

371. The Delegation of Canada indicated that this most recent clarification was not in accord with its recollection. Perhaps this made it all the more important to have the understanding reflected in the following paragraph. The delegation of Brazil had made constructive proposals on paragraph 3, including making a direct reference to WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. This paragraph could then read that “the Committee requested that its tenth session be extended to seven working days, to continue work in accordance with its renewed mandate on all comments received on documents discussed at the night session, including WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5”. The Delegation however stressed that it was necessary to continue work on GR issues, and it was necessary to establish sufficient language, perhaps in a separate paragraph, to reflect that.

372. The Delegation of Columbia expressed support for the previous formula proposed by the Delegation of Canada as amended by the Delegation of Brazil. This would be the best formula to get an agreement on this matter.

373. The Delegation of Mexico clarified that there was a reference to the mandate of the Committee, which included reference to GR. The documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 would be sufficient, if the wording was retained as before, with reference to the continued work on its mandate. This would include reference to GR, and an additional paragraph would not be necessary. This clarification was made to reassure the Delegation of Canada that its concerns would be addressed.

374. The Delegation of Switzerland expressed support for the proposal of the Delegation of Canada, noting that it was very important that there be a reference to GR in this paragraph; otherwise they would not be any reference to GR in the future work of the Committee and this item would be lost.

375. The Delegation of Honduras stressed that it was in accord with the comments of the Delegation of Mexico. From the beginning, when the Secretariat referred to the continuation of the mandate, it was clear that this also included GR. At the same time, the Delegation was willing to support the direct reference to WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. When the Committee reconvened for its next session, it would be able to discuss which documents and which issues it would address.

376. At the request of the Chair, the Secretariat provided a further clarification of the drafting proposal formulated by the Delegation of Brazil, with amendments by the delegations of Canada and Mexico, as follows “the Committee requested that its tenth session be extended to seven working days, to continue work in accordance with its renewed mandate on all comments received on the documents discussed at the ninth session and to enable review of the comments received on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5.”

377. The Delegation of the Islamic Republic of Iran requested clarification as to whether this formulation would enable delegations to make written submissions on the issue of GR.

378. At the request of the Chair, the Secretariat indicated that the wording would leave open the possibility for any member state to make any comment on any document, or make any proposal or submission at any time.

379. At the proposal of the Chair, the Committee adopted this revised paragraph.

Decision on agenda item 11: Future Work

380. On the basis of the indications of delegations that they would be submitting written comments on the contents of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, the Chair proposed, and the Committee agreed, that Committee participants be invited to submit such written comments to the Secretariat before July 31, 2006, so that the comments could be circulated prior to the tenth session of the Committee.

381. The Committee requested that its tenth session be extended to seven working days to continue work in accordance with its renewed mandate on all comments received on the documents discussed at the ninth session and to enable review of the comments received on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5.

AGENDA ITEM 12: CLOSING OF THE SESSION

Decision on Agenda Item 12: Closing of the Session

382. The Committee adopted its decisions on agenda items 2,4, 5, 7, 8, 9, 10 and 11 on April 28, 2006. It agreed that a draft written report containing the agreed text of these decisions and all interventions made to the Committee would be prepared and circulated by May 19, 2006. Committee participants should submit written corrections to their interventions as included in the draft report before July 31, 2006. A final version of the draft report will then be circulated to Committee participants for subsequent adoption.

383. A first draft of this report was accordingly circulated as document WIPO/GRTKF/IC/9/14 Prov. The current, second, draft of the report (WIPO/GRTKF/IC/9/14 Prov 2) is circulated for consideration and possible adoption at the tenth session of the Committee, including comments and corrections received up to November 5, 2006.

384. The Chair remarked that, at the end of the ninth session, it had been a challenging journey. Tremendous efforts had been made, hard work had been done by all delegations to achieve progress. All could not but receive deepest gratitude from the Chair. The Chair would not be effective in discharging his responsibilities without the full cooperation and continued support of all delegations. Some may say that not much had been achieved. However, whatever had been achieved during this session was one step forward on a long journey. Now of the Committee had better understanding of the substance of every position, and the complexity of the challenge confronting it. In one way or another, it should help in narrowing the gap in the future work of the Committee. The Chair recalled the observation that “the pessimist sees difficulty in every opportunity, and the optimist sees opportunity in every difficulty.” It would not be an exaggeration for the Chair to see a great opportunity to make a bigger leap at the next session, but this advance would not be possible without the active cooperation and wisdom of the delegates. The Chair expressed his thanks to the two

Deputy Chairs, to the Advisory Board, and to the Secretariat for tireless efforts in assisting him in carrying out his responsibilities.

385. The Chair closed the Ninth Session of the Committee on April 28, 2006.

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

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Asia/Pacific Cultural Centre for UNESCO (ACCU):

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Asociacion de Conjuntos Folkloricos de La Paz:

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Assembly of First Nations:

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Association internationale pour la protection de la propriété intellectuelle

(AIPPI)/International Association for the Protection of Intellectual Property (AIPPI):

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Association littéraire et artistique internationale (ALAI)/International Literary and Artistic

Association (ALAI):

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Association Tamaynut/Amazigh People:

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Call of the Earth (COE):

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Centre for Documentation, Research and Information of Indigenous Peoples (DoCip):

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Centre for Folklore/Indigenous Studies:

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Center for International Environmental Law (CIEL):

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

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Chambre de commerce internationale (CCI)/International Chamber of Commerce (ICC):

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Coordination des ONG africaines des droits de l'homme (CONGAF):

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Council of the Otomi Nation:

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Fédération européenne des associations de l'industrie pharmaceutique (EFPIA)/European Federation of Pharmaceutical Industries and Associations (EFPIA):

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Fédération ibéro-latino-américaine des artistes interprètes ou exécutants (FILAIE)/Ibero-Latin-American Federation of Performers (FILAIE):

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League for Pastoral Peoples (LPP):

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Maasai Cultural Heritage Foundation (MCHF):

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