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

Twenty-Seventh Session
Geneva, March 24 to April 4, 2014

REPORT

Adopted by the Committee

1. Convened by the Director General of the World Intellectual Property Organization ("WIPO"), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee" or "the IGC") held its Twenty-Seventh session ("IGC 27") in Geneva, from March 24 until April 4, 2014.

2. The following States were represented: Albania, Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belarus, Belgium, Bolivia (Plurinational State of), Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Congo, Côte d'Ivoire, Cuba, Czech Republic, Djibouti, Ecuador, Egypt, El Salvador, Democratic People's Republic of Korea, Estonia, Ethiopia, Finland, France, Germany, Ghana, Greece, Guatemala, Guinea, Holy See, Honduras, Hungary, India, Indonesia, Islamic Republic of Iran (Islamic Republic of), Israel, Italy, Jamaica, Japan, Jordan, Kenya, Latvia, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Mauritania, Mexico, Monaco, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Senegal, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia and Zimbabwe (110). The European Union ("the EU") and its 27 Member States were also represented as a member of the Committee.

3. The following observers were represented: Palestine, South Sudan (2).

4. The following intergovernmental organizations ("IGOs") took part as observers: African Regional Intellectual Property Organization (ARIPO), African Union (AU), Eurasian Patent Organization (EAPO), European Patent Organisation (EPO), International Organization of La Francophonie (OIF), Food and Agriculture Organization of the United Nations (FAO), International Union for the Protection of new Varieties of Plants (UPOV), South Centre, United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations University (UNU) (10).

5. Representatives of the following non-governmental organizations ("NGOs") took part as observers: Arts Law Centre; *Associación Kunas unidos por* Napguana/Association of Kunas United for Mother Earth (KUNA); Australian Centre for Intellectual Property in Agriculture (ACIPA); Center for Multidisciplinary Studies Aymara/*Centro de Estudios Multidisciplinarios Aymara* (CEM-Aymara); Civil Society Coalition (CSC); *Comisión Jurídica para el Autodesarollo de los Pueblos Originarios Andinos* (CAPAJ)*; Conseil national pour la promotion de la musique traditionnelle du Congo* (CNPMTC); Copyright Agency Limited; CropLife International; Culture of Afro-indigenous Solidarity (Afro-Indigène); EcoLomics International; Foundation for Aboriginal and Islander Research Action (FAIRA); Health and Environment Program (HEP); Incomindios Switzerland; Indian Council of South America (CISA); Indian Movement "*Tupaj Amaru*"; Indigenous Peoples' Center for Documentation, Research and Information (doCip); *Institut du développement durable et des relations internationales* (IDDRI); *Instituto Indígena Brasileiro para Propriedade Intelectual* (InBraPi); International Center for Trade and Sustainable Development (ICTSD); International Council of Organizations of Folklore Festivals and Folk Arts (CIOFF); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Trade Center for Development (CECIDE); International Video Federation (IVF); Knowledge Ecology International (KEI); Nigeria Natural Medicine Development Agency (NNMDA); *Sámikopiija* (The Saami Reproduction Rights Organization); *Tebtebba* Foundation – Indigenous Peoples' International Centre for Policy Research and Education (*Tebtebba* Foundation); Tulalip Tribes of Washington Governmental Affairs Department ("Tulalip Tribes"); Traditions for Tomorrow; University of Tromsø, Norway's Artic University (UiT) (31).

6. The list of participants is annexed to this report.

7. Document WIPO/GRTKF/IC/27/INF/2 Rev. 2 provided an overview of the documents distributed for the Twenty-Seventh session.

8. The Secretariat noted the interventions made, and the proceedings of the session were communicated and recorded on webcast. This report summarizes the discussions and provides the essence of interventions, without reflecting all the observations made in detail or necessarily following the chronological order of interventions.

9. Mr. Wend Wendland of WIPO was Secretary to the Twenty-Seventh session of the Committee.

AGENDA ITEM 1: OPENING OF THE SESSION

10. The Director General, Mr. Francis Gurry, opened the session and welcomed its participants. He reminded them that the General Assembly ("the GA") of September 2013 had adopted a work program comprising, first, a session on genetic resources ("GRs") that took place from February 3 to 7, 2014 and which had developed a revised version of the Consolidated Document Relating to Intellectual Property and Genetic Resources ("the GRs text"); second, the present session of ten working days on traditional knowledge ("TK") and traditional cultural expressions ("TCEs"); and third, a cross-cutting session of three days in July 2014 that would take stock of the progress made and make a recommendation to the September 2014 GA. The renewed mandate foresaw, once again, that the Committee expedite its work with open and full engagement on text-based negotiations and submit to the 2014 GA the text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. The current IGC mandate provided furthermore that "with a view to finalizing the text(s) within the biennium, the GA in 2014 would take stock of and consider the text(s), progress made and decide on convening a Diplomatic Conference, and will consider the need for additional meetings, taking account of the budgetary process." The present session would include four days devoted to TK, four days to TCEs and two days set aside for the consideration of cross-cutting TK and TCE issues. The Director General recalled that the last time the Committee had discussed the issue of TK and TCEs was at IGC 24 and IGC 25 respectively. The Committee had produced at those sessions two texts, namely "The Protection of Traditional Knowledge: Draft Articles" ("the TK text"), that was annexed to document WIPO/GRTKF/IC/27/4, and "The Protection of Traditional Cultural Expressions: Draft Articles" ("the TCEs text"), that was annexed to document WIPO/GRTKF/IC/27/5. Those texts served as the basis for discussion during the present session on TK and TCES respectively. The Director General also referred to three other documents: a "Joint Recommendation on Genetic Resources and Associated Traditional Knowledge" (WIPO/GRTKF/IC/27/6) that was co-sponsored by the Delegations of Canada, Japan, Norway, the Republic of Korea and the United States of America; a "Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources" (WIPO/GRTKF/IC/27/7), co-sponsored by the Delegations of Canada, Japan, The Republic of Korea and the United States of America; and, a "Proposal for the Terms of Reference for the Study by the WIPO Secretariat on Measures Related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing Access and Benefit-Sharing Systems" (WIPO/GRTKF/IC/27/8), co-sponsored by the Delegations of Canada, Japan, Norway, the Republic of Korea, the Russian Federation and the United States of America. The Director General referred to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities ("the Voluntary Fund") and reminded the participants that it was a very important means of financing the participation of indigenous and local communities' representatives in the Committee. He emphasized that the Voluntary Fund had no longer any funds and reiterated his strong appeal to all delegations to find a way to assist with voluntary contributions to the Fund. He acknowledged the presence of Mr. Pavel Sulyandziga, President of *Batani* Fund and member of the United Nations Working Group on the Issue of Human Rights and Transnational

Corporations and other Business Enterprises, Moscow, Russian Federation, Mrs. Edith Bastidas Calderón, Legal Advisor of the *Entidad Promotora de Salud Indígena* Mallamas, Nariño, Colombia, and Mr. Preston Hardison, Policy Analyst for the Tulalip Tribes of Washington, United States of America, who would participate in the session's Indigenous Panel on "Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions: Indigenous Peoples' `right to maintain, control, protect and develop their intellectual property´ under Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples". He emphasized that the present session was the twenty-seventh of its kind and that a long time had elapsed since the establishment of the Committee in 2000. This endeavor represented an extraordinary amount of work that had been put into the process. He acknowledged in particular the leadership and contribution of the present Chair of the IGC, His Excellency Ambassador Wayne McCook. While he recognized that the IGC had been making progress, he encouraged all participants to exercise some patience and continue their extremely good engagement, since the IGC negotiating process was a complex process. He was confident that the IGC would produce a result, but it would need that delegations maintain an atmosphere of mutual understanding in order to achieve a positive outcome.

11. The Chair of the IGC, His Excellency Ambassador Wayne McCook from Jamaica, thanked the Director General for his opening statement and echoed the reference made by him to the financial situation of the Voluntary Fund. After twenty-seven sessions of the Committee, he expressed the hope that the drying up of the Fund was not symbolic. He joined the Director General in making a strong call that the Voluntary Fund be replenished, as the Committee could not fail in the last stages of its negotiating process. He thanked the Regional Coordinators for having ensured coordination within their respective groups regarding the program and working methodology for the session. He thanked also Mr. Abdulkadir Jailani from Indonesia, Ms. Ahlem Sara Charikhi from Algeria and Ms. Alexandra Grazioli from Switzerland, for their support as Vice-Chairs of the Committee. He recalled that the present session, as previous sessions, would be on live webcast on the WIPO website in order to further its transparency, openness and inclusiveness. He reminded that the process was a negotiating one, and that only through discussion, mutual respect, and constructive engagement on all sides, could agreement be reached. He urged delegations, individually and in groupings, to discuss substantive issues with each other. He also encouraged observers, especially custodians of TK and TCEs, indigenous peoples and local communities, to engage with Member States and Member States to engage with observers. He thanked the Government of Indonesia for having convened an informal Consultative Meeting on the work of the Committee in Bali from March 10 to 12, 2014 ("the Bali Consultative Meeting"). The Chair seized the occasion to welcome the presence at the session of His Excellency Ambassador Triyono Wibowo, Permanent Representative of the Republic of Indonesia in Geneva, who had chaired the Bali Consultative Meeting. The Chair believed that the Consultative Meeting had been a useful and frank conversation among the participants present, both on substance, particularly on the cross-cutting issues, as well as on the way forward. These kinds of Member State-led, cross-regional and informal discussions could further assist in actualizing the IGC objectives. He commended the Chair's Summary of the Bali Consultative Meeting that had been distributed for reflection. As for the proposed working methodology and program for the present session, especially for Agenda Items 6 on TK and 7 on TCEs, he referred to the consultations he had held with the Regional Coordinators on March 14, 2014. He described what had been agreed upon as a methodology to advance the work at this session, emphasizing that it was a continuation of the evolving working methods that had been adopted for previous sessions. For Agenda Items 6 and 7, a twin approach, combining formal discussions, namely the plenary, and informal discussions, namely expert group and open-ended informal informal consultations, would be employed. Facilitators would be nominated and continue to play their usual role as described below. Discussions in the plenary would serve to guide the facilitators and provide them with broad directions for their work on the respective textual revisions, namely revisions to the Annex to WIPO/GRTKF/IC/27/4 ("the TK text") in the first week and revisions to the Annex to WIPO/GRTKF/IC/27/5 ("the TCE text") in the second week of the session. The plenary would review the TK and TCE texts developed in the respective weeks at least twice. No live drafting

would be undertaken in the plenary. The expert group process would be to facilitate in a smaller, informal setting, the reaching of compromises during the present session. Similarly to the plenary, expert group meetings would also be led by the Chair or Vice-Chairs when necessary. Regarding the expert group, each regional group would be represented by a maximum of seven experts, one of whom would preferably be the Regional Coordinator. The presence of the Regional Coordinators remained important, but each Regional Coordinator might elect to exchange his or her presence with an expert, thereby extending to seven the number of experts by regional groups. The Chair wished, however, to have the Regional Coordinators present in the expert group meeting room in order to coordinate the interchange of experts at all times. Regional groups could nominate a lesser number of experts. The Chair noted that other Member State delegates, in addition to experts, had sometimes sat in the room at previous sessions. This had not been disallowed, provided that participation would be limited only to the experts seated in accordance with the agreed working methodology. The indigenous representatives would be invited to nominate two expert representatives to participate in the expert group as observers, and an additional two representatives to sit in on the meetings without speaking rights. A regional group could change the composition of its experts, depending on the article or issue being worked on. The experts forming the expert group might take the floor and make drafting proposals during meetings of the expert group. The text would be up on a screen for ease of reference and drafting proposals could be entered on the screen. However, the editing and final preparation of the text(s) to be considered by the plenary would be done by the facilitators on the basis of these inputs. The text(s) would be addressed by issue, rather than in a sequential, article-by-article manner. The expert group would meet in Room B in the WIPO premises. Interpretation into and from English, French and Spanish would be available. In the interest of transparency, there would be a live audio feed of the proceedings of the expert group. Depending on the language preferences of delegations and observers, an English audio feed of the expert group proceedings would be made into Room A, a French audio feed into Room J. Bilger, and a Spanish audio feed into Room U. Uchtenhagen. The text which would be on the screen in Room B would also be visible simultaneously on the screens in the three venues mentioned above. To ensure that the integrity and informality of the expert group were maintained, delegations and observers would be requested to refrain from communicating to the public, whether live or at any future time, the content or nature of the discussions taking place in the informal meetings, whether in general terms or by way of quoting specific individuals or delegations. The Chair wished that the experts be confident that the nature of their exchanges would remain informal. For security reasons, the Secretariat would continue to monitor whether attendance in Room B was consistent with its capacity. As had been the case at IGC 26, and based on their positive contribution to the IGC work, the Chair intended to call for open-ended informal informal consultations (“informal informals”), where required, on specific issues, where such would assist delegations in further discussing and arriving at compromises on difficult aspects of the negotiations. These informal informals would be convened and facilitated by the Friend of the Chair, Mr. Ian Goss from Australia, and/or the facilitators. Regarding the facilitators, their functions would remain the same as in the previous sessions. They would be responsible for shaping the revised text(s) that would be submitted to the plenary, by taking advantage and taking into account the interventions of in the plenary, the expert group and informal informals. In their work on the respective textual revisions, the facilitators would also be guided by the cross-cutting TK and TCE discussions that were scheduled at the present session. Facilitators might make proposals for consideration by the informal informals, the expert group and the plenary, under the understanding that the negotiating process remained a Member-States-driven process, and that the facilitators would ultimately have to rely on what Member States presented and accepted. The Chair had asked Mr. Goss to be a bridging facilitator as he had done in the last sessions, as Friend of the Chair. The Chair acknowledged the following delegates as facilitators: Ms. Margo Bagley from Mozambique, Mr. Nicolas Lesieur from Canada, Mr. Justin Sobion from Trinidad and Tobago and Mr. Tom Suchanandan from South Africa (the latter for TCEs only). In line with the present mandate of the Committee, consideration of cross-cutting TK and TCEs issues would be undertaken during the present session, at two occasions, during one day at the beginning of

its first week and during another one day at the beginning of its second week. As mentioned already, the present session would also include a four-day discussion on the TK text and another four-day discussion on the TCEs text. The Chair proposed that the program of the session as the first week was concerned, proceed as follows. On day 1, after the completion of Agenda Items 2, 3 and 4 and the indigenous panel, the plenary would be invited to consider cross-cutting TK/TCE issues which arose within the TK and TCEs texts and/or which might benefit from greater coherence in the further development of the respective texts. Consideration of cross-cutting issues would commence in the afternoon of day 1 and be prolonged on the morning of day 2. In view of this cross-cutting consideration, both the TK text and the TCEs text had been made available for reference. Further, document WIPO/GRTKF/IC/27/INF/10, which summarized the Chair's views on some of the possible cross-cutting TK/TCE issues, had been prepared and was circulated as an information document for the session. In terms of the sequence of the work on day 1, the Chair proposed an initial discussion in plenary on cross-cutting issues followed by an expert group discussion on cross-cutting issues. The four-day negotiations on the TK text under Agenda Item 6 would then begin. As mentioned, the Chair expected that Agenda Item 6 be closed at the end of the first week of the present session. In the final discussions under Agenda Item 6 taking place on March 28, 2014, the plenary would be invited to correct any obvious errors in the revised TK text, make other comments on the text, which would be recorded as usual in the full report of the session, and transmit it to the 2014 WIPO GA, subject to any agreed adjustments or modifications arising on cross-cutting issues at IGC 28, taking place in July 2014. It would also be made available in all of the six United Nations (UN) languages by 9 am on day one of the second week of the IGC session, namely on March 31, 2014. The revised version of the TK text, which would have been transmitted to the GA already, would at that stage no longer be open for further drafting at the present session but would, however, be made available to delegations as a reference for the second one-day segment of cross-cutting discussions which would take place on day one of the second week of the session. Based on the outcome of the first one-day segment regarding the cross-cutting issues of the first week, the plenary would make a determination of what more would need to be done during the second one-day segment of the second week. The Chair expected that this second cross-cutting discussion would also serve to further inform the four-day negotiations that would take place on the TCEs text under Agenda Item 7 that were scheduled for the second week of the present session. In the final discussions under Agenda Item 7 on April 4, 2014, the plenary would be invited to correct any obvious errors in the revised TCEs text, make other comments on the revised text, which would be recorded as usual in the full report of the session, and transmit it to the 2014 WIPO GA, subject to any agreed adjustments or modifications arising on cross-cutting issues at IGC 28. The Chair urged once again delegations to show flexibility and mutual understanding in order to find bridging solutions on the issues at hand.

AGENDA ITEM 2: ADOPTION OF THE AGENDA

Decision on Agenda Item 2:

12. The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/27/1 Prov. 3 for adoption and it was adopted.

AGENDA ITEM 3: ADOPTION OF THE REPORT OF THE TWENTY-SIXTH SESSION

13. The representative of Tupaj Amaru said that he would abstain from adopting the report since he considered that his comments and suggestions on the drafting texts had been excluded from its content.

Decision on Agenda Item 3:

14. The Chair submitted the revised draft report of the Twenty-Sixth session of the Committee (WIPO/GRTKF/IC/26/8 Prov. 2) for adoption and it was adopted.

AGENDA ITEM 4: ACCREDITATION OF CERTAIN ORGANIZATIONS

Decision on Agenda Item 4:

15. The Committee unanimously approved the accreditation of all the organizations listed in the Annex to document WIPO/GRTKF/IC/27/2 as ad hoc observers, namely: International Information and Networking Centre for Intangible Cultural Heritage in the Asia-Pacific Region under the auspices of UNESCO (ICHCAP); Russian Indigenous Training Centre (CSIPN/RITC); The Batani – International Development Fund for Indigenous Peoples of the North, Siberia and the Far East; Universitetet I Tromsø, Norges Arktiske Universitetet (UiT)/University of Tromsø, Norway's Arctic University (UiT).

AGENDA ITEM 5: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES

16. The Chair introduced documents WIPO/GRTKF/IC/27/3 and WIPO/GRTKF/IC/27/INF/4. The Chair recalled that the GA had decided in 2005 to create a Voluntary Fund to support the participation in the IGC of indigenous and local community representatives of accredited NGOs. Since its establishment, the Voluntary Fund had benefited from different contributors: SwedBio, France, the Christensen Fund, Switzerland, South Africa, Norway, Australia and New Zealand. The Chair drew attention to document WIPO/GRTKF/IC/26/INF/4, which provided information on the current state of contributions and applications for support. He reminded that, together with the Director General, he had referred, at the opening of the present session, to the critical situation of the Voluntary Fund which was depleted, due to a lack of fresh contributions. Repeated appeals for new contribution had not proved successful, and this had created a situation of great concern. The Chair urged Member States who had ideas as to how to effectively replenish the Fund to share them with the Chair and the IGC. The issue of the depletion of the Voluntary Fund would have to be addressed in a practical and sustainable way during the present session. The IGC would revert to this question later. The Chair informed the Committee that he had invited Ms. Alexandra Grazioli, Vice-Chair of the Committee, to serve as Chair of the Advisory Board and asked participants to nominate the members of the

Advisory Board. The outcomes of the Advisory Board's deliberations would be reported later in the current session of the IGC in document WIPO/GRTKF/IC/27/INF/6.

17. In accordance with the decision of the IGC at its seventh session (WIPO/GRTKF/IC/7/15, paragraph 63), a half-day panel of presentations took place during a suspension of the IGC session. The Chair acknowledged the presence of the keynote speaker Mr. Pavel Sulyandziga, President of *Batani* Fund and member of the United Nations Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Moscow, Russian Federation. He also welcomed the two other panelists: Mrs. Edith Bastidas Calderón, Legal Advisor of the *Entidad Promotora de Salud Indígena* MALLAMAS, Colombia and Mr. Preston Hardison, Policy Analyst for The Tulalip Tribes of Washington, United States of America. He also invited the Chair of the Panel, Ms. Lucia Fernanda Inacio Belfort, representative of the *Instituto Indigena Brasilero da Propiedade Intellectual* (InBraPi), to come to the podium. The presentations were made according to the program (WIPO/GRTKF/IC/27/INF/5 Rev.) and would be available on the TK website as received.

18. The Advisory Board of the WIPO Voluntary Fund met on April 1, 2014 to select and nominate a number of participants representing indigenous and local communities to receive funding, pending availability of funds, for their participation in the next session of the IGC. The Board's recommendations were reported in document WIPO/GRTKF/IC/27/INF/6 which was issued before the end of the present session.

19. [Note from the Secretariat: This part of the session took place on the last day of the present session. The Vice-Chair, Mr. Jailani, was chairing the session at this point]. The Vice-Chair recalled that the IGC had been invited by the Chair, in his opening statement, to discuss new ideas in order to address the depleted financial situation of the Voluntary Fund. It opened the floor for any comment, idea or proposal in this regard.

20. The Delegation of Switzerland referred to the dramatic financial situation of the Voluntary Fund, which had lasted for some time. It added that it would be impossible to fund the participation of the representatives of the indigenous peoples and local communities in future sessions of the IGC, should the situation remain so. That would be very regrettable for the IGC process, in view of the very useful contributions made by these representatives to the IGC negotiations. The present lack of funding would continue unless there were new voluntary contributions coming in. The Committee had not heard any news about pledge or fresh contributions since July 2013, in spite of repeated appeals from the Chair and delegations, including at the GA. The Delegation of Switzerland referred to the invitation by the Chair to consider alternative and creative solutions for finding fresh sources of funding for the Voluntary Fund. This had been what the Delegation had tried to do, together with several other delegations over the last few days. The Delegation, together with the Delegations of Australia, Finland and New Zealand, were pleased to submit a proposal in this regard for the consideration of the Committee (WIPO/GRTKF/27/9 Rev.), entitled "Participation of Indigenous and Local Communities: Proposal for Subsidiary Contributions to the Voluntary Fund". The proposal aimed to amending the rules of the Voluntary Fund in order to make it possible in the future, together with, and as a supplement to the present way of funding the Voluntary Fund, to allow WIPO to make an *ad hoc* contribution to the fund from its regular budget, would the GA so decide, and according to the usual budgetary rules. The amendments would concern Article 6(a) of the rules of the Voluntary Fund and foresee the addition of a new Article 6(b), as showed on page 3 of the Annex to this proposal. The Delegation explained that the intention was not to modify the present way of working of the Voluntary Fund, since the Voluntary Fund met the purposes for which it had been set up, but to allow for an additional source of funding in the absence of sufficient funds from present sources, namely voluntary contributions from governments, NGOs and public and private institutions. The Delegation recalled that the present rules of the Voluntary Fund prevented any contributions from the WIPO regular budget. The Delegation believed that the deletion of this exclusion from the rules of the Voluntary Fund had become a necessity. It emphasized that the complexity and the prolonged nature of the

IGC negotiations did make it very difficult for potential donors, which included the co-sponsors of this proposal, to keep up the funding of the Voluntary Fund at a level that would be sufficient to allow the participation of the representatives of indigenous and local communities in the work of IGC in a durable way. It would be desirable that the decision to amend the rules of the Voluntary Fund in accordance with what was proposed be taken by the GA in September 2014 on the basis of a recommendation by the IGC. As a complement to this decision, the GA could consider and decide upon a WIPO contribution in accordance with the regular budgetary rules. The Delegation further emphasized that once the GA had taken the decision on such a contribution, the use of that contribution would then be completely subject to the rules of the Voluntary Fund, as had been the case for all contributions received to date. Together with the other co-sponsors, the Delegation realized that this proposal had been submitted during the present session and understood that delegations would still need some time to examine it. Therefore the Delegation was interested in hearing any preliminary reactions to the proposal, and to answering any questions that might have arisen. Its intention was to continue to engage until IGC 28 with all interested delegations, in particular with those who would like to join the co-sponsors of this proposal, with the view to having a more detailed discussion at that session and submit a recommendation to the September 2014 GA.

21. The representative of the Copyright Agency Limited, speaking on behalf of the Indigenous Caucus, thanked the Delegation of Switzerland and expressed support for the proposal it had introduced. Considering that the full and effective participation of indigenous peoples and local communities in the IGC process constituted an essential prerequisite for balancing the discussion and for better understanding of the concepts involved, as well as government perception and the worldview of indigenous peoples, the representative urged WIPO to provide funds from its regular budget to cover the shortfall in the Voluntary Fund, so that that applicants from indigenous peoples and local communities who had been recommended for funding by the Advisory Group of the Voluntary Fund, might be financed.

22. The Delegation of Australia said that it was proud to co-sponsor the proposal with the Delegations of Switzerland, New Zealand and Finland. It recognized the valuable contribution that representatives of indigenous and local communities had made to the IGC process. It considered that the facilitation of participation by indigenous and local communities through the Voluntary Fund was very important to maintain the credibility, transparency and relevance of the IGC process. It took the opportunity to thank Australian indigenous representatives for their active contribution. It recalled that Australia had made several voluntary contributions to the Voluntary Fund. The complexity and length of the IGC negotiations combined with the discretionary and irregular nature of voluntary contributions had made it difficult for potential donors to maintain an adequate level of financial resources in the Voluntary Fund. The Delegation noted that the Voluntary Fund was now effectively empty, with some 823 Swiss Francs remaining. It emphasized that it was proposing a recommendation simply to amend the rules of the Voluntary Fund to make it possible for WIPO to contribute funds from its regular budget. Any subsequent decision by Member States for WIPO to contribute to the fund would be subject to the normal budgetary processes and a decision by the WIPO General Assembly. It did not propose a change in the level of funding which had been provided to indigenous representatives in the past. It invited Member states to consider the proposal before the next session of the IGC. It would welcome any comments or questions that Member states had on the proposal. He thanked the participants who had already indicated their support.

23. The Delegation of New Zealand, as a co-sponsor, supported the interventions made by the Delegations of Switzerland and Australia on the proposal to amend the rules of the Voluntary Fund in the manner specified by the Delegation of Switzerland. It saw indigenous peoples and local communities' participation as being vital to the work of the Committee. For that reason, it was supporting this proposal as co-sponsor.

24. The Delegation of Kenya, speaking on behalf of the African Group, thanked the co-sponsors for their proposal. It noted that the participation of indigenous people and local

communities was critical in the IGC process, as they provided the IGC with useful insights which were complex issues in its negotiations. It looked forward to further discussion of this proposal during the intersessional period, with the view for the GA to take a position in September of 2014. It would like to ensure that indigenous people and local communities were able to participate in all future sessions.

25. The Delegation of the Czech Republic, speaking on behalf of the Central European and Baltic States (the CEBS), acknowledged the desirability of effective participation of indigenous peoples in the IGC process. It would seek clarification from the proponents as needed.

26. The Delegation of Chile thanked the Chair of the Voluntary Fund Advisory Board, Ms. Alexandra Grazioli from Switzerland, for her work, and also for the report that the Advisory Board submitted to the IGC (WIPO/GRTKF/IC/27/INF/6). It thanked as well the Delegations of Switzerland, Australia, New Zealand and Finland for their proposal. The participation of indigenous and local communities in this process was highly relevant. It believed and emphasized that it was important to find a solution to the lack of funding of the Voluntary Fund. While the proposal seemed quite simple and clear, it was just submitted a few times ago. It said it would take the necessary time to analyze it in detail and make comments if needed.

27. The Delegation of South Africa aligned itself with the statement made by the Delegation of Kenya on behalf of the African Group. It recalled that South Africa had contributed two times to the Voluntary Fund for the mere reason that it valued the participation of the indigenous people and the local communities. It thanked the proponents of the proposal. It would study it further and consult further on it during the intersessional period and revert to it with a position at IGC 28.

28. The Delegation of Thailand said that the participation of indigenous peoples and local communities was crucial in the IGC negotiations. It supported the proposal on amending the rules of Voluntary Fund as proposed by its co-sponsors.

29. The Delegation of Canada thanked the co-sponsors for their excellent proposal. It underscored the importance of the participation of indigenous peoples. It would study this proposal with great interest, based on all the considerations that were attached to it.

30. The Delegation of Peru acknowledged that the IGC was facing a problem that could be described as the failure of a group, namely those of indigenous peoples and local communities, to be able to participate. It underlined that the IGC needed to find a solution to that problem. In this context and although it had not looked in detail at the implications of the proposal, it was grateful for the proposal. It thought that it certainly had merit and could be adopted at the next session of the Committee in order to come up with a solution to that problem.

31. The Delegation of El Salvador expressed its gratitude for the proposal submitted by the Delegation of Switzerland. It asked itself a few question about the proposal and would be analyzing the proposal in connection with the WIPO budget. The Delegation would come back to it as appropriate.

32. The Delegation of the Republic of Korea, speaking on behalf of the Asia-Pacific Group, appreciated the proposal made by its co-sponsors. It was useful for the future of the IGC discussions. It was very positive in supporting the amendment of the rules of the Voluntary Fund in order to allow voluntary contributions from the regular budgets of WIPO, subject to a decision by the General Assembly. It hoped that this amendment of the rules of the Voluntary Fund would signal that the participation of the indigenous peoples and local communities was of high importance for the future of discussion of the IGC.

Decisions on Agenda Item 5:

33. The Committee took note of documents WIPO/GRTKF/IC/27/3, WIPO/GRTKF/IC/27/INF/4 and WIPO/GRTKF/IC/27/INF/6.

34. The Committee strongly encouraged and called upon members of the Committee and all interested public or private entities to contribute to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities.

35. The Committee also took note of document WIPO/GRTKF/IC/27/9 Rev. ("Participation of Indigenous and Local Communities: Proposal for Subsidiary Contributions to the Voluntary Fund") submitted by the Delegations of Australia, Finland, New Zealand and Switzerland and decided that discussion on the proposals contained therein be deferred to the Twenty-Eighth session of the Committee.

36. The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mrs. Catherine BUNYASSI KAHURIA, Senior Counsel, Legal, Kenya Copyright Board, Nairobi, Kenya; Mr. Nelson DE LEÓN KANTULE, representative, Asociación Kunas unidos por Napguana/Association of Kunas for Mother Earth (KUNA), Panama; Ms. Simara HOWELL, First Secretary, Permanent Mission of Jamaica, Geneva; Ms. Lalita KAPUR, Executive Officer, Intellectual Property Section, Ministry of Foreign Affairs and Trade, Canberra, Australia; Mr. Shi-hyeong KIM, Counsellor, Permanent Mission of the Republic of Korea, Geneva; Mr. Wojciech PIĄTKOWSKI , First Counsellor, Permanent Mission of Poland, Geneva; Mrs. Madeleine SCHERB, representative of Health and Environment Program, Yaoundé, Cameroon; Mr. Jim WALKER,

representative of FAIRA, Brisbane, Australia.

37. The Chair of the Committee nominated Ms. Alexandra Grazioli, Vice-Chair of the Committee, to serve as Chair of the Advisory Board.

CONSIDERATION OF CROSS-CUTTING TRADITIONAL KNOWLEDGE/TRADITIONAL CULTURAL EXPRESSIONS ISSUES (DAY ONE)

38. [Note from the Secretariat: This part of the session took place in the afternoon of the first day, and in the morning of the second day of the session. The Chair was chairing the session at this point]. The Chair recalled that in accordance with the 2014 work program of the Committee, the Committee would dedicate two days with a view to consider cross-cutting TK/TCEs issues. The Chair introduced the first one-day segment on cross-cutting TK/TCEs issues. He expected that delegations or groupings would indicate broad approaches and views in the plenary first. He would then suspend the plenary and lead a more detailed discussion within the expert group. He recalled that he had committed to paper, and made available for reflection, some of his thoughts on cross-cutting issues (WIPO/GRTKF/IC27/INF/10). As he had indicated in this non-paper, the points he had made there had no standing in and of themselves. His intention had been to facilitate the discussion of cross-cutting issues with some sense of the areas of focus that might be considered. The Chair was aware that individual delegations and groups had done their own reflection, and he hoped that the plenary would benefit from a distillation of the views expressed on the cross-cutting issues. He expected that certain fundamental policy issues would be touched upon, because a number of the issues that were fundamental were in and of themselves cross-cutting in nature, like subject matter, beneficiaries and scope. He expected as well that the cross-cutting discussion would involve also a more direct and interactive comparison between the TK and TCEs texts. The Chair hoped that that would make the work of the Committee easier, to the extent that what could be sorted out to address in one text could be used in the other. The Chair understood that this comparative exercise would be one of the objectives of the cross-cutting discussion. The Chair recalled the core documents that would serve as a base for the cross-cutting discussion, namely the TK text and the TCEs text, as well as the two Joint Recommendations and the Proposal that he had referred to in his opening statement. There were a number of information documents which were also available, and it was expected that delegations would call on any and all documents that could help in shaping and focusing interventions. In his non-paper, the Chair had put forward views on four possible cross-cutting issues, namely the meaning of “traditional”; the beneficiaries of protection, in particular, the role of states or “national entities”; the nature of the rights, including the meanings of “misappropriation” and “misuse”; and the treatment of publicly available and/or widely diffused TK and TCEs. The Chair announced that he intended to begin the cross-cutting dialogue with a certain degree of flexibility, but asked participants to focus on cross-cutting issues. He pointed out that it would be useful to identify the particular issue that was being addressed, how it was cross-cutting, and what ways might be found to advance the work through the treatment of the issue being addressed. Groups would be allowed to present overall statements but his preference was to focus immediately on cross-cutting issues. The Chair opened the floor for interventions.

39. The Delegation of Kenya, speaking on behalf of the African Group, was confident that, under the leadership of the Chair, the IGC would finalize its negotiations of the draft texts on TK and TCEs. Its main goal remained unchanged, namely to reach an agreement on the text or texts of an international legal instrument or instruments which would ensure the effective protection of TK and TCEs. It recalled that TK and TCEs had long enriched, empowered and

sustained communities and nations around the world. Much of its TK and TCEs could still be discerned in the modern technologies, innovation and art that were currently protected under the formal IP system. The African Group was pleased with the progress made during IGC 26 and hoped that the same spirit and efficiency which had prevailed in that session would be duplicated during IGC 27. It recognized that the draft articles on TK and TCEs contained overlapping issues. It was open to a process that would ensure that the texts on both issues advance and mature meaningfully, so that the 2014 GA take stock and decide on convening a Diplomatic Conference in 2015. The African Group was committed to ensuring that the Committee did not move backwards on substance and, instead, that the work over the next two weeks allow it to move as close as possible to its end goal in a practical and meaningful way. It hoped that the cross-cutting exercise would help to create coherence and consistency in the treatment of similar concepts when they appeared in both TK and TCEs texts, and referred to the same matter. Regarding the issues which could be dealt with under the cross-cutting agenda, the African Group was of the opinion that a good starting point could be provided by the summary by the Chair of the Bali Consultative Meeting, which had examined cross-cutting issues such as the subject matter of protection, the extent of rights and its relationship with misappropriation, the beneficiaries, the notion of publicly available TK and widely diffused TK, as well as limitations and exceptions. Another useful contribution to those discussions could be the non-paper by the IGC Chair on possible cross-cutting issues. The Delegation noted that while the two lists looked similar and overlapped, there were important elements in each list which could be useful in formulating a comprehensive list. It looked forward to participating in fruitful discussions during the session and anticipated a highly productive session.

40. The Delegation of Indonesia, speaking on behalf of the Like-Minded Countries ("the LMCs"), invited the Committee to take into account the outcome of the Bali Consultative Meeting as appeared in the informal Chair's Summary, submitted to the IGC for practical reference and reflection. The Bali Consultative Meeting had identified common denominators that were valuable in advancing further discussions on issues of TK and TCEs. That meeting had successfully distinguished several important cross-cutting issues, namely the subject matter of protection, beneficiaries, the scope of protection, and the exceptions and limitations. In addressing those issues, the meeting had highlighted the merit of considering the nature of rights related to TK and TCEs. There had been interactive and dynamic discussion on the practical value of establishing the level of rights as determined by the character of the TK and TCEs in question and the character of their use. The LMCs believed that such approach could be a useful tool in the process of determining the characters of TK and TCEs, and designating corresponding rights on them. It had also been emphasized in the meeting that, by recognizing that approach, the Committee would be able to ascertain a stepping stone to advance the discussions in resolving the cross-cutting issues. The Delegation recommended continuing further discussions on that particular issue. With respect to the first cross-cutting issue, namely the subject matter, it reiterated that definitions of TK and TCEs in a broad and inclusive sense would be preferable, while recognizing that such definitions should also provide a certain level of clarity. In order to achieve that, a non-exhaustive list of examples could be used, and might be included within the instrument. The distinguishing characters of TCEs, namely "intergenerational", "maintain" and "develop", should be kept as a part of the definition. The LMCs maintained their view that the protection granted by the instrument(s) should also extend to the publicly available or widely diffused TK and TCEs. In that connection, the LMCs recommended that the issue relating to criteria of eligibility be removed from the subject matter of protection. On the issue of beneficiaries, it was imperative to address the role of the State. Such a role was essential, as there were certain circumstances in which TK and TCEs could not be specifically attributable to a particular local or indigenous community. That usually occurred when TK and TCEs were not specifically attributable or confined to a local community or indigenous community, or when it was not possible to identify the community who had generated them. Under those circumstances, the LMCs suggested that the provision on beneficiaries included the State as an administrator and as a beneficiary. With regard to the scope of protection, there seemed to be converging views that emphasized the need to safeguard the economic and moral interests of the beneficiaries. For that purpose, determining

a standard on certain levels of protection that accommodated the rights granted for each TK and TCE would ensure that safeguarding was achieved. The safeguards put in place should take into account the nature of the rights according to the level of diffusion of the TK and TCEs. Regarding exceptions and limitations, it would be essential to ensure that the provisions were not too extensive in order to ensure that the scope of protection was not compromised. It was necessary to bear in mind the different kinds of protection granted with respect to TK and TCEs, so as to ensure they were not breached. The LMCs reiterated their firm position on convening a Diplomatic Conference in 2015, with a view to adopting a legally binding instrument(s) that would provide effective protection of GRs, TK and TCEs. The Delegation expressed its confidence to the Chair and the Vice-Chairs' guidance of the discussions, so as to enable the Committee to make progress on the draft texts on TK and TCEs.

41. The Delegation of Japan, speaking on behalf of Group B, thanked the Chair for his ongoing efforts and dedication as Chair of the IGC. It was confident that the Committee would be able to make progress under his leadership during the present session. It believed in the importance of safeguarding GRs, TK and TCEs. It reiterated that the protection of those subjects should be designed in a manner that did not create adverse effects on innovation and creativity, which were the basis of development. It reiterated that any instrument on the protection of TK and TCEs should be flexible in its implementation and sufficiently clear. It welcomed the cross-cutting segments which could shed light to the common issues between TK and TCEs, and provide room to step towards coherent solutions on those issues. Although TK and TCEs were different subjects, and should be dealt with respectively on equal footing, it would be useful to examine the cross-cutting issues in relation to TK and TCEs at the same time, upon which the Committee could advance its further work on the respective issues. The Delegation thanked the Chair's effort to prepare his non-paper as contained in WIPO/GRTKF/IC/27/INF/10. The non-exhaustive four elements listed by the Chair in paragraph 4 of that document could form the main part of the issues to be discussed at the cross-cutting segments. Many Member States had repeatedly insisted on the meaning of "traditional" as well as the beneficiaries of the protection as fundamental issues to be tackled first. The nature of the right was a basic concept to be agreed upon as a basis for the possible international legal instrument(s). The treatment of publicly available and/or widely diffused TK and TCEs was one of the critical elements in developing an effective international legal instrument or instruments that would avoid adverse effects on innovation and creativity. Those elements could also be expanded to a discussion on the relationship between the level of the protection and the nature of TK and TCEs. Through the frank exchange of views that took place at the ambassadorial/capital-based official meeting during IGC 26, the feeling had been shared that the IGC had already accomplished some progress in exploring national practices and clarifying differences in positions through text-based negotiation during the past biennium. At the same time, one faced the reality that there were divergent and sometimes conflicting views that were reflected in the current draft texts of the international instruments, due to the lack of common understanding on policy objectives and guiding principles. The Delegation strongly believed that the exercise during the cross-cutting segments could contribute to establish the basis for common understanding on policy objectives and guiding principles. It reiterated its belief that text-based negotiations, complemented by analysis that would focus on specific examples of national situations, measure as well as common language, would contribute to further progress. The importance of discussing specific examples could not be overemphasized in the context of the cross-cutting discussion. Group B remained committed to contribute constructively in order to achieve a mutually acceptable result.

42. The Delegation of Pakistan thanked the Chair for his non-paper. It said that its country attached great importance to TCEs and TK. Since times immemorial, those issues had played a significant role in its culture and influenced all aspects of its people's life. The present global intellectual property ("IP") system dated back to the industrial revolution and the adoption of the Paris Convention for the Protection of Industrial Property ("The Paris Convention") and Berne Convention for the Protection of Literary and Artistic Works ("the Bern Convention") in response to a need for protection of IP. The human intellect, however, had not started at that point, but

had existed much before. Developing countries over the last two centuries had made less progress compared to the industrial world. That did not, however, mean that what they had been developing during those immemorial times were not worth protection. The Delegation believed that the global IP system would remain inadequate until it addressed the issue of protecting cumulative subject matter. It put forward the example of the *peshawari chappal* produced by the people of Charsadda in Pakistan for centuries, that had been marketed for twenty times its original cost as "Robert", the only visible difference it said, being the addition of a neon pink stripe. After immense criticism in social media, admission was made that the "Robert" was "inspired by the *peshawari chappal*. If Facebook and the common man could achieve this, Member States could achieve much more, would they so decide. Disparity in development or lack of awareness should not, and must not, lead to misappropriation. There was a need to address misappropriation of traditional assets all over the world through the establishment of instruments which guaranteed benefit-sharing and free and prior informed consent ("FPIC"). The Delegation looked forward to meaningful and productive discussions during the session and hoped that the Committee would make tangible progress.

43. The Chair noted that the Delegation of Pakistan referred to a concrete example, echoing thereby a recommendation made by the Delegation of Japan on behalf of Group B. He pointed out that as work progressed, it might be useful to think about how to address practical considerations. He emphasized that the legal instrument or instruments that were being negotiated should be conceived as living and practical tools for the purposes for which they were intended. He recalled the Hippocratic Oath: "Do no harm".

44. The representative of CEM-Aymara, speaking on behalf of the Indigenous Consultative Forum and the Indigenous Caucus, reminded Member States that TK and TCEs were parcel of the culture of indigenous peoples and that their value went beyond being just market goods. She believed that the content of the TK and TCEs texts confined protection of TK and TCEs to national legal frameworks that already existed. These IP legal frameworks did not do much to recognize the rights of indigenous peoples pursuant to the UN Declaration on the Rights of Indigenous Peoples ("the UNDRIP") and the Convention 169 of the International Labour Organization ("ILO"). In order to make progress towards an agreement on those documents, she recommended that legal frameworks be amended at a national level to recognize the rights of indigenous peoples over their TK and TCEs. Reversely the texts on TK and TCEs should include that aspect as well. By way of example, by excluding indigenous peoples from participating in the determination of the national entity in Article 2, one excluded the right to self-determination of indigenous peoples as to how their TK should be protected. The issue of beneficiaries was a very important subject. The term "indigenous peoples" was consistent with the rights of indigenous peoples, and therefore, should be used in all documents dealing with GRs, TK and TCEs. Any other term should be avoided, in particular the term "nation", because it could be confusing. No other entity should be considered as beneficiary of the TK of indigenous peoples. Misappropriation and misuse in the context of IP referred to the granting of rights without the FPIC of the indigenous peoples, as holders of rights, and equitable benefit-sharing under mutually agreed terms ("MATs"). With regard to participation, Member States had the obligation of promoting good faith consultations before the adoption of legal or administrative measures that could affect the lives and culture of indigenous peoples. Broad, full and effective participation of indigenous peoples in the IGC process was indispensable for devising an international instrument which would tally with the international legal framework regarding the rights of indigenous peoples. If the Voluntary Fund did not have resources to support the participation of indigenous peoples and local communities, what legitimacy would have the instrument to be defined in the IGC without the participation of the indigenous peoples? With regard to the scope of rights, a rights-based approach should guide deliberations. The rights of indigenous peoples already recognized in treaties and other international instruments, such as the UNDRIP and the ILO 169 Convention, should not be jeopardized or undermined. The text of the future instrument should recognize that the indigenous peoples were the holders and owners of exclusive and sovereign rights to maintain, control, protect and develop TK and TCEs. The creation of an international legal instrument to

protect TK and TCEs, that were part and parcel of their identity and cultural heritage, should be consistent and compatible with the traditional uses and customary law, and should not go counter to the freely expressed will of indigenous peoples regarding the necessary measures to safeguard their TK and TCEs. In order to ensure the respect of the rights of indigenous peoples, those should be able to control and administer their TK and TCEs. Member States were urged to attain that goal, so that the legitimate rights-holders be identified, and FPIC be respected through MATs. If TK and TCEs were erroneously placed in the public domain, indigenous peoples should still be the rights-holders and have the right to compensation.

45. The Delegation of the Czech Republic, speaking on behalf of the CEBS, was confident that the Chair's continuing leadership and expertise would guide the Committee towards a fruitful result at the end of the session. It thanked the Chair for his effort to steer the cross-cutting issues by having issued his non-paper. However, the CEBS were yet to digest its content. The Delegation recalled that the work that had been done so far by the Committee was a solid basis to continue constructive efforts to achieve its common goals. It was aware of the significant number of issues that required due consideration. However, in the fields of TK and TCEs, it seemed to be difficult to find a consensual agreement as to objectives, definition, concepts such as misappropriation, scope of beneficiaries, and the scope of protection, etc. It hoped to make progress on those issues at the present session. It pointed out that one of its main concerns related to the proposed binding character of the negotiated instrument or instruments as regarded TK and TCEs. The CEBS continued to consider it reasonable and productive to first achieve a consensus on the policy objectives, related intrinsic values and required results. Only after that, efforts should be devoted to refining the final wording of the negotiating text to be submitted to the GA for its decision. It welcomed the methodology suggested by the Chair for the present session. It was convinced that the cross-cutting exercise would bring significant progress in the discussions. Although the texts regarding TK and TCEs should remain separate, a number of parallels between the issues were noticeable. The Delegation reiterated that, in the interest of an agreeable solution to all parties, a right balance between the effectiveness of protection and the flexibility of the negotiated instruments was needed. The CEBS was committed to cooperate and actively participate in the discussions of the Committee and believed that the work of the IGC would be carried out in a pragmatic and efficient manner.

46. The representative of Tupaj Amaru acknowledged the submission by the Chair of a non-paper on cross-cutting issues. However, he felt that the opening-up of the issues identified in the non-paper would divert attention from the substantive debate on the binding international legal instruments.

47. The Chair re-emphasized that his non-paper had no standing and that it would be withdrawn were it to become an issue for debate on its own, in order to avoid any diversion from the key issues under discussion.

48. The representative of Tupaj Amaru stated that the non-paper by the Chair should be withdrawn and that the Committee should consider the draft text that he had submitted already in 2011.

49. The Chair asked whether any delegation supported the suggestion made by the representative of Tupaj Amaru. He noted that there was none.

50. The representative of Tupaj Amaru maintained the draft text that he had submitted in 2011. He noted that Article 1 of the TK text, on protected subject matter, had been replaced by eligibility criteria. He did not understand how a subject matter could be defined, while another article could be established to rule out the protection of that subject matter. There seemed to be a contradiction. The criteria of eligibility should be withdrawn. The beneficiaries could only be the holders and creators of TK, and those were the indigenous peoples, not the states. Regarding the scope of protection, he had presented a list of what should be protected. He

pointed out that an instrument that had no implementation mechanism was pointless and merely declaratory. Regarding the methodology for the present discussion, he said that the continuation of the present discussion in expert groups and behind closed doors, and the development of revised versions of the texts by facilitators and Friends of Chair alone were undemocratic. He stated that the plenary was the entity that had the power to discuss, amend and draft documents.

51. The Chair recalled that the plenary was in control of the whole process and that the methodology and structure of the negotiating process for the present session had been agreed by all participants. The format of the expert group and the open-ended character of the informal informals were designed to cope with space constraints and ensure efficiency. The Chair recalled that the expert group proceedings were channeled live in three languages into three different meeting rooms for all participants in order to ensure full transparency.

52. The Delegation of Canada thanked the Chair for his non-paper on cross-cutting issues. It reiterated its strong interest in preserving a robust public domain, as it played a critical role in promoting creativity and innovation. It was of the view that subject matter that was currently publicly available and that was not, could not, or was no longer protected by an IP right ("IPR") should not be protected under those instruments. With respect to misappropriation, it invited delegations to think outside the box. A key question was: "What is it that we all want to prevent, and how do we prevent this in a way on which we can all agree?" Part of the answer could be found in mechanisms and policy approaches that did not collide head-on with the IP regime or with other existing laws for that matter. For example, countries might have put in place measures, under their competition law or elsewhere, addressing false or misleading representations. The Delegation believed that there was one cross-cutting issue missing from the list, namely the rights and interests of third parties, including users. That fundamental issue was addressed in Article 6.8 of the TK text and Article 5.4 of the TCEs text. It was of the view that the IGC could not develop international instruments without considering the interests of those that would be affected by those instruments. Insofar as the Committee was looking at cross-cutting issues relevant to TK and TCEs, those issues were also relevant to consideration of the treatment of TK associated with GRs in the GRs text, because it was a subset of TK.

53. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the Chair for his continued able stewardship of the process. It fully supported the objective of a balanced approach towards the subjects discussed and acknowledged the importance of GRs, TK and TCEs and the role they played in the cultural and natural heritage. The EU and its Member States had demonstrated their engagement and flexibility in the IGC process. They had proposed a mechanism under which they could contemplate agreeing a requirement to disclose the origin, or source, of GRs in patent applications. That did not mean that they could accept any form of disclosure requirement, but one having a specific form with safeguards existing as part of an overall agreement to ensure legal certainty, clarity and appropriate flexibility. A disclosure requirement which discouraged, or created legal uncertainty in, the use of the patent system would not facilitate the sharing of benefits, and would not be in any party's best interests. If that was achieved, and in accordance with their position expressed in document WIPO/GRTKF/IC/8/11, the Delegation could eventually consider a mandatory requirement in that regard. However, the components of the IGC were complex issues with potentially far-reaching ramifications. It was imperative that the IGC got things right. This could only be ensured if the work of the IGC was guided by solid evidence of the implications, and feasibility, in social, economic and legal terms. The Delegation noted that, especially in relation to TK and TCEs, there was an absence of evidence of the effect the instruments under negotiation would have on stakeholders, be they holders, users, or society at large. Many members of the IGC would see its work as being to develop *sui generis* IPRs which afforded economic protection, and the right to exclude others, for knowledge and cultural expressions that were deemed "traditional", regardless of whether that knowledge or those cultural expressions were in the public domain. If one built such a system, it would be on a paucity of national experiences and little clear view of the potential effects. Evidence that the

contemplated measures would encourage innovation and creativity, while safeguarding the rights of not just indigenous but all peoples in society, should be the foundation upon which the work of the IGC proceeded. The Delegation pointed out that it did not see that such evidence had been presented. This was probably one of the reasons why, despite many years of work, the Committee had not yet been able to establish even common objectives for its work. Against that background, it was becoming increasingly clear in its view that the IGC would not succeed in balancing both a better recognition of TK and TCEs and safeguarding existing freedoms and the public domain, if it continued working in the context of binding instruments. The Delegation proposed that other, non-binding, solutions should be considered. From an IP perspective, actions including raising awareness and encouraging use of the existing national legal frameworks, including the patent, trademark, design and copyright systems, and improving access to those frameworks to safeguard both TK and TCEs could be usefully explored, and would provide important progress compared with the *status quo*. Such an approach could sit usefully alongside encouraging uses which did not disrespect the cultural norms and practices of holders. The Delegation clearly reaffirmed its commitment to the IGC process, and fully supported and committed to continued negotiations in which it would engage constructively and with appropriate representation. However, the work of the Committee should not continue down a blind alley, but had to be pragmatic, efficient, guided by economic evidence, clear objectives and a clear picture of the likely effects.

54. The Delegation of the Islamic Republic of Iran associated itself with the statement of the Delegation of Indonesia on behalf of the LMCs. The non-paper submitted by the Chair was thoughtful and informing. It would be beneficial to the progress of negotiations and, by expediting the work of the Committee, could serve the mandate of the GA. The Delegation pointed out that a direct and interactive comparison between the TK and TCEs texts would be imperative. The issues identified in the non-paper deserved more attention and discussion in an informal setting. The non-paper distinguished accurately between the concepts of protection, and preservation, safeguarding and promotion of cultural heritage. Any element that could bring clarity to the concept of protection could be identified as a cross-cutting issue. Another cross-cutting issue which deserved more in-depth discussion was the sanctions, remedies and exercise of rights, which could be discussed under the umbrella of enforcement. That matter had been identified in the non-paper among the other issues to be considered. Enforcement procedures should be available to permit effective action against misappropriation and misuse of TK and TCEs, and to constitute a deterrent to further infringement of rights by misappropriation and misuse. Without having a meaningful and robust enforcement procedure, including reasonable compensation in the event of misuse and misappropriation, the beneficiaries would not be able to protect and enforce their rights and the validity of the IP regime which the Committee was seeking to establish in order to ensure the legal and effective protection of TK and TCEs would be put under question. The Delegation stressed that the availability of enforcement procedures was therefore imperative. The detail of those procedures could be determined in the national level, following the methodology which was recognized and used in the Trade-Related Aspects of Intellectual Property Rights Agreement of the World Trade Organization ("the TRIPS Agreement"). It was deplorable that the IGC had not been able to meet the GA mandate in holding a Diplomatic Conference. The Delegation acknowledged that it would be difficult to reach agreement on all identified divergences. Therefore, to fulfill the GA mandate and establish a legal international framework for the effective protection of TK, TCEs and GRs, the Committee should draw a lesson from other norm-setting processes, namely the TRIPS Agreement and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biodiversity ("the Nagoya Protocol"). While agreeing on specific principles and standards as minimum standards for protection, the instrument(s) should preserve policy space for countries in the national level to devise implementing those principles and standards consistent with their national law. For example, while accepting a definition for beneficiaries which could circumscribe the potential beneficiaries, the Committee would recognize the role of each state in identifying the beneficiaries under its jurisdiction. Based on this methodology, endless discussions on any list of beneficiaries could be avoided. The Delegation agreed with

paragraph 43 of the non-paper of the Chair that matters be left at the national level according to the national situation.

55. The Chair intervened and recalled that he did not wish to have a discussion on the non-paper as such.

56. The Delegation of the Islamic Republic of Iran followed up on its statement and believed that introducing the concept of public domain in the discussion might not be compatible with the nature of TCEs and TK. Alternative concepts to bring balance between private rights and public interests could be discussed. It was committed to engage constructively in informal discussions, with a view of reaching agreement in the identified cross-cutting issues which could bring expeditious solution for existing differences.

57. The representative of the Health and Environment Program supported the statement delivered by the Delegation of Kenya on behalf of the African Group. She congratulated the representative of CEM-Aymara, who spoke on behalf of the Indigenous Consultative Forum and the Indigenous Caucus, for the good quality and solid arguments that she put forward to create value for the indigenous peoples of the whole world. A specific mechanism on how people could benefit from the forthcoming protection to be established was essential.

58. The Delegation of Uruguay, speaking on behalf of the Latin American and Caribbean Group of Countries ("GRULAC"), recalled, as it already indicated during the ambassadorial/capital-based official meeting that took place during IGC 26, that GRULAC considered crucial to reach an outcome that would prevent further cases of misuse and misappropriation of TK, GRs and TCEs, and allow to change a situation which was detrimental to its country members, since they had a great wealth of biological and cultural diversity. The non-existence of an international legal instrument had facilitated misappropriation, which took place in some places without the prior informed consent ("PIC") required by national laws. It was essential for GRULAC to include the requirement of disclosure of origin in the texts to be discussed, so as to have a balanced international legally binding framework. Legal certainty would not be reached without discussing what the Committee wanted to protect, the levels of rights that the Committee wished to grant, and the limitations and exceptions to be included to avoid undesirable effects. While the Delegation recognized that the discussion of examples might contribute to making progress on the texts that would only be effective if the Committee considered the joint treatment of those three important parts of the instrument: definition of the concept, scope of rights, and limitations and exceptions. With respect to the definition of TK, it was in favor of a broad definition which gave flexibility to national legislations and which could be applicable bearing in mind the particularities of the different cultures and legal systems among Member States. The Delegation considered suitable, in order to provide guidelines for those who would have to implement the protection, to have a non-exhaustive list of examples of TK. A similar treatment would grant a degree of certainty to the TCEs text and could benefit from progress made in the TK text.

59. The Delegation of Trinidad and Tobago thanked the Chair for his non-paper and aligned itself with the statement made by the Delegation of Uruguay, on behalf of GRULAC. It congratulated the Chair on the way he had infused fresh zeal into the prior IGC sessions that he had chaired. It emphasized its appreciation of the work that had been done at the Bali Consultative Meeting. Trinidad and Tobago had been represented at the meeting and was extremely pleased at the potential progress without prejudice made that hopefully could be built upon at the present IGC. The Delegation thought that it was not too early to predict the "fruitful ripening" of the long process with respect to TKs and TCEs. There was still some way to go, but the Bali Consultative Meeting had made potential pathways to a successful outcome clearer. The Delegation was optimistic that the same approach would yield tremendous results during IGC 27. The Delegation gave its fullest commitment to working with all other Member States during the following days to bridge the gaps so that the Committee could come to more common ground, especially as it pertained to the TK and TCEs texts. There was an overlap

between TK and TCEs, so even though the current texts were separate, the Delegation acknowledged the possibility that, going forward, there might be a potential consolidation of the texts. That was definitely worth exploring. The Delegation applauded the tireless work of WIPO and the IGC in bringing the Committee to that juncture. There were certain cross-cutting issues for TK and TCEs that warranted intense focus, namely, the subject matter of protection, the extent of the rights to be granted, the beneficiaries, what would constitute publicly available TCEs and diffused TK, as well as the limitations and exceptions. With respect to the subject matter of protection for TCEs, there had been a great deal of good will and compromise among Member States thus far. The Delegation firmly supported the retention of a non-exhaustive illustrative list of TCEs in the footnote to the TCEs text. Footnotes existed as agreed statements in both the Beijing Treaty on Audiovisual Performances ("the Beijing Treaty") and the Marrakech Treaty for the Benefit of Blind and Visually-Impaired Persons ("The Marrakech Treaty"), as well as in the TRIPS Agreement, and they had their place in the draft instrument. It noted that there had been some creative compromises in that part of the text. The Delegation would continue to advocate that "works of mas" should be accommodated therein. With respect to the issue of beneficiaries, it recognized that in some countries there might not be indigenous persons, as was expressed by the Delegation of Barbados in previous IGC sessions. Member States had to challenge themselves during the session to find a workable solution to that issue, whether the right-holders be the "nation", a "national entity" or "local community", for situations where the right-holders could not be identified. Similarly, the Committee had to challenge itself to find a workable compromise regarding the issue of term of protection, or whether there should be any term of protection at all for TK or TCEs. The IGC was at a crucial juncture. An international legal instrument was beginning to take shape in all three areas. The Delegation encouraged Member States to use their collective energies to review, to improve where necessary, close the gaps, collectively draw inspiration from the successes of the Beijing and Marrakech treaties, and to see that long but richly rewarding process moving through to a successful conclusion. It was hopeful that a Diplomatic Conference on the three areas could be convened at the very least by 2015.

60. The Delegation of Peru supported the statements made respectively by the Delegation of Uruguay, on behalf of GRULAC, and the Delegation of Indonesia, on behalf of the LMCs. Regarding the meaning of "traditional", the Delegation stressed that it should not be confined to what was old or ancestral, because it formed part of cultural heritage that was constantly evolving. It favored the use of the term "intergenerational", so as to cover all levels of transmission from generation to generation. Regarding the beneficiaries of protection, it proposed the following text to be dealt with in the expert group: "The beneficiaries of protection are local communities and indigenous peoples or others that the Member State/Contracting Party defines as a beneficiary in its national legislation." Regarding the nature of the rights, it understood that "misappropriation" and "misuse" were concepts which would allow the discussion of mechanisms such as FPIC, MATs and equitable benefit-sharing for the access to TK or TCEs. What was important, apart from the definitions, was to find an effective solution to each problem. As regarded the treatment of publicly available and/or widely diffused TK and TCEs, there should be just and fair compensation systems for TK that was widely diffused, and that should be subject to national legislation. The Delegation pointed out that Article 13 of its national law included a definition that it could share at the appropriate time with the expert group. It did not support any merging of texts, because of the specific nature of TK and TCEs.

61. The representative of CISA explained that indigenous peoples of South America recognized themselves as "originary nations" that were masters of their TK. As such, they ought to be considered as the main beneficiaries of the forthcoming instruments.

62. The Delegation of the United States of America appreciated the opportunity to comment on cross-cutting issues. It pointed out that TK and TCEs were distinctly different subject matter. TK was a specific type of knowledge, whereas TCEs were specific types of creative expressions. When one discussed options for protecting TK and TCEs, some of the elements, such as the meaning of "traditional", the beneficiaries of protection and the nature of the right,

overlapped. It might be evident that overlap also existed when one discussed options for protecting TK and GRs: for example, the meaning of "associated TK", "derivatives" and beneficiaries of protection. Bearing that in mind, the Delegation undertook the discussion on cross-cutting issues in the interests of consistency and efficiency, with respect to those elements of overlap between the TK and the TCEs texts. In its view, the term "traditional" meant intergenerational in nature. In December 2013, the United States National Park Service Director signed Director's Order #77-10, establishing a National Park Service benefit-sharing policy, which included a definition of TK as "knowledge that reflects recognizable cultural patterns transmitted by a group across at least two successive generations". It noted that the term "successive" did not necessarily mean "consecutive". The Delegation believed that TCEs had to be intergenerational. In the context of an international legal instrument, it would be difficult to agree upon a precise definition of TK and TCEs, due to the wide variety of definitions that existed at the national level. It believed that the intergenerational nature of TK and TCEs was fundamental to their definitions. Beneficiaries of protection should be indigenous and local communities, those who generated, used, held and maintained TK and TCEs. Rewarding the originators of TK and TCEs would help to incentivize the generation of new knowledge and the creation of new creative expressions. Those incentives would function similar to the rewards that were provided to inventors and creators through patents and copyrights, respectively. Where TK or TCEs were not attributable to a particular community, they would not satisfy the criteria for eligibility and should not be protected. The Delegation believed that the nature of the rights would be determined by any particular instrument. At past IGC sessions, it had suggested a definition of misappropriation in the context of TK and GRs. It suggested modifying that definition to work in the context of TK and TCEs, and GRs, as follows: "Misappropriation is the use of GRs, TK, and/or TCEs of another where the subject matter has been acquired by the user from the GRs, TK, TCEs holder through improper means or a breach of confidence and which results in a violation of national law in the provider country. Acquisition of GRs, TK, TCEs from the GRs, TK or TCEs holder by lawful means such as independent discovery, independent creation, reading books, receiving from sources outside of intact traditional communities, reverse engineering, and inadvertent disclosure resulting from the GRs, TK or TCEs holder's failure to take reasonable protective measures is not misappropriation." It noted that the term "misuse" had specific meaning in the context of unfair competition. For example, when the IP owner attempted to improperly extend the scope of the IPR or violated antitrust laws. That term could create confusion in the TK and TCEs context, if the Committee was to assign a separate meaning to it. Alternatively, the Delegation suggested that the term "unauthorized use" be used for greater precision and clarity. It believed that publicly available and widely diffused TK and TCEs did not lend themselves to protection by exclusive rights. Also, the origin of those TK and TCEs might be difficult to trace. For example, Italian sailors used to wear heavy blue pants. French manufacturers sought to produce those pants using local production techniques and materials. United States manufacturers then improved upon that fabric, and used the fabric to make what became eventually blue jeans for use by gold miners in California. Granting exclusive rights to blue jeans might have a devastating impact on many current blue jeans manufacturers. While the origination of blue jeans in the United States of America could be traced to a private company in about 1860, if the method of making denim and blue jeans was TK, what community did it belong to? Would that be the Italian community, whose sailors wore blue pants or the French community that produced a sturdy fabric, emulating the Italian pants, or would that be the company from the United States? The Delegation believed that objectives and principles related to TK and TCEs were necessarily related to the underlying subject matter. TK was a distinct subject matter from TCEs. Therefore, all of the objectives and principles of TK and TCEs might not be consolidated or combined. For example, one objective related to TK might be to provide appropriate prior art to patent offices, to allow patent examiners to make proper and informed decisions regarding the granting of patents. That objective would not be relevant to TCEs. Likewise, an objective relating to TCEs might be to prevent protected TCEs from being used in a manner that misrepresented the source of the good bearing the TCEs. That objective would not be relevant to TK.

63. The Delegation of Egypt thanked the Chair for his non-paper and acknowledged that he had dealt very skillfully with the subject. The Delegation recalled that, during the first session of the IGC, it had already pointed out that some subjects overlapped. Those were currently called "cross-cutting issues". It noted that the terms "folklore" and TCEs were being used as if "folklore" was something different from TCEs, which was not the case. The Delegation stressed national terms might be used alternatively as equipollent to "traditional knowledge" and "traditional cultural expressions". In Egyptian and Arab culture, one spoke of "popular traditions". That term encompassed both TCEs and TK, because there was a very close relationship between them. It fully supported the statements made by the Delegation of Kenya on behalf of the African Group and by the Delegation of Indonesia on behalf of the LMCs. It noted that the term "indigenous" was irrelevant in some countries. This remarked was not directed against indigenous peoples, and the intention was not to deny that they had rights over their own TK or TCEs in other countries. The Delegation strongly disagreed though that protection should only be granted to indigenous peoples, because there were also non-indigenous peoples that equally deserved full respect. With regard to the process, the Delegation was concerned that the IGC was turning in circles. It deplored that every time the IGC took a step forward, new issues had been raised that dragged it backward. It reminded that the mandate of the IGC was to try and enhance the well-being, properties, and culture of peoples. Commitment was needed to protect those who created TK and TCEs, and enable them to continue to create as well as to receive some form of compensation for such creation.

64. The Delegation of China noted that despite the efforts made in previous IGC sessions, the basic articles still reflected divergent views. It deplored that IGC was still far from coming up with one or several international instruments. During its discussions, the IGC should take into consideration, not only the interests of the users, but also the interests of the creators. The Delegation reaffirmed its will to participate actively and in a flexible way in the discussion. It was very much encouraged by the Chair and hoped that all sides would likewise participate constructively, so that the IGC could be completed its work soon.

65. The Delegation of Japan attached great importance to the issues of TK and TCEs. It reminded that it had been actively and constructively engaged in discussions on these issues over the years. Due recognition should be given to the progress that the IGC had made so far. It should be acknowledged as well that, despite a long history of discussion, the IGC had not been able to find common ground on the fundamental issues yet, namely on policy objectives, guiding principles, subject matter of protection and beneficiaries. The depth of understanding among the Member States of the IGC on those issues was still insufficient for any kind of agreement at an international level to be formed. The ambassadorial/capital-based official meeting of IGC 26 discussed fundamental issues and the IGC should not be afraid of going back to them. Such discussion would hopefully enable the IGC to overcome the divergent views and reach a shared understanding on the subject matter of protection and the beneficiaries of protection. In this regard, as a first step to find a way out of the current situation, the Delegation welcomed the opportunity to deepen its understanding of cross-cutting TK/TCEs issues, such as the meaning of "traditional", the beneficiaries of protection, the nature of protection, and the treatment of publicly available and/or widely diffused TK/TCEs. It suggested that at this session, the IGC should focus on finding at least the minimum scope of the subject matter and beneficiaries of protection, which all Member States could agree on. Each Member State might have defined this scope in a very different way, but at the same time, the IGC should have endeavored to find a common denominator to which no one could deny the necessity of protection. The Delegation was also convinced that concrete examples of national experiences and practices could help the IGC drawing a line between "traditional" knowledge and "traditional" cultural expressions on one hand, and "contemporary" knowledge and "contemporary" cultural expressions on the other. Regarding the first two cross-cutting issues, namely the meaning of "traditional" and the beneficiaries of protection, it indicated that the issues were linked to each other. Intangible cultural heritage such as practices, representations, expressions, knowledge and skills which were transmitted from generation to generation by communities, including but not limited to indigenous communities, were to be

safeguarded by the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. The Delegation reminded that Japan, in turn, designated and registered for safeguarding particular traditional craftworks and intangible cultural heritages present on its territory under this Convention. One example of such intangible cultural heritage of Japan was Japanese cuisine, which had attained growing popularity worldwide. It was recently added to UNESCO's Intangible Cultural Heritage List, as French cuisine and Turkish cuisine had been inscribed. While it welcomed such an addition to the UNESCO's list, it considered it problematic if Japan started to assert its right to demand that licenses be issued every time a cook served Japanese cuisine, based on the single fact that it had been transmitted inter-generationally in Japan and had the characteristic of being "dynamic and evolving". The Delegation asked who would want a world in which Japan asserted its rights over its unique culture such as *manga*, *anime* and *karaoke*. In view of this, and in order to find common ground on what IP-like protection, if any, should be awarded to TK and TCEs, the Delegation proposed confining such potential TK and TCEs protection to a specific narrow scope that might be a good start with the view to testing the concept. In this regard, building upon the internationally shared concept under the UNDRIP, which had been the main topic of the indigenous panel at this session, the Delegation encouraged Member States to first devote all their attention to the consideration on a case in which, only indigenous peoples and local communities were assumed as beneficiaries, and to foster a better understanding as to the subject matter and the scope of protection thereunder. After Member States reached a certain consensus on the subject matter and the scope of protection of indigenous peoples' TK/TCEs, the IGC would then be able to move to the next phase and discuss how far such protection could be adequately expanded for the sake of safeguarding TK and TCEs, that have been passed on over generations within a certain community, and were not necessarily linked to indigenous peoples. If the IGC limited the beneficiaries to indigenous peoples, a clear and precise definition for the term "traditional", even so for "TK" or "TCEs", might not have been necessary, as long as the scope of indigenous peoples was clear and, consequently, as long as the scope of knowledge or cultural expressions to be protected was determined by the context in which such knowledge or cultural expressions had been passed on by indigenous people from generation to generation within their communities.

66. The representative of the Tulalip Tribes referred to the statements made by the Delegation of Canada and the Delegation of the United States of America. The representative underscored that his intervention aimed to focus on the issue of the public domain and publicly available or widespread TK and TCEs. On these cross-cutting issues, he posed several questions in order to understand the position of those Delegations. First, the representative asked what the actual threat to the public domain of protecting TK and TCEs was and what potential for creativity and innovation was harmed if these were protected. He aligned himself with the statement made by the Delegation of the EU, in believing that evidence of these threats was needed and indicated that he could provide ample evidence of the harm the public domain had had on indigenous peoples and local communities. Secondly, the representative expressed the need for a clarification of the third-party rights that were being referred to and asked whether these were existing third-party rights or prospective third-party rights. He noted that if prospective rights were being argued, it seemed like it was argued that the interest of, for example, a publishing industry to maintain access to one kind of subject matter that it would like to publish in the future, would outweigh considerations of harm, offensiveness or desires to keep traditions private and controlled through FPIC. He further asked whether there was any evidence of the potential harms of protection relative to the vast volume of information already in the public domain. The representative stated that he had pointed out again and again that there were already vast amounts of information in the industrial property system. There were all sorts of cultural information that could not be classified as TK that was available for creativity and innovation. The representative aligned himself with the position of the Delegation of Indonesia on behalf of the LMCs in that, exceptions and limitations should not be extensive and thereby compromising the scope of protections that could be offered. Any exemptions and exceptions should be carefully crafted and could be made without necessarily referencing the public domain. The experiments towards extending protection should not have started with

such expansive categorical exclusions of the recognition or granting of rights.
The representative declared being open to talk about issues related to publicly available and diffused TK and TCEs and the public domain, but believed that potential rights should not be preempted. The IGC should have looked at the principle of proportionality as well as balance, and remembered the fact that this was in many cases minorities against vast majorities. Regarding the failure to take precautions as a reason for not granting protection, the representative noted that this required some explanation because the meaning of this was unclear. It was a real problem, as indigenous peoples and local communities were not necessarily aware of, or skilled in this. They were not used in the brick-and-mortar organizations of industrial organizations that held vast IP and had numerous legal advisors advising them how to protect it. The representative offered the example of *pueblo Kiva* in the United States of America. In 1984, an airplane flew over the *Kiva* and took pictures down into the hole in the top of the Kiva of a sacred ceremony, and then published the picture. At that time, the law said that the air space was free and that if the group wished to protect their ritual, they should cover their Kiva. The representative asked whether the failure to take precautions was meant as the same kind of request. If it was requested that traditional practices were changed in order to accommodate the existing IP system, he stated having some issues in relation thereto. Finally, in the example of the blue jeans, the representative asked whether there was a difference in the methodology of blue jeans *versus* the rituals and ceremonies that may have been used since time immemorial, and where there may be deep spiritual issues associated with the practices and issues of cultural identity and integrity. He wondered whether the IGC should be putting all of these examples in the same box. There seemed to be a range of ways in which the cultural practices were attached to other matters. It was pointed out that there was a spectrum of TK types, a spectrum of TCEs types, and there might be a spectrum of rights in limitations and exceptions associated with each. The representative declared being open to discussing this and figuring out if the IGC could find some ways around this impasse. Noting the he did understand the issue of distant chains of provenance, he proposed "reasonable person, due diligence" requirements as one way to get around it.
The representative had many examples where a reasonable person could be expected to take the due diligence to discover certain kind of origins and provenances of things, but might be able to find some exemptions for these very difficult and long and distant chains.

67. The Delegation of Brazil aligned itself with the statements made by the Delegation of Indonesia on behalf of the LMC's and the Delegation of Uruguay on behalf of GRULAC. Regarding the suggestions presented by the Chair on cross-cutting issues, namely the concept of "traditional", nations or states as beneficiaries of protection and the nature of rights, the Delegation made some preliminary remarks. Regarding the concept of "traditional", it stated that a discussion on the meaning of the term "traditional" may not be an easy way to achieve progress in the discussions. It highlighted that other instruments that dealt with TK, such as the Nagoya Protocol and the Convention on Biodiversity ("the CBD") avoided defining the term traditional. The decision not to define this term was instrumental in achieving consensus in the CBD and the Nagoya protocol. The Delegation highlighted four common elements in both texts regarding the term "traditional". These elements were, firstly, production and transmission by indigenous peoples and local communities; secondly, transmission from generation to generation; thirdly, written, qualified oral or other forms; fourthly, existence in a collective context. These elements, as well as others that were aimed at defining the subject matter of protection, could have been included in Article 1 of the TK and TCEs texts. The Delegation reserved its right to contribute to the discussions of the other three items during the expert group. Regarding proposals put forward by some delegations regarding the meaning of the term "misappropriation", the analysis of possible common aspects between GRs and TK was outside of the scope of the mandate given by the GA to the present session of the Committee. In this regard it emphasized that any discussion of the subject should not in any way affect the good progress achieved in IGC 26 on the GRs text.

68. The Delegation of South Africa supported the statement made by the Delegation of Kenya on behalf of the African Group. It identified two issues that seemed to be emerging, which

the IGC needed to look at, at a cross-cultural level. These were the issue of protection *versus* a self-guiding approach, on the one hand, and the distinction of the instruments that fell under WIPO *versus* the instruments that fell under UNESCO and other regimes. In this regard, the Delegation emphasized the importance of focusing on the tasks that WIPO was committed to pursue. Secondly, the issue of the call for balance had emerged. This balance might have been called for between public and private, but a need had arisen for balance in terms of proportionality. Thirdly, the call for the protection of TCEs and TKs was not a call for changes within the present IP system. It was a call to enhance the IP system by being more inclusive of other knowledge systems and thereby enriching the IP system. The Delegation highlighted the importance of this point. Redress was needed, as well as a governance system that would create a democratic IP system that was inclusive of all knowledge. Equity should be pushed through. The Delegation welcomed that delegations had begun to engage each other on substantive issues and pointed out that the IGC needed to take advantage of how delegations understood other delegations' understandings of these issues. The important thing was that the IGC engage on specific issues which would create emerging clarity. The Delegation noted that emerging clarity would require from the IGC that it avoid a "winner takes all" approach. The Delegation aligned itself with the statement made by the Delegation of Brazil regarding the issue of TK. "Tradition", within conventional knowledge paradigms, would sound as the opposite of "modern" or "contemporary". This might be deceptive, since TKs and TCEs were dynamic and evolving, and were not just consigned to the past. They could be found, and were being generated in the present. The Delegation referred to another challenge arising out of this consideration. It asked to which field tradition and custom would pertain, if not to the collective area. It proposed the approach taken in South Africa, where the term "indigenous knowledge" was used because of all the pitfalls that was related with the term "Traditional Knowledge". On the nature of beneficiaries, the Delegation questioned the limitations that had been submitted, and pointed out the possibility of a broader and more inclusive approach. The Delegation pointed out that there were certain areas that appear to be consensual. The rights-based approach and the measures-based approach should be mutually complementary. It noted in the same time the strong commitment made by some delegations over the years to a rights-based approach. Concerning public available, widely diffused TK and the public domain, it was concerned that the publicly available and widely diffused TK became a back door entrance for TK to be assimilated as public domain. The Delegation wondered what the definition of public domain was, how the distinction would be made between publicly available knowledge and public domain, and who would determine what TK would be publicly available and make this distinction. Such discussion would raise new challenges. The submission of new concepts on the table would request clear definitions and a sound glossary comprising fewer words.

69. The Delegation of Sweden reiterated its position that any instrument that would come out of the IGC negotiations should be non-binding, flexible and sufficiently clear. It stated then that it would like to make further comments on the cross-cutting issues.

70. The Chair intervened and asked delegations that had expressed a preference for a non-binding instrument to clarify what they meant by "non-binding". He reminded the Committee that it was trying to negotiate an international legal instrument whose content was evolving. He wondered whether an *a priori* determination of its result as "non-binding" would not force the Committee to reconsider the course of its work.

71. The Delegation of Sweden recalled that WIPO diplomatic conferences had been used to adopt binding instruments. It explained that this was something that the Delegation would like to avoid as far as the negotiated texts were concerned. It expressed its preference for a flexible instrument that would leave sufficient margin of maneuvering for Member States themselves to determine how to implement the provisions in the texts.

72. The Chair suggested that there was, on the one hand, a difference between an instrument that afforded national flexibility and an instrument that had no capacity at all to compel. He had

noted the view, on the other hand, that the Committee should not prejudge the outcomes of the negotiations. At the same time, it was unclear to him whether or not some delegations were of the view that the forthcoming instrument could not *a priori* have any treaty-like effect, regardless of the final result. Since such a position, should it be confirmed, could make, in his view, the continuation of the present negotiations problematic, and given the fact that he had very limited latitude as a Chair in second-guessing delegations' instructions, he requested from delegations that they clarify their positions in this regard as needed, by referring back to their capitals as necessary. The Chair announced that his intention was to suspend the plenary until the next day.

73. The Delegation of Sweden stated that it was not its intention to dwell on the issue of the legal nature of the potential instruments coming out of these negotiations. The Delegation said that the issue of the legal nature was in fact an open question and emphasized that the Delegation had just stated its position on this issue. It added that it would come back to its comments on the cross-cutting issues at a later stage.

74. The Chair suspended the plenary until the next day.

75. The Chair re-convened the plenary on the next day and opened the floor for comments on TK/TCEs cross-cutting issues, giving the floor first to the Delegation of Sweden. The Chair acknowledged the presence of His Excellency, Ambassador Jan Knutsson, Permanent Representative of Sweden in Geneva.

76. The Delegation of Sweden offered the following comments regarding the cross-cutting issues. It said that misappropriation was a technical term that it did not support in the context of these negotiations. It added that this term implied a rights-based rather than a measures-based approach. It suggested instead the terms "illicit use" or "misuse". For the same reason, it preferred to use the term "safeguard" rather than "protect" throughout the text. It believed that only the indigenous peoples themselves should be the beneficiaries of the instrument. It could not support the inclusion of states or nations among the beneficiaries. The Delegation said that such inclusion would mislead the Committee from the objectives of these negotiations. The Delegation supported a rich and robust public domain as it was crucial for development, innovation and creativity in its view. It could not accept that subject matters in the public domain were withdrawn or reclaimed as an effect of any potential instrument. The Delegation supported the idea presented by other delegations that "rights of third parties" should also be considered as a cross-cutting issue." Finally, it reiterated its position that any instrument on TK should be non-binding, flexible and sufficiently clear.

77. The Chair thanked the Delegation of Sweden for its statement and took note of its position regarding the character of the instrument. In this regard, he wondered whether it would not be appropriate to dedicate time to that issue at the present session. He invited delegations that had instructions that the outcome of the IGC negotiations, whether at present or in the future, could be of only a limited character, to state so. He would then open the floor for a discussion on this issue. However, should delegations' positions not have changed, namely that they remained open to negotiations that did not prejudge the nature of the outcome, he would then understand that there would be no need for opening a further discussion on this aspect during the present session.

78. The Delegation of the Republic of Korea wished to briefly express its views on the cross-cutting issues. Regarding the definition of TK and the meaning of "traditional", it noted that defining tradition and TK was very important and that the definition had to be concise and clear cut in order to prevent future ambiguous interpretation in the process of implementation. Regarding beneficiaries, the Delegation opposed the inclusion of individuals, nations and national entities as beneficiaries since it was contrary to the definition and conditions of TK. Beneficiaries of TK and TCEs should be the indigenous peoples and local communities who have created, preserved and handed down the TK and TCEs. Regarding the publicly available

or widely diffused TK and TCEs, the Delegation believed that it belonged to the public. Retrospective protection of TK that would already be publicly available or widely diffused would for example involve huge costs for public health.

79. The Delegation of Panama supported the statement made be the Delegation of Uruguay on behalf of GRULAC. It recalled that the Republic of Panama had adopted Law Number 20 which was introduced to protect the collective rights of the indigenous peoples and their TK. Three claims or applications from indigenous peoples concerning the misuse of their TK had been submitted so far. The judges accepted their requests and the claimants benefitted from their judgments. The indigenous peoples concerned won the lawsuits, and the companies that had been denounced had to pay a large fine. The Delegation suggested that countries which did not have a law on the collective rights of indigenous peoples such as Law Number 20 of Panama develop a similar one in order to protect indigenous peoples' rights against misuse of their TK.

80. The Delegation of India acknowledged the efforts of the IGC Chair in preparing a non-paper on cross-cutting issues. He appreciated as well the submission of the summary of the Bali Consultative Meeting by its Chair. Both were useful inputs. The Delegation supported the statement made by the Delegation of Indonesia on behalf of the LMC's on cross cutting-issues based on the outcome of the Bali Consultative Meeting. It believed that, while discussing cross-cutting issues, the IGC was not attempting to develop common language for all the key articles in both the documents, but trying to resolve the divergent views resulting from common issues that found place in both documents. There might be a possibility of common language in some articles, though there was bound to be differences, particularly in the articles dealing with definitions. The central issue that was interlinked between the key four articles in both the TK and TCEs texts was the treatment of widely spread TK and TCEs. Finding solutions to the coverage of widely diffused TK would enable the IGC to resolve the divergent views expressed in determining the definition of TK and TCEs and beneficiaries. In this regard, the Delegation supported the statement made by the Delegation of Indonesia on behalf of the LMC's to specifically include spread TK and TCE's in the article dealing with definition. This could be achieved by adding "whether widely spread/diffused or not" at the appropriate place in the definitions. This would bring more clarity and also remove any doubt regarding its coverage for protection. The Delegation stated that it was the widespread misappropriation of publically available TK and TCEs that had led to the creation of the IGC as a WIPO body to discuss the protection of TK and TCEs. This was evident from the WIPO Report on Fact-Finding Missions that was published before the creation of the IGC (WIPO Publication Nr. 768E). The number of examples that had already been made available, including the one cited by the Delegation of Pakistan, was also indicative of this. The Delegation of India reiterated that the concept of the public domain, which did not enjoy conceptual clarity in the area of IP, was not the appropriate concept to determine the nature of TK to be protected. The solution for the concerns raised by some of the delegations on the free availability of TK and TCEs was not to exclude them from protection but to find appropriate remedies to those concerns, by addressing it under the articles that provided for the scope of protection and limitations and exceptions. In this regard, the Delegation welcomed the suggestion made by the Delegation of Indonesia on behalf of the LMC's to focus on the nature of TK and TCEs and their use in order to find the appropriate scope of protection. It reiterated that diffused/widely spread TK and TCEs was a definite category in this classification based on an appropriate level of protection. The Delegation was open to discuss this in order to find a viable solution. It had been the consistent view of the Delegation that limitations and exceptions should not unreasonably dilute the level of protection afforded to TK and TCEs on the ground of fostering creativity by third parties who were using it without authorization, particularly for commercial gains at the expense of right-holders of TK and TCEs. The Delegation assured the Chair of its continued constructive commitment. It reserved the right to provide further specific comments on the issues in the upcoming expert group.

81. The Delegation of New Zealand supported the interventions made by the Delegation of the United States of America and the representative of the Tulalip Tribes. It found both interventions interesting and informative. When one participant talked about jeans and another talked about sacred rituals, there was a sense of which they were talking past each other. The intervention of the representative of Tulalip Tribes alluded to this. The Delegation supported those who thought that the IGC should look more closely at whether the type of protection should vary depending on the type of TK or TCEs in question

82. The Delegation of the EU, speaking on behalf of the EU and its Member States, stated that it supported the right of the Delegation of Sweden to intervene in the IGC deliberations, and welcomed the fact that the Delegation of Sweden had been given an opportunity to do so after the suspension of the plenary.

83. The Chair stated that there had been no denial of the right of the Delegation of Sweden to intervene. The Chair said that he had exercised his right to intervene during the Delegation of Sweden's statement with a question, because an issue had arisen that he thought, as Chair, required reflection at that time. He recalled that he had interrupted other participants at previous sessions, without being denied that prerogative as a Chair. He further recalled that he had made sure that the Delegation of Sweden was able to complete its statement and make its comments on the cross-cutting issues right after the suspension of the session. He also reminded that no Point of Order had been raised against the suspension of the session until the next day. The Chair asked delegations to consider whether he had denied the right of the Delegation of Sweden to intervene. . He said that he would be ready to withdraw if that would be the case. He further invited delegations to consider whether he should discontinue his practice of intervening during participants' interventions as appropriate under the WIPO General Rules of Procedure. He reminded delegations that such discontinuation would then apply to any participant. He then suspended the plenary.

84. The Chair re-convened the plenary after a short suspension and opened the floor for comments.

85. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that it was firmly of the view that the IGC process should continue under the guidance and chairmanship of the Chair.

86. The Delegation of Egypt said that it had full confidence in the chairmanship of the Chair and thanked him for his patience throughout his term as Chair and during the last few years. It did not feel that the Chair discriminated against any delegation or any participant and noted that no participant had been denied its right to express its view under the General Rules of Procedure. It considered that it was the right of the Chair to ask questions that would facilitate progress in the IGC work. It was also the right of the Chair to interrupt anyone, should the Chair consider that the participant did not speak to the subject being discussed. It added that delegations had the right to have a Chair who would direct the discussion for the sake of the IGC's work.

87. The Delegation of Sweden recognized the right of the Chair under Rule 15 of the General Rules of Procedure to intervene if any delegation did not speak to the point of the subject matter. It was its opinion though that the legal nature of the instrument was a cross-cutting issue that concerned both the TK and TCEs texts. It considered therefore that it had been speaking to the subject under discussion. It did not question that the Chair had the right to intervene. However, it was of the view that it might be preferable if delegations would first be allowed to finish their statements, before being questioned regarding the substance of what they had said. It pointed out that questioning, by singling out one sentence, might not really capture the full intention of what that delegation wished to state. It expressed its continued trust in the Chair and his future chairmanship.

88. The representative of Tupaj Amaru recognized that the Chair had the exclusive right to interrupt a speaker when that speaker departed from the subject under discussion. He said that the representative of Tupaj Amaru was used to being interrupted for the past thirty years since discussions had started on the rights of indigenous peoples at the UN. He understood that there were rules and placed its trust in the Chair. He wished that the Chair would give the floor more often to the victims of misuse and misappropriation, namely the indigenous peoples. He wished the Chair good success in his chairmanship.

89. The Delegation of South Sudan, through Her Excellency, Nadia Arop Dudi Mayom, Minister of Culture, Youth and Sports of the Republic of South Sudan, expressed gratitude to the leadership of WIPO for inviting South Sudan to participate at the IGC Twenty-Seventh session as an Observer for the first time. The Delegation stated that additional participants were not at the session because of the situation facing the country. The Delegation appreciated and aligned itself with the statements made by the Delegation of Kenya on behalf of the African Group, and the importance of TK and TCEs were highlighted on the basis that there is no country without cultural and traditional expressions. The people of South Sudan believe in TK and TCEs, which are an important part of their life; however, they did not fully understand the significant need to recognize and protect TK and TCEs. Therefore, the risk of misappropriation was high, as anyone could adapt TK and TCEs without recognizing the role of the owners or beneficiaries. Furthermore, the Delegation highlighted the importance of the four cross-cutting issues that were identified in the Chair's non paper and supported the document. Member States were invited to hold a debate that would be based on mutual respect and understanding in this regard. Regarding the meaning of nation or state, the Delegation noted that Nations should be taken broadly and should not be limited to indigenous peoples and local communities. As an example, the people in South Sudan live in harmony with each other and they could not be differentiated except by their specific traditional cultural heritage. The Delegation concluded by acknowledging the work of WIPO since the organization was established, and pointed out that in the absence of laws and policies in South Sudan, the country is working to put systems in place and hoped to join the organization soon; and in that regard, the new country needs support. The Committee was also assured that South Sudan would work hard to become an effective Member State in order to promote and protect the rights of her people in terms of obligations and benefits.

90. The Chair thanked the Delegation of South Sudan for its statement and wished South Sudan every success in its efforts to advance in IP protection and further engage with WIPO.

91. The Delegation of Angola drew the attention of the IGC participants to the fact that, apart from the participation of Angola in the work of the IGC and its cooperation at the regional level regarding the protection of TK, TCEs and GRs, namely in Cameroon and Botswana recently, Angola had regularly participated in the International Fair of Science, Technology and Innovation in Nuremberg, Germany, where Angola had received several awards. The Delegation of Angola requested that the IGC negotiations find an expeditious and appropriate solution in order to protect the concrete interests of traditional and local communities that developed TK and TCEs. It aligned itself with the statement made by the Delegation of Kenya on behalf of the African Group concerning the overall approach of the African continent.

92. [Note from the Secretariat: the following statement was submitted in writing.] The representative of Tupaj Amaru said that Article 2 of the Vienna Convention on the Law of Treaties, approved on May 22, 1969, stated, with regard to the nature of binding instruments, that “Treaty” meant an international agreement concluded between States in written form and governed by international law. He added that those delegations which insisted on the primacy of national constitutions should remember that international treaties took precedence over the national constitution of the State signatory to the instrument concerned. He said that one good example of this hierarchy was the Maastricht Treaty of 1992 that created the European Union, a text which, he said, overrode the national constitutions of the EU Member States.

He emphasized that binding instruments, including treaties, conventions, pacts and agreements, established provisions which had been expressly recognized by the contracting States and which created a legal obligation before the international community. In his view, non-binding instruments, mainly made up of declarations, such as the UNDRIP, the Resolutions of the Human Rights Council and the UN guidelines and principles concerning transnational corporations, did not involve any legal obligation on the part of the State Parties. He recalled that the process by which treaties were approved and entered into force was made up of three main stages: the negotiation, authentication, signature and ratification of the text. However**,** he added that efforts by the international community to set up a legal basis for the new international economic order must take into account the need for an international instrument for the establishment of international legal regulations governing the activities of transnational corporations and pharmaceutical and agro-industrial companies in the market economy. He said that in a lawless world marked by an absence of morals, growing chaos and violence and wars of aggression over the division of natural resources, the lack of an international legal framework capable of guaranteeing the protection of TK was felt more keenly than ever. He added that various factors underpinned the need for a binding international instrument. From a material and spiritual point of view, biological diversity and TK were essential to the survival of mankind, in particular with regard to the balance between man and nature, playing a vital role in supporting all life on Earth. Biological resources and associated TK involved an infinite number of living organisms and other forms of life that had been in a state of permanent transformation for millions of years and that now, more than ever, were under threat of extinction owing to bio-piracy and bio-prospecting. He put forward a definition of what was bio-piracy. He said that it referred to the illegal and unpaid access to and use of biological resources and their derivatives, as well as of the associated TK of indigenous peoples, in violation of the provisions of the CBD, by misusing IP, with the aim of claiming exclusive rights over said resources and their derivatives. Bio-piracy involved the appropriation of the biological resources and TK of developing countries and was a harmful activity driven by the strategic, economic and political interests of transnational corporations and the governments of the highly-developed countries. The representative added that this phenomenon basically constituted the privatization of GRs (derived from plants, animals, micro-organisms, and even human beings), and the TK of indigenous communities by third parties, individuals and institutions seeking to establish exclusive control over said knowledge and biological resources through patents or IP. He said that the ancestral knowledge of indigenous communities had also been plundered by parties attracted by its potential economic, strategic or political benefits. The culprits, he added, were usually transnational corporations, governments, or scientific or environmental institutions based in industrialized countries and the victims were usually developing countries and their indigenous communities. He further stated that multinational pharmaceutical and agro-industrial companies, such, he said, as Monsanto, were currently locked in a fierce struggle to patent as many forms of life and GRs as possible, seizing valuable resources that did not belong to them and cheating the legitimate owners of their rights. He was of the view that the population of the planet was in thrall to powerful interests in the form of 100 huge transnational corporations, 50 financial corporations and 10 pharmaceutical and agro-industrial corporations. In his view, these bodies made up a spider’s web of production, consumption, trade in goods and services and capital investment that stretched across the globe. He said that the pharmaceutical and agri-business companies and financial empires that made up the global oligarchy, represented and defended by the Western powers, were oppressing the peoples of the world as no other empire had done before in the history of mankind.

93. The Chair closed the plenary discussion of the first one-day segment on cross-cutting TK/TCEs issues. He suspended the plenary and invited the expert group to meet under his leadership in the agreed format in order to further discuss the views expressed in plenary on the cross-cutting issues and discuss the TK text on that base, in anticipation of the production by the facilitators of a revised version of the TK text under Agenda Item 6.

AGENDA ITEM 6: TRADITIONAL KNOWLEDGE

94. The Chair introduced Agenda Item 6 and referred to the working methodology, as agreed by the Regional Coordinators, that he had described in his opening statement and that would be used in dealing with Agenda Items 6 and 7 and, in particular, in revising the Annex to document WIPO/GRTKF/IC/27/4 ("Consolidated Document relating to Intellectual Property and Genetic Resources") ("the TK text"). He recalled that since the beginning of the session, the IGC had had already an extensive and rich one-day discussion of cross-cutting TK/TCEs issues. He reported that that discussion in the expert group had proved to be useful as well in anticipating on a revised version of the TK text. Based on the cross-cutting discussion, participants in the expert group had opened the way for a further revision of the TK text by the facilitators ("Rev. 1"). He understood that participants had already begun, upon distribution of Rev. 1, to study and informally consult on that revised version. He intended to ask the facilitators to introduce Rev. 1 in plenary formally, and open the floor for initial comments thereon. He would then suspend the plenary in order to allow time for further review of Rev. 1 and consultations among participants, before the plenary be reconvened. He signaled that some concepts required further discussions, such as the nature and characteristics of TK, the differentiated approach for protection, publicly available, widespread TK, and the concept of the public domain. He urged the IGC not to attempt to solve every issue in one go. Issue needing further elaboration could be taken to the expert group. He said he had been positively struck by the fact that delegations had posed direct questions in the expert group to which there had been direct responses. He was also impressed by the fact that informal exchanges, for example, on "nations," had been done an environment of mutual understanding. It was important not to stick to positions that were broad-brushed. If something was unclear, delegations had to question it.

95. Mr. Nicolas Lesieur, speaking on behalf of the facilitators, welcomed the opportunity to provide a short overview of the work done on the text. He stressed that the text was a facilitators' text prepared for the IGC's consideration on the basis of discussions held so far during the session, and with a view to simplifying the text and constructing a revised framework to move the text forward. He said they had done that without prejudice to ongoing work. He recognized that there were some novel elements, which were based on the sum total of delegations' views, or at least that was its aim. He recognized that all delegations would need to review the text. Any omissions or mistakes were unintentional; should the facilitators not have reflected any views, or should they had not reflected the views correctly, delegations should let the facilitators know and to have them addressed in the forthcoming Rev. 2 of the TK text. He apologized in advance for any such omissions or mistakes. First of all, the facilitators had split the Policy Objectives into two sections; first, a Preamble/Introduction, which grouped elements that were more aspirational and, secondly, actual Policy Objectives that were actionable elements that could be deliverable by an instrument. They had also removed the Principles altogether, considering that they generally overlapped with the Policy Objectives. Moving on, they had added a Use of Terms section, considering that some delegations had proposed definitions. They had started to place definitions in that section. In Article 1, they had tried to collapse the definition and criteria for eligibility into more concise language. That reflected the concepts of "collectively created," "maintained," "linked with the cultural and social identity and cultural heritage," and "transmitted from generation to generation". On that last point, they had used "transmitted from generation to generation, whether consecutively or not" as it was synonym with but clearer than the term "intergenerational," while it also retained the concept of "transmittal." They had placed the language on databases that was found in former paragraph 5 in paragraph (b) of a new Article 3*bis*, which sought to group complementary protection measures that did not easily fit into the revised framework of Article 3; that included databases and codes of conduct. In Article 2, they had restructured paragraph 1 to something that was closer to the TCE text. They had also reworked paragraph 2 so that it more clearly outline, through the use of subparagraphs, the conditions under which a member state or contracting party could designate a national entity as a custodian. In Article 3, the facilitators had sought to construct a tier-based framework that was itself based on the extent to which the

TK was diffused and/or protected by the beneficiaries, or not, such that there were different levels of diffusion and protection. The facilitators hoped that it generally reflected discussions. In Article 4, paragraph 4.1 was based on the "optional addition" of paragraph 4.2 of the former version. They had not touched any other part of the text. Mr. Lesieur said they would be pleased to answer any questions, and welcomed any comments or suggestions.

96. Mr. Ian Goss, as Friend of the Chair and facilitator, speaking on behalf of the facilitators, added that the issue of "nations" still remained unresolved in the text. However, paragraph 2.2 had been established to capture the majority of circumstances when a state may be the custodian on behalf of the nation's communities. He asked that countries who requested the inclusion of "nations" consider if paragraph 2.2 could meet their interests; in other words, noting that "nation" or "states" could be a custodian on behalf of communities or peoples. He noted that that issue also arose in Article 3 and still needed to be resolved, perhaps in the expert group or informal informal.

97. The Chair opened the floor for initial comments on Rev. 1.

98. The Delegation of El Salvador expressed its thanks to the facilitators for the excellent text, which was very satisfactory. In particular, it welcomed Article 1(c) which dealt with cases of lost generations, which it had concerns about. In that connection, it drew attention to Article 7(a), which also mentioned "from generation to generation" and said that the phrase should be in line with Article 1(c). Generally speaking, it was grateful for the flexibility in the text, specifically because the burden of proof was not on the IP office; on that point the text was in brackets, as it had requested. Lastly, it was grateful for the flexibility provided for national legislation.

99. The Chair asked that delegations hold their specific article-by-article comments for a later stage. He asked for broad reactions and preliminary comments. As the facilitators had signaled, they had only amended four articles, so the articles that had not been touched would actually be discussed more in depth later on.

100. The Delegation of Peru said that Rev. 1 was a lot clearer and represented progress. It wanted to know why "peoples" was in brackets, as it was its understanding that the IGC had agreed that "indigenous peoples" would be included in the new text. As to Alternative 3.3, it was not clear about the term "public domain" and asked if the facilitators could explain what was meant by that in the text. It decided to leave the rest of its comments to the expert group.

101. The Chair noted that there was no further request to take the floor for initial comments on Rev. 1 at that stage. He suspended the plenary discussion on Rev. 1 as announced and invited participants to further consult on the revised text before the plenary be reconvened.

102. [Note from the Secretariat: The Vice-Chair, Ms. Grazioli, was chairing the session at this point]. The Vice-Chair reconvened the plenary re-opened the floor for comments on Rev. 1.

103. The Delegation of Peru said that it would make detailed comments at the expert group.

104. The Delegation of Kenya, speaking on behalf of the African Group, thanked the facilitators for the work in coming up with Rev. 1. It welcomed the text and noted that it was much clearer and a big step in the right direction. It noted that the African Group would be making specific comments in the expert group, but requested that the other articles that had not been discussed be so in the expert group, in order to produce a more comprehensive revision of the text as Rev. 2.

105. The Vice-Chair confirmed that it would be the case.

106. The Delegation of Indonesia, speaking on behalf of the LMCs, expressed its appreciation for the work put in the draft text, and noted that it was very well constructed. It was ready to further negotiate based on that text. It wished to address specific issues in the expert group.

107. The Delegation of India thanked the facilitators for the excellent work done in preparing the text. It concurred with the statement made by the Delegation of Indonesia on behalf of the LMCs. On Article 1, it was happy to see that the term "distinctively" had been removed, and that there was a wide coverage of all subject matter, including widely spread and diffused TK. It reiterated that the conditions should be stand-alone, which would enable all forms of TK to be covered. On Article 2, paragraph 2.2 took care of the question of nations. The conditions in the subparagraphs had again to be stand-alone and not cumulative. Article 3 had been vastly improved, but there were still changes to be made. In paragraphs 3.1 and 3.2, it wanted to add exclusive and collective economic and moral rights. In paragraph 3.2 it wanted to add PIC and the disclosure requirement, which was available under paragraph 3.1. In paragraph 3.3, it wanted to follow the principle of exclusion rather than inclusion, so it preferred paragraph 3.3 to address those items that were not covered in paragraphs 3.1 and 3.2, rather than using the terms "publicly available" "widely known" or "are in the public domain" which created a lot of problems of definitions. Also, there had to be some form of economic rights flowing in those occasions such as a user fee. It put some reservation on Article 3*bis*, which could not be made mandatory, and the database could only cover subject matter under paragraph 3.3 and not all TK. There could not be any provision with reference to GRs and associated TK. It would make more specific comments in the expert group.

108. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the facilitators for their hard work. Rev. 1 included quite a few changes, reflecting the facilitators' efforts. The Delegation had not had the time to fully consider them. Consequently, it reserved its right to comment more fully both during a later plenary session and in the expert group. It had a few preliminary comments. It welcomed the introduction of a preamble, which it regarded as helpful, though it reserved its right to comment on its content at a later stage, as it was the first time it had been included in the text. With regard to the Policy Objectives, it requested that the term "misappropriation" be bracketed, because of the unclear operative effect of the instrument. It preferred the terms "unfair and inequitable uses," or "misuse" or "illicit use." It also requested that point (i) be bracketed. With regard to point (ii), it requested that the term "reward" be bracketed, as it was not normally the function of IP instruments to offer rewards. With regard to points (iii) and (iv) relating to PIC, MATs and benefit sharing, it also requested that brackets be inserted, as what constituted TK was still open to multiple and wide-ranging interpretations, and it did not think it appropriate that the instrument address those mechanisms. Under "Use of Terms," it requested that "misappropriation" be bracketed and joined by "unfair and inequitable uses," or "misuse" or "illicit use." While it was still considering the options defined thereunder, it did not support Option 1, and would consider Option 2 interesting. With regard to the definition of "publicly available," it noted that it referred to the "subject matter," but what subject matter the instrument addressed, protected or safeguarded, was currently unsettled. Consequently, the definition had to be bracketed. The Delegation had not had time to study how "Use/Utilization" interacted with Article 3, and requested that a bracket be introduced at the beginning of paragraph (a), to join that at the end of paragraph (c). On Article 1, it noted that a definition of TK was missing, and wondered whether the facilitators intended to introduce one in the list of terms, or leave it to national law. The link referred to in paragraph (b) had to be further qualified. It said it might have further comments on Article 1 pending further reflection. On Article 2, it wished to bracket the term "nations." In Article 2.2, it said that points (b), (c), and (d), would appear to define TK not linked to an indigenous or local community, and therefore might lie outside the scope of Article 1. It was still reflecting on point (a), but had concerns that it might open the door for states becoming beneficiaries. With regard to Article 3, and the tiered level of protection concept, it remained unconvinced, as the dividing lines between the different levels of TK diffusion was not legally clear, and was open to interpretation. The most logical boundary line was between that TK which was confined solely to the indigenous and local community and that which was not. Therefore it did not support paragraphs 3.2 and 3.3, and requested that they be bracketed, though it requested that Alternative 3.3 remain in the text. Additionally, paragraph 3.1 appeared to be defined in terms of a rights-based approach, which it could not support, though it could accept the provision of legal policy and administrative measures as appropriate and in accordance with national law.

It could also support the principle of attribution, in paragraph (b) provided it extended only to TK confined to the indigenous and local communities. It had not had time to consider Rev. 1 any further beyond Article 3. It reserved its position in respect of the remaining articles. As a cross-cutting issue, it requested that the term "peoples" be bracketed throughout the text. It understood that it was an emotive issue, but solutions were found in respect of the CBD and the Nagoya Protocol, and while the IGC was not bound by those instruments, their example would be the most expedient for WIPO to follow.

109. The Delegation of Brazil associated itself with the statement made by the Delegation of Indonesia on behalf of the LMCs. It thanked the facilitators for drafting a much easier working tool to further work on in the next sessions. It reserved its right to comment on the text in the expert group. It mentioned that the tiered approach in Article 3 was new and deserved a careful look by delegations.

110. [Note from the Secretariat: The Chair was chairing the session again at this point]. The representative of *Tebtebba* Foundation, speaking on behalf of the Indigenous Caucus, thanked the facilitators for their work. She welcomed Rev. 1 which provided a good basis for further negotiations. She looked forward to presenting specific proposals in the expert group. However, she continued to be concerned with inclusion of the term "public domain" in the text. She believed that was not a well-defined term.

111. The Delegation of China welcomed Rev. 1. As to the beneficiaries, Policy Objectives, and Principles, it found that text was clearer and useful to make progress. It thanked the facilitators for their efforts. As to the articles themselves, it had a few preliminary comments. On Article 3.3, it said that Member States should ensure that users were aware of the source of the subject matter, in other words the TK component. It asked what was meant by "publicly available" and "widely known." Did it mean that in certain member countries that subject matter was publicly available and widely known? Those terms had to be defined even more clearly. It also thought that the text needed to add the right to respect the customs of indigenous peoples. The article on databases should not apply in the limited fashion described in paragraphs 3.1 and 3.2.

112. The Delegation of Oman thanked the facilitators for their efforts. It was satisfied with the progress that Rev. 1 represented. It was important that the international text be in conformity with national law. Particularly, the term "nation" should not be in brackets, because in Oman there were no distinctions of peoples among its nation.

113. The Delegation of the Islamic Republic of Iran appreciated the efforts of the facilitators. It said that the Policy Objectives and the Preamble had to emphasize effective, positive protection and enforcement issues. It would propose appropriate language in the expert group.

114. The Delegation of Thailand wished to bracket the terms "publicly available" in the Use of Terms. In Article 2.2(b), (c) and (d) "local communities" should replace "local community."

115. The Delegation of Canada thanked the facilitators for Rev. 1. The new text was an excellent new basis for negotiation. Unfortunately it had not had much time to go through the text; therefore it was willing to meet in the expert group. For consistency purposes, it argued using the term "traditional knowledge" rather than "subject matter" throughout the text. It welcomed the restructuring of the Policy Objectives into an operational preamble and actual objectives. It reiterated that the Policy Objectives should have a strong link with the operative provisions and indeed frame those provisions. It stated that the sharing of benefits should not be an objective of that instrument, considering that it was an objective of other existing instruments such as the Nagoya Protocol. However, it did not deny that the sharing of the benefits could be a possibility under that instrument. It thus proposed using a broader concept which would entail amending the title and substance of Policy Objective (iv), which would refer to "fair and equitable compensation." That change would also need to be reflected in

Article 3.1(b) and 3.2(d), among others. In Article 1(b), it wished to replace "linked" with "distinctively associated" which was clearer. In Article 2, it wished to bracket the word "nation." In Article 3, it expressed its strong preference for a measures-based approach. More specifically, it preferred the phrase "Member States should provide legal, policy and administrative measures" as found in paragraphs 3.1 and 3.2. In Article 4, it found Article 4.11 too broad; however, it remained open to exploring mechanisms to address misappropriation and misuse of TK. Under Article 4.5, it expressed concerns about the idea of setting a new international dispute settlement mechanism and reserved the right to comment further.

116. The Delegation of the United States of America thanked the facilitators for their quality work on the text. It offered three preliminary suggestions, postponing the remaining of its comments for the expert group. First, in Article 1, it wished to bracket the word "protection" in the title and to replace it with "the instrument." What was currently defined in Article 1 was TK; further refinement had to be made to the criteria of protection. In Article 2.2, it suggested replacing the word "benefits" with "beneficiary" because the custodian should be for the beneficiary, not the benefits. In Article 3, it suggested inserting "criteria and" before "scope of protection" in the title, as that was where criteria for protection could be added.

117. The Delegation of Armenia did not wish to have the term "nations" in brackets in the text, so as to respect and protect the rights of nations in their TK and TCEs from times immemorial.

118. The Delegation of Jordan extended its thanks to the facilitators that had worked to facilitate agreed-upon solutions in the IGC. On the issue of "nations," it said that Jordan was one Arab nation. It had national legislation (including copyright law) which recognized that the state was responsible for the protection of TK.

119. The Chair concluded the discussion on Rev. 1 in plenary. He called upon the expert group to reconvene under his leadership and prepare the ground for the production by the facilitators of Rev. 2 of the TK text.

120. The Chair reconvened the plenary and referred to three documents that were on the agenda under Agenda Item 6: the "Joint Recommendation on Genetic Resources and Associated Traditional Knowledge" (WIPO/GRTKF/IC/27/6) that was cosponsored by the Delegations of Canada, Japan, Norway, the Republic of Korea and the United States of America; the "Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources" (WIPO/GRTKF/IC/27/7), cosponsored by the Delegations of Canada, Japan, the Republic of Korea and the United States of America; and, a "Proposal for the Terms of Reference for the Study by the WIPO Secretariat on Measures Related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing Access and Benefit-Sharing Systems" (WIPO/GRTKF/IC/27/8), cosponsored by the Delegations of Canada, Japan, Norway, the Republic of Korea, the Russian Federation and the United States of America. [Note from the Secretariat: The Vice-Chair, Ms. Charikhi, was chairing the session at this point]. The Vice-Chair invited the cosponsors to introduce the documents.

121. The Delegation of Canada, speaking on behalf of the Delegations of Japan, Norway, the Republic of Korea and the United States of America, introduced the "Joint Recommendation on Genetic Resources and Associated Traditional Knowledge" (WIPO/GRTKF/IC/27/6) that invited Member States to consider using several recommendations as guidelines for the protection of GRs and TK. The joint recommendation contained a preamble, key terms, objectives and principles, and a list of practical measures aimed at preventing patents from being granted erroneously with regard to claimed inventions that included GRs and/or TK associated GRs; allowing third parties the opportunity to dispute the validity of a patent with regard to inventions that include GRs and/or TK associated with GRs; encouraging the development and use of voluntary codes of conduct and guidelines for the protection of GRs and/or TK associated with GRs; facilitating the creation, exchange and dissemination of, and access to, databases

regarding GRs and TK. The Delegation believed that the guidelines enumerated in the joint recommendation not only represented common ground but also would go a long way toward raising awareness of, and addressing concerns relating to, patents granted in error with regard to GRs and TK associated with GRs. For these reasons, it would welcome any Member State who would like to cosponsor the joint recommendation.

122. The Delegation of Japan, speaking on behalf of the Delegations of Canada, the Republic of Korea, and the United States of America, referred to the "Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources" (WIPO/GRTKF/IC/27/7), which was the same document submitted to IGC 26, but significantly differed from document WIPO/GRTKF/24/7 that the IGC had already discussed. The Delegation touched upon two points among the changes that had been made. First, in paragraph 18, the revised joint recommendation laid out several key issues to be addressed by Member States, including the content to be stored in databases and the allowable format for the content. These were important elements in terms of understanding the function and benefit of the database. The Delegation invited Member States to share their views and experiences on these issues. Second, paragraph 19 referred to the necessity of feasibility studies to be conducted by the Secretariat. Particularly, creating a prototype of the proposed WIPO portal site would enable the IGC to consider this database in all aspects and define future steps. It reminded that some delegations expressed their concern over the financial burden of this type of database at the last session. The Secretariat was also encouraged to examine the possibility of technical assistance to Member States, especially for developing and least developed countries. As a result of IGC 26, the essence of paragraphs 4 up to 7 of this document was included in the revised version of the "Consolidated Document Relating to Intellectual Property and Genetic Resources (Rev. 2)" (the GRs text), as its paragraphs 9.2 and 9.3. The Delegation re-emphasized that those paragraphs were also highly relevant to the text on TK, which included complementary measures in Article 3*bis*. It was therefore convinced that the discussion on this joint recommendation would facilitate the text-based negotiations. In addition, the Delegation appreciated every comment and question that had been formulated by Member States during IGC 26. With those comments and questions in mind, and in order to find a common ground on this issue, the cosponsors of the joint recommendation submitted the information document WIPO/GRTKF/IC/27/INF/11 entitled "Responses to Questions regarding National-level Databases and an International Portal", which included valuable contributions from some other Member States as well. The Delegation of Japan looked forward to delving deeper into this important issue, and further exchanging views and experiences at the next session, taking into account the information document that the cosponsors had produced.

123. The Delegation of the United States of America recalled that in accordance with the 2014-2015 mandate of the IGC, the GA took note "of the possibility for members of the IGC to request studies or to provide examples to inform the discussion of objectives and principles, and each proposed article, including examples of protectable subject matter and subject matter that is not intended to be protected as well as examples of domestic legislation." The Delegation presented the "Proposal for the Terms of Reference for the Study by the WIPO Secretariat on Measures Related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing Access and Benefit-Sharing Systems" (WIPO/GRTKF/IC/27/8). The former cosponsors of the proposal had been in discussions with the Delegation of Norway, which had provided revisions and additional questions to be raised in the study. It was pleased to inform the Committee that the Delegation of Norway had become a cosponsor of this proposal, along with the Delegations of Canada, Japan, the Republic of Korea, the Russian Federation and the United States of America. It invited other delegations to express their support for this proposal and welcomed any additional questions or improvements upon the study that other Member States might have. In past sessions, the IGC had had constructive discussions about national laws and how disclosure requirements in Access and Benefit-Sharing ("ABS") systems functioned. Those discussions had helped to progress the Committee's work on the text under negotiation. The Delegation emphasized that the study that was proposed would carry forward

that work without slowing down the work of the Committee. It would welcome Member States' support for the proposal. The Delegation referred also to document WIPO/GRTKF/IC/27/INF/11 entitled "Responses to Questions regarding National-level Databases and an International Portal". It recalled that since the IGC began its work, it had made significant progress on TK. For example, WIPO had created a TK Documentation Toolkit, and Database of actual and model biodiversity-related ABS agreements and related information. It believed that guidance on the creation and the maintenance of databases would be another contribution that WIPO could make. During IGC 26, the representative of the Indigenous Caucus as well as Member States raised a number of questions relating to national implementation of TK and GRs databases. It recalled that it promised to work with other delegations to seek answers to those questions. It believed that by collecting these questions and proposed answers to these questions, valuable guidance could be provided on the creation of databases. It informed the IGC that over the last month a coordinated response and a coordinated effort were made to address all of the questions that were formulated. The results of this effort were contained in document WIPO/GRTKF/IC/27/INF 11. It recalled that this document was cosponsored by the Delegations of Canada, Japan, Norway, the Republic of Korea and the United States, and contained input from these delegations as well as additional delegations. Each of the replies to the questions was made from a distinct national perspective. The perspectives contained in this document ranged from TK and GRs databases creators and users to those who only used TK and GR databases. The responses forwarded by the Delegation of the United States of America fell into the latter category, although it drew from its country's experience in creating national patent and patent application file history databases. It recalled that the national patent, patent application publication, and file history databases of its country were available to patent examiners and to the public. Because this information was publicly accessible, a patent applicant would have a better understanding of whether his or her invention was patentable. The responses from the Delegation also were mindful that some databases that were used by its country were not available to the public, such as the Indian Traditional Knowledge Digital Library ("the TKDL") for which it used terms contained in the TKDL Access Agreement, which permitted it to use documentation from the digital library as prior art in patent examination in the same manner as other prior art, while it maintained the confidentiality of the database itself. Highlights of document WIPO/GRTKF/IC/27/INF 11 included different views on whether databases should contain only prior art, and whether the database would be available to the public. The document reflected the wide range of practices that existed in creating and using TK and GRs databases. The Delegation suggested that additional work might be required to develop best practices in this regard. It welcomed additional input on this document. By updating it to reflect additional views, including additional questions, the Committee would gain a more comprehensive understanding of national implementation of TK and GRs databases.

124. The Vice-Chair opened the floor for comments on the documents under discussions.

125. The Delegation of Norway referred to document WIPO/GRTKF/IC/27/6. It recalled that it was one of the cosponsors of the joint recommendation. As expressed at earlier sessions, it hoped that the proposed joint recommendation could form a basis for a positive and concrete outcome on some of the elements that were being discussed in the Committee. It underlined that the proposal was intended to complement the proposed GRs text, and should not be taken as an alternative proposal. To contribute to the conclusion of an agreement on a text, including on a text that would include provisions regarding disclosure requirements, had always been and still remained of high priority for the Delegation.

126. The Delegation of the Russian Federation referred to document WIPO/GRTKF/IC/27/6. It was of the view that the document was very useful in the context of the work of the Committee and was extremely topical as well. It contained sections on the objective, the principles, some additional measures that needed to be taken in order to better manage the use of GRs and also the setting up of a database. It would be very useful to start working on a document that would draw from the acquired expertise in the area of GRs and associated TK. It would also be very useful also in terms of avoiding erroneous patents. The document was an excellent basis for

the work of the Committee. It fully agreed with the Delegation of Norway who underlined that the document did not constitute an alternative solution, but a complement to the GRs text.

127. The Delegation of Indonesia, speaking on behalf of the LMCs, noted that the decision of the GA in 2013, allowed the possibility for Member States to request studies or provide examples to inform the discussion of objectives and principles, and each proposed article, including examples of protectable subject matter as well as subject matter that was not intended to be protected, and examples of domestic legislation. The Delegation, however, emphasized that, in accordance with the mandate, such examples and studies were not expected to delay progress nor establish any preconditions to the text-based negotiations.

128. The Delegation of the Republic of Korea expressed its support for document WIPO/GRTKF/IC/27/7 and hoped that the joint recommendation would be instrumental in preventing the erroneous grant of patents. It reiterated the importance of protecting TK in the light of erroneously granted patent rights. It was of the view that a database system would provide the most effective form of protection for TK. With respect to its national experience with the establishment of a TK database, the Delegation noted that, from 2005 to 2009, the Korea Intellectual Property Office (KIPO) had worked to establish a TK database. It explained that the KIPO TK database included vast knowledge documented from old medicines and also included a wide range of articles and patent documents, thus containing records of TK from the past and present. It noted that over 90,000 cases had been raised in the database, including 5,500 cases of herbal medicines, 20,212 cases of prescription drugs and over 30,000 medical-related dissertations. The database was made available online through the Korean Traditional Knowledge Portal (KTKP) and had been made publicly accessible to lay the foundation for the international protection of Korean TK and thus prevent the unauthorized use of TK inside and outside the country. It had also been made publicly available to provide the public with an abundance of information on TK and related research, thereby expediting the development of further studies and industries. Thirdly, it had been made publicly available to provide essential information to patent examinations, thereby enhancing the quality of IP applications on TK. The Delegation explained that patent examiners at the KIPO patent office were obliged to search the database for prior art. This method had been used successfully for the protection of Korean TK. It further noted that, in August 2012, its database was shared with the EPO, at their request. It believed that the use of databases offered a practical and feasible method for reducing the number of erroneously granted patents.

129. The Delegation of Kenya, speaking on behalf of the African Group, expressed its reservation towards the proposed study contained in document WIPO/GRTKF/IC/27/8. It explained that substantial progress was made on the theme of GRs during IGC 26, and that, during the present session, progress had already also been made in the discussion on TK. In the light of the substantial progress that had already been made in the IGC's negotiations, it was of the view that the proposed studies would not add much value to the work of the Committee. The Delegation believed that the IGC should rather concentrate its efforts on the work at hand. It noted, with respect to document WIPO/GRTKF/IC/27/6, that the joint recommendation was likely to result in the duplication of the Committee's work and was also likely to affect the focus of the IGC on its work done so far.

130. The Delegation of Japan associated itself, as a cosponsor, with the introductory statement made by the Delegation of Canada with respect to document WIPO/GRTKF/IC/27/6. It also agreed with the Delegation of Norway and the Delegation of the Russian Federation that document WIPO/GRTKF/IC/27/6 was not a stand-alone document. It was of the view that a discussion on document WIPO/GRTKF/IC/27/6 would lead the IGC to a deepened mutual understanding of the fundamental issues which were being addressed, and believed that this would serve to further contribute to the IGC text-based negotiations. In support of this view, the Delegation recalled that during IGC 26, the concepts contained in paragraphs 3 to 5 of document WIPO/GRTKF/IC/26/5 were eventually reflected as paragraph 9.1 of the "Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2" that

had been developed at IGC 26. It believed that these concepts on defensive measures were also highly relevant to the current text on TK, which included complementary measures in its Article 3*bis*. The Delegation, therefore, noted that the discussion of document WIPO/GRTKF/IC/27/6 would only serve to further assist the IGC in moving forward with its text-based negotiation. With respect to document WIPO/GRTKF/IC/27/8, the Delegation welcomed the Delegation of Norway as a new cosponsor of the proposal and acknowledged the contribution that it had made to it. The Delegation was of the view that, pursuant to the current mandate of the IGC, it was entitled to request the WIPO Secretariat to undertake the study contained in document WIPO/GRTKF/IC/27/8, with a view to clarifying divergent views and helping the discussions move forward. The Delegation reiterated that the proposal could contribute to the process by ensuring a comparative review of the various effects wrought by the mandatory disclosure requirement as well as a cost benefit analysis. It noted that it would be interested to learn about the experiences of Member States that had implemented mandatory disclosure requirements within their patent systems, as it believed that such requirements had resulted in adverse effects in some countries. The Delegation, therefore, requested the proponents of the mandatory disclosure requirement to substantiate the actual benefits that such a requirement could provide to Member States and also to illustrate their views with concrete examples. It believed that a study based on the proposed terms of reference contained in document WIPO/GRTKF/IC/27/8 would help the Committee to find a common ground on such IGC issues from a practical point of view.

131. The Delegation of South Africa aligned itself with the statement made by the Delegation of Kenya on behalf of the African Group. It was of the view that documents WIPO/GRTKF/IC/27/6, WIPO/GRTKF/IC/27/7 and WIPO/GRTKF/IC/27/8 were all interrelated and were, therefore, best viewed as a package. The Delegation noted that the documents concerned GRs and associated TK, as well as the use of databases. It pointed out that the proponents had indicated that the documents were not intended to replace the negotiations and were also not intended as additional measures being put on the table. It observed however that the proponents were clearly advocating that the documents contained effective methods of protection and noted that the IGC was being requested to support these documents. The Delegation, reflecting on the intervention made by the Delegation of Japan, observed, with concern, that the proponents of the disclosure requirement were being challenged to defend, with evidence, their views. The Delegation consequently noted that it was important to ensure that the link between the current process of negotiation under the renewed mandate and the documents being submitted were kept as two separate tracks. It cautioned against the process under the 2014-2015 IGC mandate being delayed or being linked to the production of another output. It noted that it could not support the documents if such would result in the IGC being taken off the track of negotiating an international instrument for the effective protection of GRs and TK. It clarified that it had provided responses to the questionnaire regarding national-level databases and the development of an international portal, and was of the view that the questionnaire had been developed from a specific interest of preventing the continuous grant of erroneous patents. It noted that the work of the IGC was not limited to the prevention of the erroneous granting of patents but was rather centered on the development of an international legal instrument for the effective protection of GRs and TK. The Delegation believed that despite the fact that Member States had been given a right to seek support for further research to a certain extent, it was too late in the process to go back into undertaking the research proposed. It observed that there was a plethora of research that had already been carried out on misappropriation and recalled that at IGC 26, there had been a series of presentations by leading researchers on their research findings with respect to misappropriation. It concluded that it could not support the documents.

132. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the proponents of document WIPO/GRTKF/IC/27/6 for their proposal, and referred the IGC to its previous comments and statements which it had provided on the subject.

133. The Delegation of the Islamic Republic of Iran aligned itself with the intervention of the Delegation of South Africa and reiterated that the mandate of the Committee required the IGC to engage in text-based negotiations of an international instrument or instruments to ensure the effective protection of GRs, TK and TCEs. It was therefore of the view that the joint recommendation contained in document WIPO/GRTKF/IC/27/6 could not fulfill the mandate of the Committee and could not be considered a solution to the existing problem which the Committee was seeking to address. With respect to documents WIPO/GRTKF/IC/27/7 and WIPO/GRTKF/IC/27/8, the Delegation was of the view that, at the present stage of the negotiations, there was no need to undertake a study or to pursue the establishment of a database, as these initiatives would not help the IGC's negotiation process. For the establishment of a database, the Delegation noted that there was a need to identify a series of requirements for their safeguarding as well as determine liabilities for their inappropriate use. It expressed concerns that these initiatives would hinder the Committee from realizing its main objective which related to the holding of a Diplomatic Conference. It noted that this main objective had been postponed since 2011.

134. The Delegation of the United States of America expressed the hope that the joint recommendation contained in document WIPO/GRTKF/IC/27/6 could be used as a confidence building measure to help the Committee move forward on key issues concerning GRs and associated TK. It believed that the joint recommendation captured key objectives and facilitated the establishment of effective mechanisms for the protection of TK. As one of the twenty most mega diverse countries in the world, the Delegation noted that the United States of America recognized the value that biodiversity contributed towards society. It supported, along with the other cosponsors of document WIPO/GRTKF/IC/27/6, the objective of utilizing national laws to promote biodiversity and the fair and equitable sharing of benefits arising from its use. In addition, it supported requirements for PIC and MATs. The Delegation noted that the proposal facilitated clear procedures for obtaining authorized access to GRs in exchange for equitable monetary or non-monetary benefits. It believed though, that such ABS procedures should be entirely independent of the filing of patent applications. It was of the view that the enforcement of PIC and MATs through the IP system was unnecessary as such mechanisms could be established under permit systems in contract law and also went beyond the scope of the established patentability criteria of novelty, incentive step and enablement. Nonetheless it believed that patent offices should have the necessary information available to enable examiners make proper decisions on patentability. This included comprehensive prior art relating to GRs. Further, it agreed that patents should only be granted for inventions that were new, involved an inventive step and met the standards of utility. In this regard, it believed that national databases of GRs and related TK could help to prevent the erroneous granting of patents and could play a pivotal role in addressing patent quality concerns. The Delegation was of the view that the recommendation in document WIPO/GRTKF/IC/27/6 would help to address concerns relating to the erroneous granting of patents while complimenting the existing patent system. It invited other delegations to express their support for the proposal. With respect to the concerns raised by the Delegation of Indonesia, on behalf of the LMCs, regarding the potential of the proposed joint recommendation to delay the process, the Delegation noted that the cosponsors had already inserted key provisions of the joint recommendation into the "Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2" that had been developed by IGC 26, in an effort to make the discussion on the concepts within the joint recommendation coherent with the broader text. It clarified that the joint recommendation would be a supplement to the existing process and would not constitute a burden or a delay to the process. The Delegation noted, with respect to further concerns raised by the Delegation of Indonesia, on behalf of the LMCs, the Delegation of Kenya, on behalf of the African Group, and the Delegation of South Africa, on document WIPO/GRTKF/IC/27/8, that, though some Member States did not see value to the study, such studies, as evidenced by Cluster D of the WIPO Development Agenda recommendations, were a normal part of WIPO's work and, as such, should be conducted. It explained that, contrary to concerns raised about the study delaying the work of the Committee, the study was expected to advance and deepen the work of the Committee. It asked that Member States adopt the proposed terms of reference so that

the study could be conducted and was of the view that the information gleaned from the study, rather than slowing down the work of the Committee, would enable the Committee to move forward on key questions that still remained.

135. The Delegation of Brazil associated itself with the interventions made by the Delegation of Indonesia, on behalf of the LMCs, the Delegation of Kenya, on behalf of the African Group, the Delegation of South Africa and the Delegation of the Islamic Republic of Iran, with respect to documents WIPO/GRTKF/IC/27/6 and WIPO/GRTKF/IC/27/7. The Delegation was of the view that the discussion on document WIPO/GRTKF/IC/27/8 was outside the ambit of the current session as the present session was not addressing the subject of GRs. On document WIPO/GRTKF/IC/27/7, it was of the view that, despite the intervention by the Delegation of Norway regarding the complementary nature of the proposal, the document was a non-starter as it failed to deal with the main issue of discussion which related to the development of a mandatory disclosure requirement. With respect to the intervention made by the Delegation of Japan regarding the mandatory disclosure requirement, the Delegation questioned whether the proposal for studies as contained in document WIPO/GRTKF/IC/27/8 would be in line with the last paragraph of the 2014-2015 mandate of the IGC. It noted that while its Delegation would possibly be inclined to engage in the discussion of studies at the next session in which cross-cutting issues were addressed, at the present time, such a discussion would not benefit the negotiated texts.

136. The Delegation of Egypt aligned itself with the interventions made by the Delegation of Kenya, on behalf of the African Group, and the Delegation of South Africa, with respect to the erroneous granting the patents. It was of the view that where a patent application concerned GRs or associated TK, particularly but non exclusively in the field of health or agriculture, there was a need for the inventor to have obtained his rights in a legitimate way. It therefore re-expressed its support for the mandatory disclosure requirement.

137. The Delegation of China expressed its support for the statements made by the Delegation of Kenya, on behalf of the African Group, and the Delegation of South Africa, with respect to the protection of GRs. It believed that there was a need to focus on the consideration of the negotiated texts in order to be able to fulfill the mandate as laid down by the GA.

138. The Delegation of the Russian Federation expressed its support for the proposal contained in document WIPO/GRTKF/IC/27/7 which related to the creation of a database. It noted the importance of utilizing technical advances and all the material available with regard to GRs and TK to address the erroneous granting of patents. It believed that the proposal contained in document WIPO/GRTKF/IC/27/7 would assist to reduce this trend. It also expressed its support, as a cosponsor, for document WIPO/GRTKF/IC/27/8. In response to delegations which had voiced concerns regarding the mandatory disclosure, it was of the view that there was a need to further study the question of disclosure in order to appropriately define the mechanism for disclosure. It explained that the proposal contained within the document was addressed to patent authorities and believed that there was a need to share experiences in order to try and avoid the erroneous granting of patents. It pointed out that it was extremely interested in a mechanism that would allow Member States to improve the quality of patent granting and achieve a high quality standard.

139. The Delegation of Zimbabwe aligned itself with the statements made by the Delegation of Kenya, on behalf of the African Group, the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of South Africa, with regard to the document WIPO/GRTKF/IC/27/8. It expressed the hope that the negotiations would continue in line with the mandate as agreed upon by the GA.

140. The Delegation of Canada expressed its support, as a cosponsor, for the joint recommendation on the use of databases as contained in document WIPO/GRTKF/IC/27/7. It believed that there was consensus among Member States that patents should not be granted

in error with regard to GRs and TK associated with GRs. Databases on GRs and TK were useful tools to prevent patents from being granted in error. For this reason, it expressed its support for the joint recommendation and encouraged other delegations to join in. The Delegation also expressed its support, as a cosponsor, for the proposal for a study as contained in document WIPO/GRTKF/IC/27/8. It noted that the proposal was in line with the IGC mandate which allowed members of the IGC to request studies or to provide examples to inform the IGC work. It welcomed the Delegation of Norway as a cosponsor. It believed that the list of questions provided in the draft terms of reference would lead to new insights on important technical issues. It was of the view that the results of such a study would enrich, inform and advance the IGC text-based negotiation. It intended to see the study conducted in parallel with the ongoing work of the Committee and not used to delay the work of the Committee. It remained fully committed to the work of the IGC and looked forward to deepening the collective understanding of the important issues being discussed.

141. The Delegation of India aligned itself with the statements made by the Delegation of Indonesia, on behalf of the LMC's, the Delegation of South Africa and the Delegation of the Islamic Republic of Iran. It observed that there was a lot of correlation amongst the documents being discussed and noted that their main emphasis was the erroneous grant of patent and the building up of a database to avoid the erroneous grant of patents. It believed that databases were merely one aspect to prevent the erroneous grant of patents and noted that the Committee had been discussing this for several years within the context of its text-based negotiations on GRs, TK and TCEs. It, however, reiterated that the main purpose of the IGC's negotiations was to achieve an agreement on an instrument or instruments for the protection of GRs, TK and TCEs. It believed that the Committee should, therefore, not just concentrate on one aspect of its work which was a supplementary issue in its view and not the core issue. It expressed its support for the earlier interventions which had indicated that the IGC should focus its energy and resources on first fulfilling the mandate that had been given by the GA relating to the finalization of negotiated texts, before examining other documents. With respect to document WIPO/GRTKF/IC/27/8, the Delegation noted that though the mandate made it possible for members to request studies, the present document reflected a request for a series of studies on the erroneous granting of patents. The Delegation was concerned that this could pave the way, in the future, for a further list of requests for such studies and examples thereby starting off a process which could continue endlessly. It was of the view that in the course of the past years, the Committee had been dealing with all the issues, including providing examples to support the negotiations. It also noted that, since WIPO had already carried out sufficient studies on the issues, undertaking such studies would amount to a repetition which should be avoided.

142. The Delegation of the United States of America expressed its support, as a cosponsor, for the statement made by the Delegation of Japan with respect to document WIPO/GRTKF/IC/27/7. It was of the view that the proposal was a valuable supplement to the work of the IGC that aimed to provide an international legal instrument(s) for the effective protection of GRs and TK. It believed that it was essential that the Committee further engaged on the proposal and continued to provide constructive, substantive comments in order that questions and concerns raised on the draft proposal could be properly addressed. It noted that document WIPO/GRTKF/IC/27/7 sought to address some of the comments which had been raised by delegations and indigenous groups in relation to the database proposal. It pointed out that edits had been made to highlight areas of future work for the IGC, which included; minimum standards to harmonize the structure and content of the data for the WIPO portal; the impact a national database could have on TK or GRs protected under tribal laws; the process used to populate a national GRs and TK database; the treatment of limited access databases linked to the WIPO portal; and, the limited accessibility of the portal beyond IP offices to address security issues. It identified further revisions to the proposal to include; a clarification that secret TK associated with GRs should not be included in the database since information which was not publicly available would not qualify as prior art when determining the patentability requirements of novelty and inventive step; an improved clarification that reference material

that was not publicly available, such as a limited access database, could still be used as a reference by a patent examiner for determining patentability. The Delegation noted that it looked forward to discussing the database system as well as the issues raised by other delegations in an attempt to further improve the proposal. It was of the view that the proposal would help the Committee address concerns which related to the erroneous granting of patents. The Delegation pointed out, in response to the intervention by the Delegation of Brazil, that the proposed terms of reference for a study as contained in document WIPO/GRTKF/IC/27/8, would help the Committee to understand how disclosure requirements had been implemented at national levels and thus allow the Committee to focus its energy on attaining a better understanding of the different proposals. In response to the concerns raised by the Delegation of India with respect to the potential list of studies that may emanate under the current IGC mandate, the Delegation pointed out that it had only proposed one study at this time, and that the single study proposed remained its sole intention at this point.

143. The Delegation of Nigeria aligned itself with the statements made by the Delegation of Kenya, on behalf of the African Group, the Delegation of South Africa, the Delegation of India and the Delegation of Brazil. With respect to document WIPO/GRTKF/IC/27/7, it was of the view that, while there was a need to recognize initiatives that would be useful and helpful in leading the IGC to its stated goal, it was important to recognize that there were also many proposals that, though useful, could be time consuming and possible distractions. Specifically, the Delegation expressed its concerns about four elements, namely; the possibility and the reality of a distraction to the process; the temptation for distortion; the inevitability of delay; and, the resultant dismay that would be created both among the indigenous communities and countries that had a long interest in the issues under discussion, and that recognized the importance and the urgency of addressing the protection of GRs and TK. The Delegation stressed that it was important that the documents received the support of indigenous groups, irrespective of how innocuous the proposals seemed, as they definitely had an impact on the kinds of harms that indigenous peoples had been articulating throughout the entire sessions of the IGC. It noted that even though document WIPO/GRTKF/IC/27/7, for example, advanced a narrowly focused objective of preventing the erroneous grant of patents, there was still the need to determine, for example, what constituted non-secret TK. The Delegation believed that even if there was eventual support for the proposal, it would need to be predicated on resolving issues that were currently under negotiation. It pointed out, for example, that significant progress was being made in clarifying the definition of non-secret TK and believed that such would have to be taken into account in the eventual implementation of such a joint recommendation. It concluded, therefore, that though the proposal may not be intended to delay the process, such a delay would, unfortunately, be inevitable. The Delegation highlighted general concerns regarding the three proposals, including, for example, the high costs of creating, maintaining and correcting databases; the length of time needed to establish databases; the funding of such a venture from the WIPO budget; and, the implication of such a huge investment on other areas of work. It finally noted that, to the extent that the Committee was focused on addressing the erroneous grant of patents, there were only a limited number of patent offices that, in fact, engaged in exhaustive patent examination. It believed that, in this light, it was worth considering whether this was a proposal that ought to be addressed to such a forum as the “five IP Offices” (IP5) rather than WIPO.

144. The Delegation of Norway noted, with respect to document WIPO/GRTKF/IC/27/8, that there were divergent views among proponents on whether a mandatory disclosure requirement for GRs and associated TK should be introduced. It believed, however, that the IGC discussions would benefit from the collection of further information on various national experiences with regard to the introduction of disclosure requirements. It reiterated the view that the consequences of disclosure requirements were still unclear to parties and noted that the actual contribution of such a requirement to securing compliance with ABS legislation remained disputed. It also noted that the extent to which disclosure requirements imposed burdens on patent offices and applicants as well as introduced further uncertainty within the patent system, was still unknown. It pointed out that the proposed terms of reference in the

revised version were aimed at shedding light on these issues. It noted that while it supported the mandatory disclosure requirement, it was of the view that the gathering of more information on what effects national disclosure requirements may have had, both with regard to securing compliance with ABS legislation and with regard to its possible negative effects on patent applicants and on innovation, should also be of great interest to the other delegations that supported this mandatory disclosure requirement. It believed that such information would help the IGC frame the disclosure requirement in a way that struck a fair balance between the different interests at stake. In response to the view expressed by several delegations that the proposal for the study was aimed at delaying the discussions on disclosure requirements, the Delegation did not see any reason to fear that. It noted on the contrary that the discussion on the mandatory disclosure requirement had already shown that there was substantial disagreement and that the Committee was very far from reaching agreement on the issue. It believed that since delegations that opposed the introduction of a disclosure requirement had called for more information, it was more likely that the proposed study would contribute to progress rather than delaying the process. It reminded delegations that if the Committee was to reach agreement on a draft instrument that contained a mandatory disclosure requirement, there was a need to convince all delegations that such a solution was the most favorable. It believed that the best way to do so was by providing information and data which showed that such a requirement was beneficial and in the interest of all parties. It concluded by noting the last sentence of document WIPO/GRTKF/IC/27/8, which stated that the study should aim to be completed as soon as possible to ensure that an informed decision could be made without any further delay.

145. The Delegation of Australia thanked the cosponsors of documents WIPO/GRTKF/IC/27/7 and WIPO/GRTKF/IC/27/8 for their proposals. It saw value in the use of databases as a solution to some of the problems being addressed by the Committee. It believed that the work on databases should, however, take sufficient account of the interests and concerns of indigenous peoples and local communities. It expressed its support for information gathering and sharing which would ensure that the Committee's discussions were as informed and fact based as possible. It noted that information on national systems was valuable in helping the Committee to understand the diverse national circumstances and possible solutions implemented by various Member States. In this context, the Delegation believed that there was value in updating the information which was available to Member States on patent disclosure requirements and related ABS systems. It noted that such information sharing could proceed in parallel to the Committee's work and would facilitate the work of the Committee. It indicated its willingness to align itself with any consensus in this regard.

146. The Delegation of El Salvador thanked the cosponsors of document WIPO/GRTKF/IC/27/6 and, in the light of paragraph 3, agreed that the joint recommendation was designed to prevent erroneous grant of patents on inventions which included GRs and TK. Despite the fact such efforts to prevent the erroneous grant of patents would eventually be made pursuant to national law, the negotiations going on in the Committee would also have to continue in the context of international legal frameworks. With respect to document WIPO/GRTKF/IC/27/7, it thanked the proponents for their efforts and noted its appreciation for the use of databases. It viewed the proposal favorably and believed that it was a very positive statement as databases would be very useful for the work of patent examiners in conducting effective searches with regard to prior art and inventiveness. With respect to document WIPO/GRTKF/IC/27/8, the Delegation noted that it had studied the document and regarded it highly from the technical standpoint. It believed that the document was very useful and thanked the proponents for the list of questions which it considered to be thought provoking. It noted that it would like to continue studying the document and expressed its intention to comment further upon it at the next session. It was fully committed to the ongoing negotiations and the completion of the IGC mandate.

147. The Delegation of Bangladesh was of the view, with respect to document WIPO/GRTKF/IC/27/8, that the studies were helpful when and where answers to an issue were

not known or when and where further ideas about an issue were being sought. It believed that the Committee was advancing well on the text-based negotiations and had not yet come across any issue that could not be settled through the ongoing discussions within the Committee. It acknowledged noted that studies could be required in the future where answers on specific queries could not be identified. But it was of the view that there was no immediate need for any study and believed that the Committee should rather invest its present time and energy in its text-based negotiations.

148. The representative of the Tulalip Tribes noted, with respect to documents WIPO/GRTKF/IC/27/7 and WIPO/GRTKF/IC/27/INF/11, that indigenous peoples had expressed long standing concerns with databases. He appreciated the effort that had been put into addressing the questions that the Tulalip Tribes and others had raised and viewed the present documents as being informative in a certain sense. He pointed out, however, that the documents limited their analyses to the functional requirements within the patent system from the perspective of a few Member States. He cautioned that there were several perspectives that needed to be considered. He identified the need to consider the perspectives of States as well as the perspectives of indigenous peoples and local communities who held the TK. He believed that any risk assessment needed to be balanced, and required the assessment of costs, benefits, opportunities and risks, noting that such an assessment needed to consider, not just the benefits that would come out of a system, but also the possible risks. He noted that though document WIPO/GRTKF/IC/27/INF/11 illustrated different views, it also had a limited perspective. He stated that the creation and the use of the proposed databases would have to be responsive to the evolving terms of references in the Committee's current negotiations and noted that the current document seemed to presuppose the outcomes. He reiterated the view that there was a need for more details as, though the present outline in document WIPO/GRTKF/IC/27/7 was useful, it did not make a complete analysis. He was of the view that moving the documents forward would require a process to receive commentary from all Member States and all observers on the proposals in order to provide a balanced study. He believed that, without fully addressing all the underlying legal, cultural, social and other issues involved in the call to expand the creation and scope of the databases, it was inappropriate at the present time to proceed with such a recommendation. He pointed out that the proposal should not only be seen in the light of patent issues but also in the form of logic which was being generally applied to reasoning. He insisted that there was a need to look at the harms being addressed as well as the benefits being guaranteed from the perspective of the indigenous peoples and local communities and the parties involved.

149. The representative of InBraPi expressed her support for the interventions by the Delegation of Egypt and the Delegation of Brazil regarding the mandatory disclosure of origin. She further noted her appreciation for the intervention by the Delegation of Nigeria. She expressed her gratitude for the efforts which had been made by the proponents of document WIPO/GRTKF/IC/27/7 to take into account the concerns, regarding the joint recommendation, which had been raised in previous sessions. She, however, noted with respect to paragraph 5 of the joint recommendation that, from a Brazilian perspective, there was an existing diversity of contexts. She noted that there were 63 indigenous groups in Brazil, reflecting a diversity of indigenous peoples in this country. She also explained that hundreds of languages were spoken in Brazil and that none of these languages had been studied until now. She noted that these indigenous peoples did not speak Portuguese and, very often, their TK and their languages were not codified. Though she envisaged the creation of databases for the protection of TK in Brazil, she reiterated the importance of the respect for indigenous peoples' rights of consultation. She noted that the indigenous peoples in Brazil could not yet agree with the establishment of databases as there was a need to first consult internally as well as reflect on issues of prior art and the technical aspects of the proposal. She also noted that the indigenous peoples would like to provide various levels of protection for various levels of knowledge under the instrument. She noted that the indigenous peoples could not agree to this right now as this required further reflection, and believed that it was probably a bit premature to discuss the issue of databases for the prevention of the erroneous grant of patents.

150. The representative of CAPAJ was of the view that the submissions in documents WIPO/GRTKF/IC/27/6, WIPO/GRTKF/IC/27/7 and WIPO/GRTKF/IC/27/8 were complementary. He believed that, as these submissions were not mutually exclusive but could be mutually supportive. With respect to studies, he pointed out that there was rich panoply of experiences and situations that existed for indigenous peoples which he believed ought to be reflected and/or used as a backdrop to the IGC negotiations. He noted that indigenous peoples would be very happy to have their experiences as well as the accounts of their situations brought into studies. He was of the view that such comprehensive studies would not delay the work of the Committee, but rather, would give further impetus and clarity to each of the articles that were being discussed. From that perspective, he called on delegations to support the proposal for studies.

151. The Delegation of Ecuador was of the view that the contents of documents WIPO/GRTKF/IC/27/6 and WIPO/GRTKF/IC/27/7 contemplated a series of elements that required internal consideration to determine whether they tallied with its national legislation and domestic system. It noted that while it was interested in the protection of GRs and TK of its people, it believed that the ongoing IGC negotiations could offer the kind of protection it sought. It supported the statement made by the Delegation of Nigeria regarding the high logistic and economic costs involved in the development of a database. It noted that this venture would also give a lot of work to IP offices and, as such, there was a need to consider it carefully. The Delegation expressed its support for the statement of the Delegation of Indonesia, on behalf of the LMC's, as well as for the statements of delegations that had noted the importance of ensuring that the proposed studies did not affect the mandate. It reiterated that there was a need to have an international treaty on GRs and TK.

152. The Delegation of Peru was of the view that progress had been made within the Committee's text-based negotiations, and believed that the IGC should continue its work along those lines so that effective protection could be afforded to GRs, TK and TCEs.

153. The Vice Chair closed the floor to interventions on documents WIPO/GRTKF/IC/27/6, WIPO/GRTKF/IC/27/7 and WIPO/GRTKF/IC/27/8. She thanked all Delegations for their contributions and noted that the proponents had clearly indicated that the submissions were but recommendations which should not take the Committee away from its goal. She also noted that the proponents had pointed out that they were simply seeking additional information and were not attempting to delay the process. She noted that some Delegations had observed that the joint recommendations were in conflict with the mandate of the IGC and believed that it would be important to see how the joint recommendations could be aligned with the work of the Committee under the mandate. As for WIPO/GRTKF/IC/27/8, she felt that several delegations were not fully convinced that the proposed study would bring additional value to the process. She understood that documents WIPO/GRTKF/IC/27/6, WIPO/GRTKF/IC/27/7 and WIPO/GRTKF/IC/27/8 would all be further studied at future sessions. She then suspended the plenary.

154. [Note from the Secretariat: this part of the session took place after the expert group had met for the second time under Agenda Item 6. The Chair was chairing the session again at this point.]. The Chair re-convened the plenary and announced that the expert group had completed its review of Rev. 1 and that a further revision of the TK text ("Rev. 2") by the facilitators had been distributed with the view to submitting the revised text to the plenary for comments, corrections and omissions. He recalled that as per the methodology and work program that had been agreed on, the plenary would be able to point out and correct any obvious errors and omissions in Rev. 2. The reference to those obvious errors and omissions, as well as any other comment, including drafting improvements and other textual proposals, would be included in the report of the present session as usual. At the end of the present discussion, Rev. 2, as corrected by the facilitators in accordance with the identification of those obvious errors and omissions, would be noted and transmitted to the GA taking place in September 2014, subject to any agreed adjustments or modifications on cross-cutting issues

arising at the 28th session of the Committee taking place in July 2014. Copies of the corrected version of Rev. 2 would be made available before the second one-day segment on cross-cutting TK/TCEs issues that would take place during the second week of the present session. The intention was that to the extent that there were elements of cross-cutting convergence or cross-cutting advance in the discussions that were reflected in the Rev. 2, they could be used for reference in the discussion on cross-cutting issues relevant to TCEs. The Chair invited the facilitators to introduce Rev. 2.

155. Mr. Nicolas Lesieur, speaking on behalf of the facilitators, gave an overview of the work that the facilitators had done in submitting Rev. 2. He apologized if there were any errors or omissions. These were unintentional and if some views had not been reflected, or had been reflected incorrectly, the facilitators would adjust the current document Rev. 2 to address these omissions and mistakes. The facilitators had added some language in the Preamble/Introduction section to reflect some of the proposed additions. They had also further restructured the Policy Objectives section based on their understanding of what the core objectives of the text were according to the discussions that had taken place in plenary and in the expert group. In the Use of Terms section, they had added definitions of the terms "misuse", "public domain", and "unauthorized use" to reflect proposals from certain Member States. A definition of "traditional knowledge" and an associated non-exhaustive list of examples TK had also been added. That definition was not new and could be found in document WIPO/GRTKF/IC/27/4. In Article 1, the title and some of the wording had been amended so as to add the term "instrument", and a "criteria for eligibility" section had also been added pursuant to a request from one delegation. In Article 2, the term "nations" had been added as well as the associated square bracketing to paragraph 2.1 based on at least one request to that effect. The facilitators proposed an alternative formulation that would see the issue of nations addressed through a footnote. The footnote was intended to be read as a full part of the alternative and not as a comment from the facilitators. The addition of paragraph 2.3 sought to mirror the approach used in another article regarding the communication of the identity of the authority to the International Bureau. Article 3 saw some further adjustments, including the addition of language found in two alternatives regarding the establishment of terms of use. In Article 3*bis*, the provisions regarding databases that were found in Article 8 on Formalities and Article 12 on Transboundary Measures had been merged in paragraph 3*bis*.1(a). The facilitators believed that this allowed considerable simplification of Articles 8 and 12. In Article 5, the concept of "interests" had been added. Article 5*bis* regarding the application of collective rights had been removed considering it now overlapped with Article 5, especially in view of the content of Article 3. He explained that the rights that certain provisions under Article 3 contemplated establishing would be collective in nature, and therefore it was not necessary and, in fact, redundant to split the administration of rights into two provisions. In Article 6, on Exceptions and Limitations, paragraph 6.1 had been moved to the Preamble to reflect discussions in the expert group. More generally, Article 6 had been rationalized in view of the facilitators' assessment that the way in which Article 3 on the Scope of Protection was now structured provided for embedded limitations and exceptions. Article 7 on the Term of Protection had been rationalized and linked to Article 3 on Scope of Protection, which now embedded concepts related to the term of protection. Further, certain elements of Article 8 on Formalities had been moved to Article 3*bis*, particularly paragraph 8.2 that related to registers and records. Article 9 on Transitional Measures saw a slight adjustment pursuant to work in the expert group, recognizing, again, that more work remained to be done. Facilitators had sought to simplify Article 10 by seeking guidance and inspiration from the other texts being considered in the IGC. With respect to Article 11 on National Treatment, facilitators had struggled a bit, much as the expert group had, and that article would need additional consideration at a later stage. Facilitators had tried to simplify Article 12 by looking at the other texts in front of the IGC and at existing international instruments. Finally, some changes had been applied throughout the text. The facilitators had sought to include alternatives to the term "subject matter" throughout, and similar changes had been made regarding the term "misappropriation", occurrences of which were now complemented by the terms "misuse"

and “unauthorized use”. The facilitators were available to answer any questions and make any corrections that were needed.

156. The Chair opened the floor for comments, errors, omissions and matters for the record.

157. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the facilitators for their work in preparing Rev. 2. It noted that many of the concepts in the text remained bracketed and understood this as indicating that they required further discussion and elucidation. The Delegation wished to generally reserve the right to comment in all future discussions of the IGC and on the text. It however wished to offer some specific comments at that stage. With reference to the Introduction, a full discussion had not taken place in the expert group and it reserved its right to make substantive comments at a future date. With regard to the Policy Objectives, it requested that point (b) be bracketed. With regard to the Use of Terms, it noted that a closing bracket had been omitted at the end of the definition of “use”/”utilization”. With regard to paragraph 2.2, it noted that there was an opening bracket in the chapeau of paragraph 2.2, but that a closing bracket at the end of point (d) had been omitted. With regard to paragraph 2.3, it noted that there was a reference to a national authority and a link with paragraph 2.2. Its position with respect to national authorities was unsettled, and it wished that paragraph 2.3 be bracketed at that stage. With regard to Article 3, the Delegation reiterated its general position that it had not had time to fully consider the tiered protection concept that had been introduced and reserved its right to comment fully at a future date. It noted that paragraph 3.1(a)(iii) should be bracketed at that stage. It recalled that it had requested that the terms “secret” and “sacred” be bracketed anywhere they appeared in the text as it had not yet fully explored the definition of these terms. With regard to Article 3*bis*, it noted that there were some elements which were not present in the previous text and retained its general reservation and right to comment. From Article 4 onwards, it noted that a full discussion had not taken place in the expert group. As in many instances, the provisions of Articles 1, 2, and 3, at least, needed to be established before it was able to comment in detail. Consequently, it reserved its position and right to comment in full. As a final point and as indicated in earlier interventions, it noted that there were some instances where the term “peoples” occurred in the text but had not been bracketed. The Delegation appreciated that this was an emotive issue but highlighted its preference that the solution found in respect of both the CBD and the Nagoya Protocol be used.

158. The Delegation of Kenya, speaking on behalf of the African Group, thanked the facilitators for their work in producing Rev. 2. Rev. 2 was much clearer, streamlined, and represented a big step in the work of the Committee. The Delegation wished to offer some specific comments on the text. In Policy Objectives, it wished to bracket the last sentence and move it to the section on Complementary Measures. On Use of Terms, it wished to bracket the definition of “public domain”. In Article 1, it wished to bracket the “criteria for eligibility” and noted that for most African countries, this was a very insensitive and discriminatory provision, given that most African countries had not had independence for more than 60 years. In Article 2, it wished to bracket the alternative paragraph 2.1. In Article 4*bis*, it wished to bracket the alternative “No Disclosure Requirement” and indicated that it had not had time to reflect it. On Article 6, with respect to “specific exceptions”, it stated that an exception should be adopted in consultation and with the permission of the beneficiaries, and therefore, it wished to bracket paragraph 6.3. In addition, it wished to bracket the words “in cases of public non-commercial use” in paragraph 6.3(c), and to bracket paragraph 6.3(d). In paragraph 6.4(a), it wished to add the words “beneficiaries of Member States/Contracting Parties” at the end of the sentence. In paragraph 6.4(b) it wished to add the words “so long as that additional knowledge was otherwise lawfully obtained" at the end of the sentence. Further, it wished to bracket paragraph 6.5 given that there was no provision in that section which related to an exception or limitation. In Article 7, it wished to bracket the remainder of the sentence starting with “which may” to the end of the article. Finally, in Article 8, Formalities, it wished to bracket Option 2.

159. The representative of FAIRA thanked the facilitators and Member States for the work done during the course of the present session. In particular, he thanked those Member States that had met with the Indigenous Consultative Forum for the opportunity to work with them on getting points of clarity. Their comments had been appreciated.

160. The Delegation of El Salvador thanked the facilitators for their efforts in including the suggestions made by the Member States and the indigenous representatives. It was very pleased with the text. However, it would have preferred it if more square brackets had been eliminated. On Article 1, the Delegation was comfortable with paragraph 1(c), however, it was very worried about the inclusion of "Criteria for Eligibility". It pointed out that if criteria of eligibility were to be included in the text, it would have to consult further with its competent authorities. In any case, it wished to bracket the word "maintained". The Delegation recalled that El Salvador was in a particular situation in that it had a diaspora. On Article 4, Alternative 4*bis*.4, it pointed out that there was a bracket missing at the beginning of that paragraph. The Delegation clarified that this comment was just made for drafting reasons as it was still in consultation on the issue of revoking a patent.

161. The representative of the *Tebtebba* Foundation thanked the Member States that had been willing to enter into the dialogue with the indigenous peoples present at IGC 27. She thanked the facilitators for a leaner and cleaner text. With respect to the Preamble, she recalled that in the expert group, the indigenous peoples had proposed a non-diminishment provision, and this was not reflected in the text in any way. When this proposal had been presented, there had not been any objection, and it had been supported. She thought that this was an unintended omission by the facilitators, and wished to see the language that had been proposed reflected in the text. The part on Policy Objectives was leaner and cleaner. She noted that the term "peoples" was bracketed throughout the text, and urged countries to reflect on this because the indigenous peoples that were represented back home were getting impatient and wished to see that their rights as peoples were being respected in this instrument. She noted the proposal made by the Delegation of the EU to follow the formulation used in the Nagoya Protocol. However, she pointed out that the Nagoya Protocol was constrained by the CBD because as the mother convention, it had the terms "indigenous and local communities". She noted that the CBD was now undergoing discussions to change the terminology from "indigenous and local communities" to "indigenous peoples and local communities", and she understood that this specific point was going to be discussed at the twelfth Conference of the Parties of the CBD this year. WIPO did not have a similar constraint. Therefore, the representative did not accept that the formulation used in the CBD should be used. As regards the Scope of Protection, she shared the concerns expressed on "sacred" and "secret" knowledge and suggested that this question be looked at from the perspective of indigenous peoples and local communities.

162. The Delegation of the United States of America offered some comments on Rev. 2. In paragraph 2.1, first line, the Delegation wished that the open bracket before "nations" be moved back one word to include "and nations", and in paragraph 2.1, second line, it wished that the words "meeting the criteria for eligibility" be inserted after the words "traditional knowledge". These were all suggestions that had been made previously. In paragraph 2.2, it wished to replace the reference to Article 1 by a reference to Article 3. In paragraph 2.2, it had previously suggested bracketing paragraphs (b) through (d) and it wished to have those brackets added. In Article 3, it wished to insert the words "criteria and" before "scope of protection" in the title of the article, as previously suggested. The Delegation had previously suggested bracketing paragraph 3.2(b), and it wished to maintain it in brackets, as well as bracketing paragraph 3.2(c). The Delegation had previously suggested moving Article 12, Option 1 to Article 3*bis*. However, it appeared that only the first paragraph of the option had been moved. It understood that the facilitators may have been concerned about redundancy, but it suggested that at a minimum the second and third paragraphs of this option be moved to Article 3*bis*. The Delegation had suggested that the word "protected" be inserted before "subject matter" in the first line of paragraph 4.6 and it wished that the insertion be reflected in the text. It wished to bracket the words "and later discovery of" in the second line of paragraph 4*bis*.4. In Article 6

regarding Exceptions and Limitations, it had previously supported and perhaps suggested many of the exceptions present, and preferred to reinsert the Rev. 1 formulations of paragraphs 6.6, 6.8, 6.9(c) and 6.11. In the fourth line of Article 7, it suggested replacing the reference to "Article 1" with a reference to "Article 3". With respect to Article 8, it suggested that the alternative paragraph that was contained in Rev. 1 of that article be retained, with the edits that it had suggested in the informal discussions. Those suggestions were to insert the words "under Article 3.1" in line 1 of the alternative paragraph after "traditional knowledge", and to insert the words "to facilitate protection under Articles 3.2 and 3.3" in line 4 of the alternative paragraph. In Article 9, Transitional Measures, it suggested replacing the reference to Article 1 with a reference to Article 3 in the second sentence of paragraph 9.1. In the alternative paragraph 9.2(a), it suggested bracketing the words "subject to a right of compensation" in the third sentence because this was new language which it had not had a chance to consider. Finally, in Article 11 on National Treatment, a close bracket was needed at the end of that article.

163. The Delegation of Canada thanked the facilitators and reserved its right to comment on the text later on. It was pleased that the text now included a much tighter, leaner, and perhaps meaner set of principles and objectives that recognized, among other important things, the importance of an outcome that accounted for the interest of all who would be impacted by the instrument under negotiation, along with issues around innovation and creation. In the Preamble, under "Promote innovation", the Delegation thought that the concept expressed in that paragraph should be broader and wished to remove the first part of the sentence. It also noted that there was new text in the Preamble under "Provide new rules and disciplines". It wished to bracket these new parts. Under Policy Objective (c), it wished to add the words "or approval and involvement", and wished to do so throughout the text every time PIC was mentioned. Under Policy Objective (d), it wished to bracket the words "tradition based". Under Policy Objective (e), it suggested removing the words "patent rights" and replacing them by "intellectual property" since it was a broader concept. The Delegation considered that the Use of Terms section needed more work, however, it saluted the attempt to define concepts that the international community had been unable to define to date. It was referring, in particular, to the concepts of "public domain" and "publicly available". On that particular point, Rev. 2 needed more cleaning up to ensure that elements of definition throughout the text were placed under the Use of Terms section. It was referring, notably, to paragraphs 1(d) and (e), which it felt had to be moved to the Use of Terms section. On the definition of "use" there was a missing bracket at the very end, and it noted that use in a creative, educational, preservation, documentation, or archiving context, for example, was not addressed, unless this was to be captured by the word "research". On Scope of Protection, Article 3, it thought that these criteria had to be cumulative. On Article 2, it preferred the Alternative, but it needed to bracket and reflect on further implications of the footnote. The Delegation wished to add the word "create" in paragraph 2.1. It reaffirmed that this future instrument had to be for the benefit of indigenous and local communities and would continue to oppose attempts to make the state a beneficiary unless indigenous and local communities identified the state in a particular situation as the appropriate and legitimate custodian. It understood this was a sensitive issue for some, but it stood firm on that issue. On Article 3, there was a lot to digest, but it welcomed this new nomenclature of protection, in particular as it related to TK already protected under national law or in the public domain. However, it wished to bracket the entire article and wanted to express some concerns over the fact that "sacred" was a very vague term, unlike "secret" TK, which bore some resemblance to existing trade secret terminology, and this could be problematic from a certainty and clarity perspective. As previously mentioned in plenary and in the expert group, there was a need for consistency on language. In particular it was referring to paragraph 3.1(a)(i), which contained a different listing than that available in Article 2. As a more general comment, the Delegation hoped that delegations would begin to move beyond just thinking about ABS and think more broadly about fair and equitable compensation, which it felt was a more all-encompassing concept and gave more flexibility to the instrument. It was pleased to see the text dealing with issues important to Canada, namely the need for innovation and creation to develop and continue to exist, which was in the public interest. It noted that

Article 3*bis*.2 should be bracketed and stressed that codification of TK needed to involve the beneficiaries. The Delegation wished to bracket Article 6, and noted that paragraph 6.3 would not apply to certain types of TK, which, of course, raised some concerns similar to the ones raised under Article 3.1. The Delegation would need to study further the implications of such a proposal.

164. The Delegation of Australia thanked the facilitators for their substantial improvements to the text and also the Member States and other participants for the cooperative dialogue that had occurred over the week. In Article 1, it objected to the reference to the use of a TK for not less than 50 years in the part on Criteria of Eligibility. It noted that in the case of Australia's indigenous peoples and local communities, in many cases, there had been continuous habitation for many thousands of years. It objected to this particular clause because traditional communities were living communities, they were evolving communities, and they could still be developing new TK. It also appeared that including such a statement would be contradicting Article 1(e), which referred to the dynamic and evolving nature of TK.

165. The Delegation of Indonesia, speaking on behalf of the LMCs, thanked the facilitators for their work. It felt that Rev. 2 could be used as a basis for negotiation. It noted that in some places the concerns of the LMCs had not been reflected. With regard to Policy Objectives, it wished to bracket the reference to "patent rights", in the last paragraph, as well as the words "and traditional knowledge associated with genetic resources". Under Use of Terms, it preferred Option 1, because it had reservations towards the definitions of "misuse", "public domain", "publicly available", and "unauthorized use". With respect to the terms "use/utilization", in (a), it wished to add the word "or" after the word "product" so as to read "where the traditional knowledge is included in a product or where a product has been developed". In (b) it wished to add the word "or" after the word "process" so as to read "where the traditional knowledge is included in a process or where a process has been developed". The Delegation preferred that the Criteria of Eligibility not be put in Article 1. Further, it wished to bracket paragraph 2.3. It noted that it preferred that the footnote in Article 2 be reformulated in a more positive language. It believed that the wording of paragraph 3.1(a)(iii) also had to be reflected in paragraph 3.2. Further, it wished to bracket the words "is publicly available, but neither widely known, sacred, nor secret" in paragraph 3.2. It preferred to use the words "not covered in Article 3.1" as an alternative. In paragraph 3.3, line 2, it wished to bracket the words "publicly available" and "in the public domain" and proposed to use the words "not covered under Articles 3.1 and 3.2" as an alternative. It noted that the LMCs had also raised a concern with respect to the addition of possible economic rights within paragraph 3.3. The Delegation wished to bracket Article 3*bis* because it felt that it needed to reflect upon the discussion that had taken place on the level of protection. It further wished to bracket paragraph 3*bis.*1(b) and in paragraph 3*bis*.1(c) it wished to replace the word "patent" by the words "intellectual property rights". The Delegation wished to bracket the words "of interests" in the title of Article 5 as well as paragraph 5.2. With respect to Article 6 on Exceptions and Limitations, it felt that it needed to reflect upon its approach regarding the level of protection and rights over TK, and it would come back to discuss that article at a later date. It however wished to bracket paragraph 6.5 at that stage. As with Article 6, the Delegation indicated that it needed to reflect more on Article 7 and would come back to it at a later stage. With respect to Formalities under Article 8 it had a preference towards Option 1. Finally, it wished to bracket Article 10 and pointed out that that article would need to be revisited when further discussion on TK and the level of protection had reached a consensus.

166. The Delegation of Indonesia, speaking in its national capacity, wished to delete the words "whose territory" in paragraph 2.2(a), and replace them with the words "in a territory that".

167. The Delegation of Japan joined previous speakers in commending facilitators for their work in preparing Rev. 2. The Delegation reserved its right to come back later with comments, but wished to give a couple of preliminary comments on Rev. 2. It wished to bracket paragraph 4.3, as it contained new text and the Delegation did not recall substantive discussion

around it. On Article 1, the Delegation was open to consider a broad definition of subject matter of protection as long as the distinctive association or linkage between the TK and the cultural identity of indigenous people and local communities was clear. However, it wished to keep the Criteria for Eligibility in Article 1 for the time being, partly because the question of whether a nation as such could be qualified as a beneficiary had not yet been settled. The Delegation recognized the need to see the instrument as a whole. In this regard, it suggested to test the concept of tiered protection with some specific examples, such as *sushi*, *mate*, and the song "Return to Innocence" and to see how the provisions of the draft instrument would play out in practice at the next session.

168. The Delegation of Algeria thanked the facilitators for their work. It pointed out that in paragraph 2.1, the words "and/or" should be included before the word "nations". Further, paragraph 2.1 Alternative, deserved some further study and consideration.

169. The Delegation of India reserved its right to make specific comment on the text at subsequent sessions of the IGC. It supported all the changes suggested by the LMCs, and wished to make a few additional comments. In Article 1, under Criteria for Eligibility, it wished to bracket the word "distinctively", as well as the words "has been used for a term as has been determined by each Member State/Contracting Party but not less than 50 years". It also wished to bracket any reference to eligibility in subsequent articles. The Delegation wished to retain the reference to "Article 1" wherever it was to be replaced by a reference to "Article 3". It was concerned by the amendments made to paragraph 2.2 and wished those amendments to be removed for the sake of clarity. On Scope of Protection, it wished to bracket paragraphs (1)(b)(ii) and 3(1)(b)(ii) Alternative. In paragraph 3.2, it wished the word "held" to be kept in brackets. The Delegation argued that the new formulation of paragraphs 3.1 and 3.2 was less clear than in Rev. 1. In paragraph 3.3, it noted that the specific language it had suggested with respect to economic rights was missing and it suggested adding a subparagraph (c) that would read "where applicable, deposit any user fee into the fund constituted by such Contracting Parties for the beneficiaries". This would take care of the economic incentive it was looking for. The Delegation wished to bracket Article 3*bis* on Complementary Measures. More specifically, it wished to bracket paragraphs 3*bis*.1 (e),(f),(g), and 3*bis*.2. It also wished to bracket Article 4*bis*. It noted that paragraph 5.2 was in brackets in Rev. 1 and requested that it be kept in brackets in Rev. 2. The Delegation wished to come back to Exceptions and Limitations at a later stage because it believed that that article had to be in tune with the new formulation of the Scope of Protection. It reserved its right to comment on the subsequent articles.

170. The Delegation of the Islamic Republic of Iran thanked the facilitators for their efforts. It associated itself with the statement of the Delegation of Indonesia, speaking on behalf of the LMCs. On the Use of Terms, It could accept the definition of "misappropriation" in Option 1 and wished to bracket Option 2. On Article 1, it wished to remove the part on Criteria for Eligibility. A lot of time and energy had been spent on Article 2 but the Delegation believed that divergences could be bridged so that negotiations could move forward. It believed that states should have a role as custodians. It believed that it might be useful for the instrument to define "nations" as a homogenous community. The Delegation did not want to see any reference to Criteria of Eligibility in Article 3. Further, it believed that the rights mentioned in paragraph 3.1 were exclusive rights and it wished to underline this nature of the right in paragraph 3.1, which had been omitted from the previous text. The Delegation wished to bracket Article 3*bis*. Due to the new additions, the text of this article had become more complicated, and a discussion on databases required defining a set of prerequisite elements, such as the safeguarding of confidentiality and the liability in case of unauthorized disclosure or inappropriate use of databases.

171. The Delegation of Thailand thanked the facilitators for their work. In paragraph 2.1, it wished the brackets around the word "nations" to be removed because it believed that nations could also be beneficiaries. Further, in that same paragraph, it wished the word "and" before

"nations" to be replaced by "or", so as to read "indigenous peoples, local communities, or nations". The Delegation wished to bracket Article 3*bis* since it was new text and the IGC needed more time to discuss it. It reserved its right to comment on other articles at a later stage.

172. The Delegation of Egypt was concerned about the text of Article 2 on Beneficiaries of Protection in Rev. 2. The Delegation found that paragraph 2.1 discriminated between the different categories of beneficiaries. It felt that those delegations wishing to delete "nations" as a beneficiary were running the risk of actually narrowing down the scope of TK to be protected under the instrument by excluding TK held, maintained, and used by nations from the scope of protection. It recalled that the IGC mandate was to accord effective protection to TK, but not to narrow down the scope of the TK to be protected. In addition, paragraph 2.2 was repetitive and still needed to be streamlined. The Delegation wished to bracket paragraph 2.3, especially the reference to identity, which still needed to be discussed further. It reserved the right to submit additional reservations on the text if and when needed.

173. The Chair noted that delegations did not need to reserve their right to comment at a later stage as, being sovereign, they had every right to do it in any case. Rev. 2 would only be taken note of at closing Agenda Item 6, but not adopted.

174. The Delegation of Uruguay commented on Article 2. During the expert group, it had said that it was aware of the difficulties of some delegations with the word "nation" or "nations" and that it was flexible on working on an alternative text. While it thanked the facilitators for the idea of a footnote, this did not represent or reflect specific cases such as that of its country and those of other countries as well. Despite this, however, it was going to work with delegations that had opted for the word "nation" or "nations" to come up with a new draft.

175. The Delegation of Paraguay thanked the facilitators for Rev. 2. Although the document had several brackets and alternatives, it nevertheless reflected the discussions that had taken place in the expert group and in the plenary. The Delegation referred to the footnote in paragraph 2.1 alternative and noted that it was ready to work on a new draft with the other delegations. On Article 12 regarding Transboundary Cooperation, it understood that the content of that article would largely depend upon the progress made on the first few articles.

176. The Delegation of China wished to bracket paragraphs 3.3 Alternative and 6.5.

177. The representative of InBraPi thanked the Chair as well as the Secretariat, the interpreters and the facilitators for their work. The IGC, however, could not congratulate itself on the results of the present session so far. The representative noted that most of Rev. 2 was in brackets. She recalled that indigenous representatives had come to the IGC with their own recourses. There was no money left in the Voluntary Fund. In addition, there was no recognition of the fact that indigenous peoples were actually peoples. Their inventive activities were not being recognized. They were the creators of the knowledge that supposedly, in square brackets, delegations were attempting to protect. She pointed out that no consensus had been achieved on any of the cross-cutting issues.

178. The Chair intervened and reminded the representative of InBraPi that the purpose of that part of the session was to address omissions and errors in Rev. 2. The facilitators did not have the authority to make a text out of nowhere, and it was no surprise that delegations had expressed reservations as many of the elements in Rev. 2 had been formulated in new forms and ways. Bracketing did not necessarily mean that there was definitive disagreement or rejection, but could reflect a need to review and consult. There would come a time for reflection on the IGC state of play, but presently the focus of this discussion had to remain on omissions and errors in Rev. 2.

179. The representative of InBraPI was surprised that a time criterion was still present in Article 1 because she understood that participants had been flexible on this point regarding Criteria for Eligibility. In paragraph 2.1, she noted that the notion of creation was missing, but her understanding was that no participant had objected to this word. On paragraph 3.3(a)(i), she noted that the word "create" was still in brackets, and she wanted to know why, as she had not seen any divergence of views on that point. Finally, the representative was not sure that indigenous peoples were going to continue to participate in the IGC. The only thing that was sure was that there still was a vibrant misappropriation and public domain going on.

180. The Delegation of Nigeria thanked the Chair, the facilitators, the Secretariat and all delegations because the IGC had had a really hard but very productive week. Despite a lot of work that remained to be done to get to the end of this process, it had, indeed, seen important progress. The Delegation noted that there were, actually, many words that were not in brackets. It wished to align itself with the Delegation of Kenya on behalf of the African Group and all of the delegations that had identified a number of concerns. On paragraph 4.3, it asked the facilitators if they could reformulate the sentence so that it did not end with the dangling preposition "with".

181. The Chair thanked all participants for their constructive engagement. He acknowledged the point made by the representative of InBraPi that the text was covered with brackets. It was up to all delegations to find convergence and until there was agreement on the whole, everything was at risk. The presence of brackets was a signal of how much work lied ahead. The reaction to the brackets was to find ways of convincing bracket owners to either yield the brackets or help find solutions so that they could be removed. He reminded that the IGC process could not continue forever and that the Voluntary Fund was depleted. The IGC had been given the responsibility to negotiate the text on which there would be agreement or not. He invited delegations to look at the drafting texts, and consult in relation to their national or group interests so as to find landing zones that were reasonable, practical, beneficial, and not harmful to any parties. The Chair read out the draft decision under Agenda Item 6 and it was approved. He then closed the agenda item.

Decisions on Agenda Item 6:

182. The Committee developed, on the basis of document WIPO/GRTKF/IC/27/4, a further text, "The Protection of Traditional Knowledge: Draft Articles Rev. 2". The Committee decided that this text, as at the close of this agenda item on March 28, 2014, be transmitted to the WIPO General Assembly taking place in September 2014, subject to any agreed adjustments or modifications arising on cross-cutting issues at the Twenty-Eighth session of the Committee, taking place in July 2014, in accordance with the Committee's mandate for 2014-2015 and the work program for 2014, as contained in document WO/GA/43/22..

183. The Committee also took note of documents WIPO/GRTKF/IC/27/6, WIPO/GRTKF/IC/27/7,

WIPO/GRTKF/IC/27/8,
WIPO/GRTKF/IC/27/INF/7,
WIPO/GRTKF/IC/27/INF/8,
WIPO/GRTKF/IC/27/INF/9,
WIPO/GRTKF/IC/27/INF/10 and
WIPO/GRTKF/IC/27/INF/11.

CONSIDERATION OF CROSS-CUTTING TRADITIONAL KNOWLEDGE/TRADITIONAL CULTURAL EXPRESSIONS ISSUES (DAY TWO)

184. The Chair introduced the second one-day segment on cross-cutting TK/TCEs issues. He was confident that this second segment would be greatly enhanced by the cross-cutting TK/TCE consideration that had taken place during the first one-day segment. He recalled that the list of documents for consideration by the IGC had been introduced in his opening statement. The most relevant documents were "The Protection of Traditional Cultural Expressions: Draft Articles "(WIPO/GRTKF/IC/27/5), the "Report of the Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions" (WIPO/GRTKF/IC/27/INF/9) and "Traditional Knowledge and Traditional Cultural Expressions: Certain Cross-Cutting Issues" (WIPO/GRTKF/IC/27/INF/10), which included the Chair's non-paper for the information of delegations and to use as they saw fit. The Chair acknowledged that the corrected version of Rev. 2 on TK that had been transmitted to the GA under Agenda Item 6 would, in addition, form part of the basis of the Committee's present work. He recalled that this latest version had been made available in all languages and would help inform the present discussions on cross-cutting issues. The intention was that given that there were similarities between the TK and TCE texts, the cross-cutting discussions could serve to facilitate a more direct and interactive comparison between the two texts, so that where, for example, the IGC might agree that a provision, wording or language in Rev. 2 on TK could be transposed into the TCE text, this would advance work on the TCE text. He recalled that the four cross-cutting issues that the Chair had identified in his non-paper were the meaning of traditional, the beneficiaries of protection, in particular, the role of states or "national entities", the nature of the rights, including the meanings of "misappropriation" and "misuse", and the treatment of publicly available and/or widely diffused TK and TCEs. During the first one-day segment on cross-cutting issues and the subsequent discussions under Agenda Item 6, there had been significant discussions around these issues and useful concepts had been advanced. The Chair was hoping that the Committee would be able to build upon them in the upcoming discussions. The Chair asked that points made in the TK/TCE discussions not be repeated except as necessary to frame any new thoughts or perspective that would need to be particularly elaborated from the standpoint of TCEs. The Chair proposed that an initial discussion on cross-cutting issues take place in plenary, followed by a discussion in the expert group combined with informal informal discussions as it had been the case for the first segment. He then opened the floor for comments on cross-cutting TK/TCEs issues.

185. The Delegation of Kenya noted that some fruitful discussions had taken place the previous week. It suggested that it would be a useful exercise to synchronize the TK and TCEs texts based on those discussions. The Delegation also asked if it would be possible to have some time to brief and coordinate with colleagues who had just arrived from capital so as to return to the plenary with a clear way to move forward.

186. The Chair noted that the Delegation of Kenya was heading in the direction that he was thinking of. He gave the floor to the Delegation of New Zealand before he would make a suggestion in this regard.

187. The Delegation of New Zealand supported the suggestion of the Delegation of Kenya. Some good progress had been made the previous week and there were a number of issues that were similar between the two texts. It suggested that synchronizing the texts in the manner suggested by the Delegation of Kenya and the Chair would allow the Committee to make a really good start in its discussion.

188. The Delegation of Egypt commented on the meaning of traditional and explained that "traditional" meant TK or TCEs that were collective and transmitted from one generation to another. TK and TCEs were mostly not found in written form, but were transmitted orally. The Delegation considered that what was valid for TK could also, in one way or another, be applied to TCEs.

189. The Chair proposed a suspension of the plenary for participants to review Rev. 2 on TK and the TCEs text, so as to examine where the progress made in the TK/TCE cross-cutting discussion could be usefully transposed into the TCEs text. He suggested the following questions for consideration by delegations and other participants: was the cross-cutting nature of the issues between TK and TCE to be validated in the TCE text? How should that be done? Should it merely be transposed as such or with some adjustments? If adjustments were needed, what should they be and why? If they could not be transposed because there was a qualitative difference on a point which distinguished TCEs from TK, what was that difference? He then suspended the plenary.

190. The Chair reconvened the plenary and reopened the floor for comments on any or all of the cross-cutting issues, or reflections on the main questions that he had raised regarding the relationship between the TK and the TCEs texts.

191. The Delegation of the EU, speaking on behalf of the EU and its Member States, commented on the issue of synchronization of texts. It did not fully understand the process being envisaged and insisted on transparency of any textual changes. The TK and TCE texts had maintained a separation for a number of years, as there were significant differences in the subject matter of the texts. The Delegation did not want to put at risk the progress that had been made through a merger of the texts. It noted that agreed definitions of TK and TCE were yet to be established, and that there were a number of differences between TK and TCEs which supported the maintenance of separately tailored texts. Some of the differences were due to the fact that the content of TCEs could already be protected via copyright and related rights, while for TK there were some aspects which did not fall fully within the existing IP regime. As it had been indicated in the Chair's non-paper, in paragraphs 5 and 6, much work had already been undertaken at the international level on TCEs or expressions of folklore, including Article 15.4 of the Berne Convention, the Tunis Model Law on Copyright for Developing Countries and the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action. It noted that there was not an existing parallel for TK. The Delegation did, however, recognize parallels in terms of beneficiaries and could appreciate that the Committee had to be consistent with respect to use of terms. It could also envisage that an equivalent approach in the Administration of Interests might be helpful. For all other issues it would need a full discussion in the format of the expert group on an issue by issue basis. The Delegation insisted that any text incorporated from the TK text into the TCE text had to be included as a separate bracketed option for consideration.

192. The Chair clarified that he did not propose a merger of texts. He was using the word "transposition" to ask if there were any areas in which the progress that had been made in the TK text could be transposed into the TCE text. That was for Member States to decide upon the approach to be adopted and to which degree. The Chair said that the specific comments made by the Delegation of the EU were exactly along the lines that he wished to see the discussion go. He noted that the Delegation of the EU had indicated that there were similarities, for example in relation to beneficiaries and administration, that might be amenable to cross-cutting

treatment. This was the kind of discussion that he was anticipating. But he emphasized again that he did not intend at this stage to embark on a discussion of merger of texts at all.

193. The Delegation of Indonesia believed that one of the biggest breakthroughs that had been made in the discussions on TK during the present session was that of the tiered approach of protection, based on the specific nature of the TK to be protected. With respect to TCEs, the Delegation believed that there was a need for a robust provision on Scope of Protection. It had a preference for Option 2 in the TCEs text, but suggested that that option be modified so that the level of protection be based on the specific nature of the TCEs to be protected. With respect to the definition of TCEs, the Delegation wished to take into account the discussion on the definition of TK, specifically with respect to the meaning of the word "traditional". It wished to see whether an approach similar to the one used with respect to TK could be used for TCEs as well. It would convey specific comments later on in the expert group.

194. The Delegation of Canada echoed the comment of the Delegation of the EU to the effect that cross-cutting discussions were an interesting exercise, but the differences between TK and TCEs should not be underestimated. In particular, one specific difference was the fact that a TCE had to be expressed, and this had to be reflected in the definition of a TCE. Such a TCE was not necessarily expressed in a collective context, since it was possible to have an individual express a TCE based on knowledge that was of a collective nature. This was a distinction that needed to be made with respect to the first of the cross-cutting questions highlighted by the Chair. The Delegation also agreed with the Delegations of the EU and Indonesia on the fact that the beneficiaries were perhaps the same for TK and TCEs. Here again, however, nuances had to be introduced in order to take into account the underlying notion of an expression, within TCEs. As for the nature of rights, the differentiated approach that had been proposed with respect to TK seemed interesting and the Delegation was looking forward to examining it further in the expert group. With respect to the notion of "publicly available", it highlighted that inspiration was a key element of creativity, and that it was important to see whether what was being proposed could risk being an obstacle to inspiration. With respect to utilization, some distinctions would also need to be made, and this also raised the question of the right of users and that of limitations and exceptions, which also had to be taken into account within the context of TCEs.

195. The representative of the Tulalip Tribes, speaking on behalf of the Indigenous Consultative Forum, put forward a new item that he believed was also cross-cutting. He proposed the development of one or two articles on the issues of awareness-raising and capacity-building. These were cross-cutting issues in all three existing texts and he believed that they would be critical in achieving the objectives of the instruments. These elements were mostly missing in the existing documents. Awareness-raising was mentioned in the Policy Objectives of Rev. 2 on TK. Capacity-building had been mentioned in Article 4 of the initial TK text but had disappeared in the revision. He pointed out that it was generally more cost effective to prevent harms than to cure them. Promoting awareness and respect for the provisions of these instruments would be important in both preventing harms in the first place, and reducing burdens on the legal system for handling these issues. It was particularly important in harms that were not easily compensable. There needed to be greater awareness and capacity-building to implement the elements of these instruments as applied to government agencies, the public and indigenous peoples and local communities. It was also important to make sure that indigenous peoples and local communities were involved in all aspects of awareness-raising and capacity-building, and that culturally appropriate and effective materials were developed in this regard. The representative recalled the existence of two articles in the Nagoya Protocol that could provide some guidance, namely Article 21 on Awareness-Raising and Article 22 on Capacity Building. Article 21 was simple and contained an obligation to take measures to raise awareness of the importance of GRs and TK associated with GRs. It contained an indicative list of measures as well. Article 22 was a bit more elaborated and made reference to different capacity-building needs. The representative believed that it was important that these issues be reflected in the operational text, rather than remain as aspirational items in

the Preamble. He was open as to how this proposal could move forward and on whether it was preferable to develop separate articles or combined article. He asked if there was Member States support for this proposal.

196. The Chair asked whether there was any Member States that supported this proposal.

197. The Delegation of Thailand supported the proposal made by the representative of the Tulalip Tribes on behalf of the Indigenous Consultative Forum. It believed that awareness-raising and capacity-building were important elements for this type of international convention and they were also important at the national policy level.

198. The Delegation of Australia joined in support of the proposal made by the representative of the Tulalip Tribes on behalf of the Indigenous Consultative Forum.

199. The Chair noted that the proposal had the requisite support and invited Member States to comment on the issues of capacity-building and awareness-raising in the overall discussion on cross-cutting issues.

200. The representative of the *Tebtebba* Foundation, speaking on behalf of the Indigenous Consultative Forum, recalled that at the closing of Agenda Item 6, she had indicated that she wished to see a provision in the Preamble on the non-diminishment of rights in Rev. 2 on TK. The representative believed that this was an important cross-cutting issue and she proposed that a provision to that effect be included in the TCEs text for further consideration by the IGC. She explained that indigenous peoples' rights had already been recognized and were contained in treaties, agreements and other constructive arrangements and that the instruments being negotiated in the IGC should not nullify or diminish these rights. She proposed that the provision read "nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous people may have now or may acquire in the future". She was open to working on the language of the provision. The representative asked if there was Member State support for this proposal.

201. The Delegation of the Plurinational State of Bolivia supported the proposal made by the representative of the *Tebtebba* Foundation on behalf of the Indigenous Consultative Forum. It noted the importance of a non-diminishment clause and indicated that such clause might have been involuntarily withdrawn from the previous versions of the TK text. The Delegation also supported the proposal made by the representative of the Tulalip Tribes on awareness-raising and capacity-building.

202. The Delegation of Australia also supported the proposal made by the representative of the *Tebtebba* Foundation regarding the introduction in the texts of a non-diminishment clause.

203. The Chair wished to recall in the plenary context what had been a rich discussion in the expert group with respect to non-diminishment. Note had been taken of the fact that among States, the 1969 Vienna Convention on the Law of Treaties and other instruments that governed the elaboration of international agreements, define some context for dealing with compatibility of new rights with old rights.

204. The representative of the *Tebtebba* Foundation explained that it would be important that the principle of non-diminishment be addressed explicitly so that the rights of a grouping be addressed explicitly and clearly within the work of the Committee.

205. The Chair understood that it was in that context that the proposal had been made. It had received support and would remain the subject of interesting dialogue in the expert group process. With the formal proposal made by the representative of the *Tebtebba* Foundation on behalf of the Indigenous Consultative Forum, it would become part of more focused discussions with a view to ultimately coming up with language. The Chair suggested that an appropriate

place for such a measure could be in a paragraph dealing with the relationship of the instrument, as it would evolve, with other agreements.

206. The representative of InBraPi greeted the parties to the discussions on TCEs and said that in South Africa, there were indigenous peoples who chose the expression “Sauabona” which was a greeting, a meaning of respect. It meant “I respect you, I value you, you are important for me” and the answer was “Shikoba” and that meant “I exist for you”. The representative wished to say “Sauabona”. She was hoping that the Committee could answer “Shikoba” to the indigenous peoples of Brazil she represented. The representative referred to the proposal made by the representative of the *Tebtebba* Foundation on behalf of the Indigenous Consultative Forum. She reiterated that the reference to the non-diminishment clause was initially included in Article 10(a) in document WIPO/GRTKF/IC/27/4. It was also included in document Rev. 1 on TK. However, it was no longer present in document Rev. 2 on TK, where it should have been included in brackets, and it was not included in document WIPO/GRTKF/IC/27/5 on TCEs. The representative thanked the Delegations of the Plurinational State of Bolivia and Australia for supporting the proposal made by the representative of the *Tebtebba* Foundation, which would be discussed during the week. She reiterated that she was flexible about where in the text and how a non-diminishment clause could be included.

207. The Delegation of the Islamic Republic of Iran found that the cross-cutting discussions could produce expeditious solutions to bridge divergences. Regarding the transposition of cross-cutting issues from the TK to the TCEs text, although the nature of TK and TCEs were in some respects different, similarities could still be found between some articles in the two texts. Some elements, such as Beneficiaries of Protection, Administration of Rights and National Treatment could be discussed together, and transposed from the TK to the TCEs text as well as some of the elements used to define the term “traditional”, such as the concepts of “collectively” and the transition “from generation to generation”. Furthermore the provision dealing with the enforcement of rights could be identical in both texts, including with respect to civil and criminal procedures. With respect to the TCEs text, the Delegation believed that the economic and moral interests of the beneficiaries should be safeguarded and that the use of TCEs should be subject to the PIC of the beneficiaries. Protection against derogatory actions over TCEs also had to be ensured. Moreover, uses of TCE or TK that were likely to mislead the public had to be prohibited. Existing policy problems in the TCE text, including the nature of the definition of TCEs, the scope of protection, the delimitation of exceptions and limitations and the three step test had to be resolved as a priority. The Delegation looked forward to direct and interactive discussions and was committed to engaging constructively in the negotiations.

208. The Delegation of the Plurinational State of Bolivia considered that one of the big benefits that had come out of the cross-cutting discussion was the identification of similarities and differences between the TK and TCEs texts. The Committee could make progress by continuing to work in that direction, especially on issues such as beneficiaries of protection and administration of rights. The scope of protection could also be duplicated in some way. More discussion was needed in the expert group and the Delegation was interested in taking part in that discussion.

209. The Delegation of Australia supported the interventions of the Delegations of the Islamic Republic of Iran and the Plurinational State of Bolivia. It also believed that the previous week produced some fruitful discussions and that the Committee had made some significant progress in terms of cross-cutting issues. It accepted that, as others had noted, the subject matter would be different in some cases but it felt that particularly in articles covering subject matter, beneficiaries and scope of protection, there was substantial overlap and opportunities to condense.

210. The Delegation of New Zealand supported the proposal of the representative of the *Tebtebba* Foundation in relation to non-diminishment and indicated that the statement made by

the Delegation of Australia during the present session had summed up what it considered the relevant areas of cross-cutting issues were.

211. The representative of CAPAJ noted that the four cross-cutting issues highlighted by the Chair had been very useful and were important. He thanked the Chair for the non-paper he had prepared on cross-cutting issues. He indicated that the Indigenous Caucus, it said, had identified an additional cross-cutting issue to be added to the list, which was that of "indigenous peoples". Indigenous peoples were to be considered as beneficiaries of protection throughout both texts. He stressed that it was very important that indigenous peoples be able to take part in the negotiations. If the point of view of the beneficiaries of protection was not expressed in the negotiations, the debate would be void. Some Member States were in favor that a dialogue take place with indigenous peoples, while others were more reluctant and had excluded the non-diminishment clause from Article 10, which demonstrated the importance for indigenous peoples to be heard in plenary and in the expert group, and also possibly to have a position within the group of facilitators and Friends of the Chair. It was important that indigenous peoples' contributions not be left out of any current or future document that could come out of the process.

212. The Delegation of the United States of America said that the discussion had been quite productive so far during the present session. It thanked the Chair for his non-paper, whose identification of some of the cross-cutting issues put the IGC on a proper path to continue to make progress. It provided some initial observations about what was similar and what was dissimilar with respect to the TK and TCEs texts. It agreed with the Delegation of Canada to focus on the word "expression." That was a key word in the discussion on TCEs, which distinguished them from TK. "Expression" could refer to a wide range of cultural productions, language, literature, music, dance, games, mythology, rituals and more. That kind of cultural production was what the IGC had to focus on like a laser beam when looking at the TCE text. It was one of the reasons why the TCEs, TK and GRs discussions had been interrelated but dealt with in separate texts. The Delegation gave the example of a bamboo flute to show how those were interrelated but distinct: the bamboo in the flute was arguably a GR; the flute itself and the TK by the flute maker were important factors that had been discussed on TK; but it was the melodies and the performance on the flute that drove the IGC's intention on TCEs. There were fundamental distinctions but also areas of significant overlap. It said that significant progress had been made on Article 3 in Rev. 2 of the TK text, and no doubt there were important applicable areas of overlap. It wished to continue that discussion, even if that would take hard work, which it was prepared to do. There were also areas of differences. In Article 5, and beginning with the watch word "expression," certainly the copyright norms in the United States of America and perhaps around the world focused on expressive works. It was related with the fair use doctrine and the First Amendment protection of the United States Constitution, and draw deeply on those exceptions and limitations, which might be different from exceptions and limitations focusing on TK. There were other areas in both texts that were obviously and flatly different, and perhaps it was not necessary to spend too much time on those because they would burden the discussion exaggeratedly. Yet, Article 3*bis* would not be required in the TCE text. The Delegation was prepared to continue a close analysis and discussion of the two texts to see, what, if any, elements could be exported from one text to the other and what adjustments, if any, needed to be made.

213. The Chair observed that one of the points made about the distinction between both texts related with the balancing of rights. In many jurisdictions, freedom of expression was constitutionally recognized in particular ways. The IGC needed to give thought to how to ensure an appropriate balancing of such right *versus* protection and how to translate such balance in the instrument or instruments. He pointed out that the identification of areas of distinction such as this would be helpful as the IGC framed its work.

214. The Delegation of the Bolivarian Republic of Venezuela supported the re-introduction of a non-diminishment clause in Article 10 as suggested by the representative of the *Tebtebba*

Foundation on behalf of the Indigenous Consultative Forum, regardless of what the 1969 Vienna Convention might contain in this regard. It did not believe that this went too far. It further noted that the facilitators should not eliminate concepts, but just to improve and tidy up the wording. The delegation supported the statement made by the representative of the Tulalip Tribes on behalf of the Indigenous Consultative Forum regarding awareness-raising and capacity building. Reference to this should be contained in the text in a cross-cutting manner. It supported the inclusion of the term "peoples" after "indigenous" in both texts.

215. The Chair stated that how to refer to indigenous peoples in the text remained to be one of the cross-cutting issues to be resolved. The IGC sought to address the concerns of one or more Member States who had particular difficulty with the expression indigenous "peoples". There was broad support for it, but it had not secured consensus. He noted that it would remain an issue that the IGC had to address as a cross-cutting matter, because it cut across all three texts, and in particular as far as the determination of the beneficiaries was concerned. The question needed to be subjected to continued dialogue among delegations and participants.

216. The Delegation of Kenya, speaking on behalf of the African Group, joined other delegations the floor that supported the use of the relevant parts of the TK text in the IGC work of the TCEs text. In this regard, it proposed that the facilitators be mandated to use Rev. 2 of the TK text in the TCEs text, where similar issues were treated, while taking into account the differences that existed between TK and TCEs. It believed that identifying the common elements and the differences that existed in the same articles in both the TK and the TCE text would enable the IGC to make progress in its work, while also ensuring consistency in both texts. The African Group would make a few suggestions during the expert group discussion.

217. The Chair closed the plenary discussion of the second one-day segment on cross-cutting TK/TCEs issues. He suspended the plenary and invited the expert group to meet under his leadership in the agreed format in order to further discuss the views expressed in plenary on the cross-cutting issues and discuss the TCEs text on that base, in anticipation of the production by the facilitators of a revised version of the TCEs text under Agenda Item 7.

AGENDA ITEM 7: TRADITIONAL CULTURAL EXPRESSIONS

218. The Chair re-convened the plenary and introduced Agenda Item 7. The IGC, in revising the Annex to document WIPO/GRTKF/IC/27/5 ("The Protection of Traditional Cultural Expressions: Draft Articles") ("the TCEs text"), would use a similar work program and methodology to the one that had been used under Agenda Item 6 regarding the TK text. Member States would decide on the transmission of a second revision of the TCE text ("Rev. 2") to the General Assembly at the end of the present session, subject to any agreed adjustments or modifications arising from the Twenty-Eighth session of the Committee that would take place in July 2014. The Chair recalled that since the beginning of the session, the IGC had had already an extensive and rich two-day discussion of cross-cutting TK/TCEs issues. Based on those cross-cutting discussions and Rev. 2 of the TK text that had been developed under Agenda Item 6, participants in the expert group had opened the way for a further revision of the TCEs text by the facilitators ("Rev. 1"). He understood that participants had already begun, upon distribution of Rev. 1, to study and informally consult on that revised version. He intended to ask the facilitators to introduce Rev. 1 of the TCEs text in plenary formally, and opened the floor for initial comments thereon. The Chair acknowledged the presence in plenary of His Excellency, Ambassador Walid M. Abdelnasser, Permanent Representative of the Arab Republic of Egypt in Geneva.

219. The Delegation of Egypt felt a strong need to build up mutual understanding with respect to the definition of the beneficiaries, and in particular to the inclusion of nations among the beneficiaries. The Delegation emphasized that this inclusion was of utmost relevance and significance to Egypt. Such mutual understanding should be based on the different situations

that prevailed within each Member State. While the concept of 'indigenousness' had been developed within the context of several other countries, which had experienced a different history of incoming cultures that coexisted with, and sometimes overshadowed, existing cultures, the Delegation pointed out that in countries such as Egypt, which had millennia of unbroken history and had stemmed from the idea of the Nation State as one inseparable entity, the notion of indigenous populations was not relevant. In this line, it reminded that the generation of TK and TCEs in its country was a nationwide process. Even if certain TCEs had originated from a certain part of the country, it had virtually spread all over the country and developed further through subsequent interaction. There was no geographic exclusiveness among population in Egypt, as it had been mobile throughout history and territory. TK and TCEs in Egypt were not traceable or confined to one single place or part of the population in Egypt, due to the continuous social mobility and mingling which defined the Egyptian nation as 'one people'. In this regard, the Delegation drew attention to the fact that the words "folk traditions" were used in Egypt to refer to both TCEs and TK. It re-emphasized that, while it respected the views of other delegations on this issue, it strongly felt a need for mutual understanding and acknowledgment of the various situations and interests of each Member State. It pointed out that it was no longer insisting on the use of the word 'State' as beneficiary, as it had originally proposed, due to the sensitivities expressed by some other delegations on this issue. It emphasized though, that it could not go below the term 'nations' for the reasons that it had explained.

220. The Chair echoed the statement made by the Delegation of Egypt, by inviting participants to further engage among each other on beneficiaries in order to build mutual understanding on the subject. A proper assessment of the linkage between TK and TCEs and the people which developed them should be at the core of such discussion. The Chair intended to suspend the plenary in order to allow consultations on this particular issue.

221. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the facilitators for their work in preparing the Rev. 1. It noted, however, that Rev. 1 had led to an unwelcomed wholesale synchronization of the TK and TCEs text. It acknowledged the novelty of the approach undertaken by the facilitators, and had a preliminary comment on the current format of Rev. 1. It recalled that it had earlier requested regarding the synchronization of the TCE text with the TK text that the drafting process occurred in full transparency. It requested therefore, for the sake of ensuring transparency with respect to any textual changes that were to be made, that any wording which was to be incorporated into the TCE Rev. 1 text from the TK Rev. 2 text be included as a separate bracketed option for consideration. It noted that the present Rev. 1 text did not fulfill that need for transparency. It insisted that the Rev. 1 text be presented again, with a clear identification of the differences between the original TCE text and the Rev. 1 text with imported portions from the TK Rev. 2 document being clearly identified. It suggested that this new presentation of Rev. 1 take the form of a track-changed version.

222. The Chair advised that, further to his consultations that had been held with the Delegation of the EU on the subject, Rev. 1 of the TCE text would remain as presented. A track-changed version of the text which showed the changes that had been made to the original text would, however, be provided upon request to the Delegation of the EU and to any other delegation that so wished. The Chair believed that, from a negotiating standpoint, the utility of prior texts was to ensure that subsequent texts did not lose elements that a delegation wished to preserve, and did not add elements that a delegation or the Committee as a whole had not contemplated. He was of the view that the circulation of the requested track-changed version would permit such a review to be done. He then suspended the plenary.

223. The Chair re-opened the plenary and informed that copies of the track-change version of Rev. 1 were available for the best convenience of participants. He invited Mr. Goss, to provide, as Friend of the Chair, a report on the series of open-ended informal informal discussions which he had conducted with interested delegations and observers.

224. Mr. Goss from Australia, speaking as the Friend of the Chair, reported that the first informal informal discussion had been conducted on the issue of nations as beneficiaries. He noted that during this discussion, the Delegation of Indonesia had further refined an approach that was discussed within the expert group, which involved the inclusion of a footnote in Article 2 of the Rev. 1 text relating to beneficiaries. He believed that, though there was no consensus in this regard, there had been an emerging consensus to include the revised footnote within the text. He noted that an important deliverable from this first informal informal discussion was with respect to an intervention made by the Delegation of Egypt which aimed at gaining consensus on nations as cultural identities as against States as administrators of rights in custodial roles. He however noted that there was a need to further explore this issue with the aim of bridging the existing divides and obtaining consensus. He reported that the framework and role of other international instruments, such as the UNESCO Conventions, with regard to the protection of intangible national cultural heritage, had also been discussed. That could contribute to balance the concerns of all. Mr. Goss noted that the discussions in the second round of informal informal discussions were aimed at clarifying the terms 'secret' and 'sacred' TK and TCEs in relation to the utility of establishing a clear link between the types of moral and economic rights to be conferred within the context of the varied nature of TCEs. He noted that the discussions were full and frank and benefited from the Indigenous Caucus' reflection on their understanding of these terms from their cultural perspectives. The Indigenous Caucus had identified some key concepts in relation to secret TCEs which were not transmitted nor disclosed outside the community. The Indigenous Caucus had also identified, in relation to sacred TCEs, the key issue of a linkage of such TCEs to a spiritual context. He noted that the concept of trade secrets had also been discussed with a view to examining the term from an extant IP system's perspective, noting the Committee's strong desire for legal certainty, particularly in relation to economic rights. He explained that the discussion on trade secrets had revolved around three elements within national jurisdictions, namely; that such knowledge was not generally known to the public; such knowledge was subject to reasonable efforts to maintain secrecy; and, such knowledge derived economic benefit from not being published. The key purpose of these elements in the scope of protection was also discussed, as well as the thresholds for different levels of protection for the owners, the general public and the users. In this context the informal informal discussion also considered whether there was a need to consider a notification or formalities approach to enable users and/or the public to identify when they had crossed the established threshold in relation to protection. On this issue, the importance of public education and awareness, which could be as important as conferring rights, was noted. This could serve to build up respect for the rights of the indigenous peoples and local communities within the broader public and amongst potential users. The protocol which had been established by the Australia Council for the Arts, relating to indigenous visual arts, was cited as an example of this. Concerns were raised regarding the use of the term 'sacred' as sacred knowledge was reflected in a vast range of communities. Some of these communities, such as religious communities or institutions, were outside the focus of the instrument as they did not constitute indigenous and local communities. It was also suggested that Article 32.2 of the TRIPS Agreement be considered as an overarching statement in relation to secret TK. Mr. Goss was of the view that while there had been no consensus on retaining the criteria of 'sacred', there had been consensus in relation to the criteria of 'secret', though with some qualifiers.

225. The Chair invited the facilitators to introduce Rev. 1 of the TCEs text.

226. Mr. Goss, speaking on behalf of the facilitators, noted that, as with previous revisions, the aim of the facilitators had been to take into account, without favor, all positions represented by Member States within the plenary and the expert group. He noted that the facilitators had reflected, within Rev. 1, the consensus that prevailed within the expert group and that favored a similar approach to the scope of protection as adopted in Rev. 2 of the TK text. In relation to the objectives, he explained that the original objectives had essentially been retained. Some editing and merging however had been undertaken for clarity. The heading, 'Principles/Objectives/Preamble', was replaced with 'Principles/Preamble' and has been placed

before the ‘Objectives’ section. This was carried out based on the facilitators’ judgment regarding the language contained in this section. He noted that this language was deemed aspirational as a preamble, more principle-based and, as such, did not seem to be objectives relating to the instrument. He noted that further to discussions held in the expert group, the facilitators had adopted, for Rev. 1 of the TCEs text, the model applying to the subject matter as used in Rev. 1 o the TK text. They also included a definition of TCEs in a new section, titled ‘Use of Terms’. This definition of TCEs retained footnotes which further expanded on the broad examples of TCEs contained within the definition. He noted that the term ‘phonetic’, in the broad examples of TCEs had been removed as the facilitators were unclear of the meaning of the term. He invited the proponent of the term “phonetic” to clarify its understanding and, if it wished, indicate for it to be put back in the text. In relation to Article 1, he noted that the TK approach had been followed and, to this end, the criteria for protection had essentially been embedded within the subject matter of protection. For this reason, a section on eligibility criteria, as proposed by some Member States, was not included. Additional language from the TK text, relating to ‘created and expressed’, ‘creative intellect’, the term of eligibility not being less than fifty years, as well as a reference to ‘dynamic and evolving’ was added. In relation to Article 2, he pointed out that, based on consensus in the expert group, the approach adopted in the TK text was also followed. Similar to the TK text, a footnote, as an alternative to the inclusion of nations, in paragraph 2.1 was incorporated. He noted that this article had been further refined as a result of the informal informal discussion conducted on the subject of nations. He also took note of the earlier intervention from the Delegation of Egypt which reflected the national cultural heritage, as being its intent around ‘nation’, as against a political state. He noted that Article 3 had been changed substantially to reflect a tiered approach to moral and economic rights developed in the TK text which was based on the level of diffusion and the uses of the subject matter. In developing this article, he explained that the facilitators had merged and amended elements in the TK and TCEs text reflecting the different natures of the respective subject matters. This was a substantive change which would require much more reflection by Member States. In Article 4, which dealt with the administration of rights/interests, he noted that Article 5.1 from the TK text, which dealt with Competent National Authorities, had been imported into Rev. 1 of the TCEs text. Furthermore, Article 4 had been simplified and the elements which related to awareness-raising had been moved into Article 13 which dealt with capacity building and awareness-raising. This was a reflection of the desire expressed within the expert group to include a capacity building and awareness-raising provision within the text. In relation to Article 5 which dealt with exceptions and limitations, the approach adopted within the TK text had again been adopted. The facilitators had incorporated sections on general exceptions and specific exceptions within the Article, and had also attempted to link the tiered approach with the rights in Article 3. He pointed out that further work was still, however, required in this regard. With respect to Article 6, Option 1 had retained the approaches from both the TK and TCE texts, while Option 2 retained the previous approach from the original TCEs text. He pointed out that Article 7 was a mere reflection of the conversations held in the expert group with respect to whether there was a need for formalities or not. He clarified that Article 8 had been placed in active language and Article 4.5 from the TK text, which related to disputes, had been imported into the article as Article 8.2. No substantive changes were made to Article 9, except that the original language had been cleaned up for clarity. In Article 10, he noted that the suggestion of the representative of the *Tebtebba* Foundation, speaking on behalf of the Indigenous Consultative Forum, which related to non-diminishment of existing rights, and which was supported by other Member States, had been incorporated. He noted that, to enhance legal certainty, Article 10.1 had been clarified as relating to Member States implementing the instrument. No substantive changes were made to Articles 11 and 12, other than cleaning up the text for clarity. He also pointed out that Article 13 was a new article which required further consideration and clarification.

227. The Chair opened the floor to interventions on Rev. 1.

228. The Delegation of Kenya, speaking on behalf of the African Group, thanked the facilitators for their work with respect to the preparation of Rev. 1. It believed that the text provided a good

basis for moving forward and had reflected the recommendations made by Member States in the plenary and in the expert group. It noted that at the commencement of the cross-cutting exercise at the opening of the session, the goal of the Committee had been to ensure that coherence was brought in the TK and TCE texts by ensuring that there was a similar treatment of concepts and issues where they appeared in the two texts and referred to the same matter. It believed that this goal had been achieved, since Rev. 1 of the TCEs text took into account the discussions in the TK text.

229. The Delegation of Indonesia thanked the facilitators for their work and believed that Rev. 1 could provide the basis of the IGC continuing negotiation. It reserved its right to provide further comments on the text at a later stage.

230. The representative of FAIRA thanked the facilitators for their hard work and noted that, in line with the intervention by the Delegation of Australia in this regard, the time period cited in Article 1(d) did not reflect the idea that TK or traditional culture could be dynamic and evolving. He noted that the dynamic and evolving nature of TK and TCEs was still applicable even where such had existed for a period which was less than fifty years. The Delegation of Paraguay was of the view that the progress made on the text was timely and believed that the progress had been based on the discussion of cross-cutting issues which were dealt with in the framework of negotiations that focused on the TK text. It requested that, with respect to Article 1(e), reference also be made to TCEs which were expressed in the form of writing. As had been done in the definition of TCE's under the 'Use of Terms', it noted that the inclusion of a reference to the written forms of TCE's was of utmost importance.

231. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the facilitators for their work and also for the track-changed version of Rev. 1 which had been of help. It, however, noted that it had had little time to consider the details of the fresh approach and the synchronization of the TK and TCE texts. The Delegation questioned the merits and value of attempting a major synchronization of the TK and TCE texts. It was of the view though that, while there were possible synergies with respect to beneficiaries and administration of rights, TK and TCEs had distinct specificities that could not be conflated. It believed that attempts at synchronization should be aimed at creating consistency of terms and not at the wholesale merger of the texts. He stated that it was in a position to make initial comments on Articles 1 to 4. But it required further time to consider the details of Rev. 1.

232. The Chair intervened and reminded that he had not proposed a synchronization of texts, insofar that that would mean a merger of texts. He noted that there had been no proposal or discussion in this regard. He clarified that the facilitators had been requested to seek to incorporate text within Rev. 1 of the TCEs text, based on identified areas of overlap between the two texts in the cross-cutting discussions.

233. The Delegation of the EU, speaking on behalf of the EU and its Member States, requested that the word 'introduction' be inserted within the heading, "Principle/Preamble", so as not to prejudge the nature of the instrument. It also requested that the language contained in objectives 3 and 4 be inserted into the 'Introduction' section, on the understanding that they, however, would still be retained within the "Objectives" section. With regard to the Use of Terms, it requested that the terms "traditional cultural expression" be placed in brackets and that the phrase "in which traditional culture is embodied" be inserted after the term. It further proposed that the definition of TCE's, as provided within the Use of Terms, be introduced in the chapeau of Article 1 so as to render the Article clearer. It also requested that the definition of "publicly available", as contained in Rev. 2 of the TK text, be introduced into the TCE text. It requested that brackets be placed around Objective 1(b) until it had fully understood the objective's implications. With regard to Article 1, it requested that the word "protection" in the title be bracketed and replaced with the word "safeguarding". In addition, it was of the view that paragraphs 1(a) to 1(d) should be cumulative and, consequently, should be linked by the word "and". With regard to paragraphs 1(e) and 1(f), it believed that these did not add to the

definition, and requested that they be bracketed. It further requested that a criteria for eligibility be added within the article to clearly specify the TCEs for which protection may be available. With regard to Article 2, the Delegation noted that it had ongoing concerns regarding the issue of nations as beneficiaries as it believed this could lead, not only to unethical practices, but also to a broadening of what should be considered as a TCE, and the safeguarding or protection that could be afforded thereto. With regard to Article 2, paragraph 2.2, it therefore noted that 2.2(b), 2.2(c) and 2.2(d) seemed to define TCEs which were not linked to an indigenous or local community and was of the view that these, therefore, lay outside of the scope of Article 1. It pointed out that though it was still reflecting on paragraph 2.2(a), it was concerned that the paragraph could open the door to states becoming beneficiaries. It requested that the entire paragraph 2.2, as well as the footnote to Article 2, be therefore bracketed. With regard to Article 3, it requested that the title be amended to read "Scope of Safeguarding". It also requested that paragraph 3.1, together with alternative paragraph 3.4, be made to appear as a separate option one, and that the title "Scope of Protection" which appeared between paragraphs 3.1 and 3.2 be deleted. It further requested that paragraphs 3.2, 3.3, and 3.4 be placed in brackets as a separate option. With regard to Article 4, it suggested that the word "under" be inserted after the phrase "provided for" in the alternative 2 to paragraph 4.1 and that the entire alternative 2 be bracketed pending further discussion. It finally requested, as a cross-cutting issue, that the term "protection" be bracketed wherever it occurred in the text and be replaced or joined by the word "safeguarding".

234. The Delegation of the United States of America expressed its appreciation of the effort made in revising the TCEs text. With respect to Article 1, it submitted that the title should be amended to "eligible subject matter". It further requested that the phrase "of protection" be placed in brackets. It would have a series of smaller changes within the text to be explained during the subsequent expert group. With respect to Article 2, it requested that the title be amended and the words "of protection" put in brackets. The Delegation was looking at a number of new elements imported from the TK text into the TCE text. Some of these elements were never discussed before, and where it had identified them, the Delegation would request that they were placed in brackets. Along those lines, Article 2.2, paragraphs (b), (c) and (d) were new elements of the discussion on TCEs. The Delegation would need time to reflect on these and should accordingly be placed in brackets. With respect to Article 3, it requested that the title be changed to "criteria of eligibility for protection". This change followed well established practices in WIPO with respect to similar titles and conventions, notably the Berne Convention, and the Delegation thought it was appropriate here. It also noted that there were a number of new elements introduced for the first time that had not been discussed in the TCEs discussions previously, notably in the area of sacred and secret TCEs. It would be looking closely at those new elements. Specifically it noted that in Article 3.2(a)(iv), there was a new element, perhaps entirely worthy of consideration, but nonetheless new. It requested that this part be bracketed. With respect to Article 3.3(d) there was a new element. The Delegation was open for further consideration of the issue, but requested that it be placed in brackets. Paragraph 3.4 was also a new topic for discussion and should be placed in brackets. Further language changes would be referred to in the expert group. With respect to Article 5, the Delegation would be exploring this in further detail in the expert group. With regard to paragraph 5.1, it requested that the permissive formulation of "may" be, at least at this point, reformulated in a "should/shall" formulation, and similarly in paragraph 5.3. With respect to Article 8, it noted, to the best of its knowledge over a long period of time, that this had not been the subject of any discussion within the TCE context. Therefore, Article 8 should be put in brackets. Regarding Article 9, it would have comments in the expert group. It should also be placed in brackets. Regarding Article 10, it noted the changes from the previous formulation and was still studying the words "mutually supportive", which it found less vigorous and disciplined and somewhat vague. For the time being, it proposed that in Article 10.1, "mutually supported" be placed in brackets. With respect to national treatment, this had not been discussed within the TCE context and the article should be placed in brackets. Article 12, had not been discussed at all in the TCE context, and should be placed in brackets. Article 13 was entirely new to the TCE discussion and should be placed in brackets as well.

235. Mr. Goss, as Friend of the Chair noted that the Delegation of the United States of America had indicated that Article 3.2(a)(iv) had not been discussed or was not in the previous text. He requested clarification on this point.

236. The Delegation of the United States of America answered that to the best of its understanding, Article 3.2(a)(iv) was a new concept.

237. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the Chair for his clarification regarding synchronization of texts and the actual purpose of the present drafting work on the TCEs text.

238. The Delegation of Switzerland referred to Article 2 with regard to nations as possible beneficiaries. The Delegation held indigenous peoples and local communities to be the rightful beneficiaries of the protection of TCEs and TK. It was concerned, like other delegations as well, that if the IGC gave rights to states, and thus recognized them as beneficiaries, that would open the possibility of misuse in that those rights and ensuing benefits might not be passed on to the rightful beneficiaries, namely indigenous peoples and local communities. Besides, the Delegation did not see how states could create express, maintain and transmit TCEs and TKs. It did not recall statements from delegations illustrating how an instrument that would include states as beneficiaries could work in practice.

239. The Delegation of Oman thanked the facilitators for their work. It supported the reference made to capacity building and awareness-raising as there were two very important elements. It wished though that two different articles be introduced on each subject. It supported the statement made by the Delegation of Egypt on the need to include nations as beneficiaries. It emphasized that the instruments should meet the particular situation and interest of all Member States. It did not dispute that the indigenous peoples were beneficiaries of TK and TCEs, but wished to see reflected that some Member States considered its entire people as one nation. It further added a comment on Article 3, where it wished to see the inclusion of nations, so as to reflect its inclusion in Article 1 and 2.

240. The Delegation of Egypt thanked the facilitators for their work. It looked forward to working with the facilitators to reach solutions and make progress. It noted that at this stage, it was useful to talk about a definition of TCE in the “Use of terms” section and pointed out that the IGC could benefit from the definition provided by UNESCO Conventions. Article 2 could still be further streamlined, and announced that it was willing to share ideas in this regard. The Delegation welcomed the statement made by the Delegation of Oman regarding a reference to nations in Article 3.

241. The representative of InBraPi thanked the facilitators. She noted that generally speaking, progress had been made regarding the TCEs text. Although she had a couple of concerns with some of the articles, she expressed her thanks to the Member States that supported suggestions regarding Articles 3, 10 and 12, including the Delegation of South Africa. She noted that some delegations had requested that parts be put between brackets because they had not been discussed yet. She would understand that some parts be put under brackets because there was not consensus yet on them. She would further comment on Article 13 at the expert group meeting. She had questions about beneficiaries and stated that the informal informals had been useful in that respect, at least in an attempt to understand the various situations and views. She aligned herself with the statement made by the Delegation of Switzerland in that beneficiaries should be local communities and indigenous peoples. She stated that the IGC should accommodate the interest of states under Article 4, which dealt with the administration of rights as custodians.

242. The Delegation of China thanked the facilitators for their work. In its view, the opinions of the various participants had been taken into account. Rev. 1 was a fairly solid foundation for the IGC to continue its negotiations. The Delegation needed more time to work on Article 13.

The Delegation would make more comments within the expert group. It supported the statements made by the Delegation of Egypt and the Delegation of Oman regarding the inclusion of the word “nations” in Articles 1, 2 and 3.

243. The Delegation of Honduras thanked the facilitators for their work. In connection with Objective 4, it referred to a case in Honduras regarding the *Lenca* indigenous people. That case was also linked to Article 3, Option 2 in the TCEs text. Objective 4 should be improved, so that it would not provide that rights already acquired by third parties could not be impacted by the instrument. The *Lenca* community made vases of ceramics that were very precious and well-known nationally and internationally. Those vases were exported by a foreigner who had been supported by NGO’s with the view to improving the living conditions of the *Lenca* people. Unfortunately, this scheme resulted in misappropriation of the rights of the *Lenca* people. It appeared that the designs obtained for that purpose had been published in catalogues and copyrighted by the foreigner in question. Such misappropriation had made impossible for the *Lenca* people to make use of their own products and sell them directly. The Delegation wished to draw attention to this case, because it thought Honduras was not the only Member State to suffer from situations of that kind. It wished that a revised drafting of Objective 4 prevent such situation from happening. Similarly, Article 3 should provide for the possibility to revoke rights granted to third parties and return them to the relevant indigenous peoples.

244. The Delegation of Canada thanked the facilitators for their work. Under the preamble on principles, it requested that the language regarding the safeguarding of the public domain be added as a principle. It referred in this regard to the wording of paragraph 5 of the preamble found in the TK text. Regarding paragraph 7, it would appreciate clarification as to whether “environment” was referred to in its literal or figurative sense. If the intent here was literal protection of the environment, then this would be beyond WIPO purview. Under Objectives and Principles, paragraph 6, it wished to bracket the word “traditional”. As an alternative, the Delegation suggested that one distinct principle be added to capture innovation and creativity. With regard to the Use of Terms, it welcomed the addition of the section and looked forward to seeing more terms being defined, included “sacred”, “secret”, “use/utilization”. Under Article 1, it welcomed the addition of the term “expression”. It believed that paragraph (e), was embedded in the proposed definition for TCEs under the Use of Terms section. In addition, paragraph (f) should be moved to this section as an alternative. The Delegation found that the language under Rev. 1 of the TK text was clearer and could be used as an option. It questioned the use of the word “create”. In retrospect, it would question it as well under Rev. 2 of the TK text. It asked whether it was the intent for Member States to provide beneficiaries with the means to create their own sacred and secret TCEs. It was not sure that this was appropriate and asked that this part be bracketed. Regarding Article 2, it stated that this was a good basis for discussion, although the footnote should be carefully assessed, as noted by other delegations in the informal informals including the Delegation of Canada. It should be ensured that such mention did not give Member States a free pass to deny protections to indigenous peoples and local communities, a denial that would be contrary to the intent of this instrument. The Delegation noted that paragraph 2.3 of Rev. 2 of the TK text was not retained and recommended adding for the sake of good transparency practice. Article 3 would require a lot of reflection. The Delegation pointed out that a measures-based approach would be the most appropriate in this regard. As a preliminary comment, it suggested that providing measures to ensure the “creation” of TCEs as contemplated in 3.2(a)(i) was beyond the scope of any instrument. In 3.2(a)(iii), the reference to PIC should be followed by the phrase “or approval and involvement”. It would like to see this change applied throughout the TCE text. Regarding exceptions and limitation, it would have to review the relevant article as it was new material. The wording of this article would also depend on the scope of protection. It noted that Rev. 1 was silent on the issue of innocent infringement. The Delegation asked that it found its way back into the draft articles. On paragraph 5.3(a), research should be included, while conditions could be discussed. On paragraphs 5.3(c) and 5.4(b), it bracketed “authorship” as it found this concept too limited, since it might not encompass certain expressions, such as performances. Regarding paragraph 5.5, after “protected”, it wished to insert “by Intellectual

Property including Copyright and Trademark Law", which it found broader and better suited. Finally, on consistency with general legal provisions, the so-called "non-diminishment" provision would fit better under the introduction of the text. It wanted to avoid creating a hierarchy of international instruments by elevating other instruments above this instrument which was contrary to paragraph 1, which talked about instruments being mutually supportive.

245. The Delegation of Armenia thanked the facilitators for their work. It supported again the inclusion of nations as beneficiary, throughout whole text. It reminded that the Delegation of Egypt introduced its country as a whole nation, coming from times immemorial. The same could be said about Armenia. It said that although today Armenia was one-tenth of its historic territory, it had its own State and was a nation of TK and TCEs for thousands and thousands of years. Due to the course of the whole history, it also had local communities all over the world. Armenia's TK and TCEs had been preserved and passed from generation to generation and had not lost their national character. The Delegation strongly supported that nations should be recognized as a beneficiary in the forthcoming instruments as to respect and protect the rights of nations in their TK and TCEs as the creators and holders thereof. The Delegation stressed that having the indigenous peoples, local communities and nations as beneficiaries would not only show respect for the diversity of humanity, but would also give the people of these nations the ability to preserve their identity and to be protected against further misuses and misappropriations. It urged Member States to respect nations, indigenous peoples and local community alike. It stated that it would insist on this position in case the term nations stay in brackets in the text.

246. The Delegation of Kenya wanted to come back to the issue of synchronization, given that it first came up with the idea. It reminded that it used the term "consistency" in describing how the drafting exercise on the TCEs text would take into account the cross-cutting nature of some issues.

247. The Delegation of the Islamic Republic of Iran thanked the facilitators for their work. It believed that Article 1 was not the appropriate place to mention criteria for eligibility. Further, it was not in favor of mentioning any time-related term in referring to "generation to generation" in Article 1. Additionally, the different paragraphs in Article 1 should not be conceived as accumulative. Regarding Article 2, the Delegation acknowledged that the main beneficiaries of TCEs protection ought to be local communities and indigenous peoples, but not exclusively. It still believed that preserving policy space for Member States to determine the beneficiaries within their jurisdictions was a way out of the existing standstill. In this line, the definition of beneficiaries in the original text provided for the simple and inclusive solution. Such a solution should therefore be retained. Regarding Article 3, it emphasized the importance of a rights-based approach. With regard to paragraph 3.2, it supported the retention in the text of Option 2 paragraph (d) as included in the original TCEs text, so that an exclusive right be granted to the beneficiaries "to prevent use or modifications, which distorted or mutilated a TCE or that was otherwise offensive or diminished the cultural significance to the beneficiaries". Regarding exceptions and limitations, it stated that introducing the concept of a three-step test into the limitations and exceptions would not be compatible with the nature of TCEs.

248. [Note from the Secretariat: The Vice-Chair, Mr. Jailani, was chairing the session at this point]. The representative of Tulalip Tribes, speaking on behalf of the Indigenous Consultative Forum, thanked the facilitators for their work. He appreciated the congenial and constructive atmosphere of the first week of the present session and reaffirmed the need to continue negotiating in goodwill and good faith. He would have to look closely at the substitution of "safeguarding" for "protection", and requested an explanation of the meaning of that. More generally, he asked Member States to explain the meaning and legal effects of the proposals they were making. It was time for the indigenous peoples to understand the limitations and the strength of the protection that it was being offered. He recalled that TCEs were not simply a form of IP right, but were primarily a form of its cultural heritage. TCEs enjoyed protection under all relevant instruments, constructive agreements, principles, and arrangements with

states, including cultural heritage rights and human rights. All of those rights had to be brought into the discussions and recognized. He was looking for language in the instrument that recognized a fundamental commitment to the rights of indigenous peoples and local communities. He was very concerned about the issues of fair use, freedom of expression, public domain, third-party rights, including innocent infringement, and common heritage of mankind. He did not deny the importance of those in normal IP law, but saw that those issues could be used as legal ratchets or pumps for dispossessing indigenous peoples of their TCEs, abrogating their rights under other instruments and legitimizing past injustices. Overtime, such principles, without limitation, would likely lead to assimilation. Open societies had to be fair and based on justice. Principles must not force indigenous peoples and local communities to conform to the expectations of dominant societies, but to the fullest extent possible, develop means to protect the vulnerable. In Article 3, the representative saw a lack of any mention of a right to participation, appeal, and mediation. He had signaled its willingness to go to the graded approach, but since that approach was novel, it needed to see mechanisms to protect their right to appeal to classifications and other kinds of legal mechanisms that might dispossess them again. He reminded that harm should not be done. Indigenous peoples and local communities were in an asymmetric relationship, since they were under threat. He did not see that the public domain was in any way threatened and wished to understand how the public domain could be possibly threatened. He wondered who was the most harmed, and who carried the burden. Balancing did not necessary capture the legitimate needs and specific situation of indigenous peoples and local communities, while proportionality should be considered.

249. The Delegation of South Africa supported the statement made by the Delegation of Kenya on behalf of the African Group. It appreciated the work done by the facilitators and the Chair, and highlighted the insights that the informal informals had been able to provide into the different issues. It recalled that the mandate clearly indicated that the Committee had to negotiate a legal, international text for the effective protection of GRs, TK and TCEs, within the WIPO context. The issue of safeguarding was addressed effectively by UNESCO. It urged negotiators to focus on the mandate of the IGC, which was not to develop an instrument to safeguard, but to develop an instrument for the protection of GRs, TK and TCEs. Regarding the issues around the tactics of introducing words from other protocols, such as “safeguarding” and “fair use”, it believed that one should not impose those kinds of expectations arising from other conventions on the IGC process. It recalled that that point had been raised in the past, when references had been made to the Nagoya Protocol and the CBD. It had been said then that PIC and MATs were not principles that the Committee wished to bring into the discussion. Those delegations who argued in that sense could not now have the right to bring in other terms from other protocols. That would not be fair play. The Delegation pointed out that an observation had been made during the present session around procedural issues, bringing into question the integrity and the leadership of the Chair. Inasmuch as it affected the Chair, it affected all those involved in the negotiating process. It was concerned about those tactics because they could unsettle and delay the negotiating process. Member States had the sovereignty to intervene on any issue and deserved respect, and the Chair, as a person who was the head of the process, needed the same respect.

250. The Vice-Chair took note of the points raised by the Delegation of South Africa. He recalled that the Committee had to focus on its mandate.

251. The Delegation of the United Kingdom supported the statement made by the Delegation of the EU, on behalf of the EU and its Member States, since it fully shared many of the comments and concerns expressed, especially up to Article 4. It emphasized that it wished to thank the Chair for his intervention that clarified the issue of synchronization. It had been a very useful summary of the state of play of the independence of the two texts, preserving the distinction between the elements and the provisions that were substantially different in the two texts. In order to be very transparent and leave no doubts about the provenance of certain language, the Delegation of the EU had asked to have a new Rev. 1, which would have a cross referencing in the footnote or some other way of exactly identifying the language from the TK

text which had been introduced to the TCEs text. It had struggled with different parts of the language in Rev. 1 and believed that a new Rev. 1 would be helpful, not just now but also in the future. The Delegation stressed its preference on having that language in Rev. 1 and cross referencing to different parts of the text.

252. The Delegation of Sweden supported the statements made by the Delegation of the EU on behalf of the EU and its Member States, and the statement made by the Delegation of the United Kingdom. It thanked the facilitators for their work. Objective 4 was an important objective for the Delegation. As regards to the use of terms, it found some merit in the definition of public domain in the TK text and wished to have it inserted in the TCEs text, for further consideration. In Article 1(c), it wished to insert the words "artistic or literary" before "creative intellectual activity". In paragraph 5.3, it wished to bracket the wording "Subject to the limitations in paragraph 1" and to replace it with "In addition". In paragraph 5.4, it wished the chapeau to read "Regardless of whether such acts are already permitted, the following should be permitted". In paragraph 5.5, it wished to introduce a reference to design law.
In paragraph 8.1, Option 1, it wished to insert "or other" after "administrative". In paragraph 8.2, the wording "each party" should be replaced with "the parties may mutually agree". That was on the interest of securing the fundamental right to justice or the right to have an issue solved by a court of law". Articles 9 to 12 prejudged the legal nature of the instrument and had to be bracketed. Regarding Article 13, the Delegation noted that it was completely new and had to be bracketed, since it needed to consider it further.

253. The Delegation of Uruguay, speaking on behalf of GRULAC, extended its most sincere appreciation to the Chair for all the work that he had done and recognized the work that he and the facilitators had done. It echoed the words of the Delegation of South Africa on that regard. It believed Rev. 1 was a major step forward. It was a good point of departure for further discussions in the expert group and stressed that the expert group was the appropriate format for making further progress. It pointed out that it would be good not to repeat the same ideas in several articles. For instance, the admissibility criteria should be dealt with in Article 1 or 3 in brackets, but not in both.

254. The Delegation of Uruguay, speaking in its national capacity, thanked the Delegation of Indonesia for its proposal on Article 2, which had been taken up by the facilitators in the footnote. That text appropriately reflected situations such as the one of Uruguay. The footnote together with paragraph 2.2 was appropriate. The Delegation wished to see it included in the future in the TK text. The Delegation had doubts though, but only about the word "exclusively" in the footnote.

255. The representative of Copyright Agency Limited thanked the facilitators for their work on Rev. 1. It was a good basis for further negotiations. She also thanked those Member States who had supported indigenous peoples' suggestions and looked forward to working with more Member States in a collaborative manner. She saw Article 5 as problematic, because the exceptions under that article were too broad. Those exceptions would allow for third parties and those outside of indigenous peoples and local communities to misappropriate and exploit more TCEs. She referred in particular to paragraphs 5.3, 5.4, and 5.5 which went against the objective of the instrument, which was the protection of TCEs for indigenous peoples and local communities. While there were great non legally binding protocols in Australia regarding indigenous arts, the Australian Copyright Law did not fully protect TCEs, as the duration of protection was limited and it did not recognize collective rights. Copyright law exceptions for research purposes further harmed and allowed for misappropriation of sacred and spiritual TCEs. If there were to be any exceptions for the use of TCEs, those exceptions should be done only and strictly with the consultation of indigenous peoples and local communities. A very recent example, which had occurred in Australia, involved a group of researchers who had gone into several indigenous communities in western, south and northern Australia, and taken TCEs without the appropriate permissions or consultations with those communities. That particular research project was called *Songlines*. The aim of that project was to be a "cutting edge

cross-cultural collaborative and interdisciplinary research project between the *Martu*, the *Ngaanyatjarra*, the *Pitjantjatjara* and the *Yankunytjatjara* peoples and the national cultural heritage institutions of the Australian National University and the National Museum of Australia". The project contained *tjurkpa* or secret dreaming stories, ecological knowledge, stories, sacred rock art, archeological artefacts, songs, stories and artworks. Those researchers had also received grants from the Australian Research Centre to go ahead with the project, even though the researchers had not received full consent from all involved indigenous communities. Some indigenous communities had given their consent, but several *Pitjantjatjara* senior men from South Australia were not happy about the exhibition, as they had not given their consent and the researchers had gone behind their backs. An article had been published two weeks before in the national newspaper "The Australian" in relation to the outcry about the exhibition. There had been a court order stopping the exhibition going ahead. Those senior men had stated that they did not wish to have their sacred and secret TCEs revealed in the project due to bad previous experiences where their TCEs had actually been copied online. Copyright Agency Limited representatives had visited the *Pitjantjatjara* lands in October 2012, and the senior men had said that they were not happy about the *Songlines* project. Their senior male stories were not to be seen by the public and they did not want the exhibition to go ahead. As there was no way of controlling those secret and sacred TCEs at the moment in Australia, and there were no laws in Australia that prevented users from misusing and misappropriating TCEs, those TCEs would be exposed to the greater public. That was a very recent and personal example of how introducing an exception for the use of TCEs for research and cultural institutions purposes was very problematic for those indigenous communities who did not wish to have their TCEs out in the public.

256. The Delegation of Thailand thanked the facilitators and participants for their work and input. Rev. 1 should serve as a good basis for further discussion. Regarding Article 2, it strongly supported the statement made by the Delegation of Egypt and other delegates on the inclusion of nation as a beneficiary, in line with what it had already indicated in the past. In paragraph 2.1, it proposed the deletion of the word "create", as it did not fit the nature of TCEs. It suggested reconsidering the use of the word "create" or "creative" used to describe TCEs elsewhere in the TCEs text. It also proposed taking out the ending clause, "meeting the eligibility criteria in Article 1", as that clause did not apply anymore. The footnote proposed by the Delegation of Indonesia was useful. However, it contained substantial content and was not only an explanation of any part of the text. The footnote deserved therefore to be included in a paragraph of its own, coming after paragraph 2.1, either as paragraph 2.1*bis* or 2.2. The Delegation felt that the word "exclusively" might create serious difficulty in the interpretation and implementation, and proposed to do away with that word. In paragraph 2.2 which would then become paragraph 2.3, it wished to delete the clause "TCEs meeting the eligibility criteria in Article 1". On Article 3, the new revised text needed further consideration. Paragraph 3.1 read as an excellent chapeau, if the sentence stopped after the word "beneficiaries" in the second line, as the rest seemed redundant. The word "safeguard" in the first line of paragraph 3.1 had to be replaced with "ensure the protection of". It pointed out that the term "safeguard" as used in the UNESCO 2003 Convention for the Safeguarding of Intangible Cultural Heritage meant keeping it safe from disappearance, and not providing legal IP protection. In paragraph 3.2, it wished to retain subparagraph (d) of Option 2 of Article 3 of document WIPO/GRTKF/IC/27/5, as it contained a very important element of protection. The Delegation reserved the right to make further comments on Rev. 1 at a later stage.

257. The Delegation of Italy thanked the facilitators for their work. It aligned itself with the statements made by the Delegation of the EU, speaking on behalf of the EU and its Member States, and the Delegation of the United Kingdom. It considered that TK and TCEs were entirely different subjects. It was not possible therefore to consider them as overlapping. Furthermore, Rev. 1 of the TCEs text did not take sufficiently into account the compatibility with copyright. There were certain overlapping aspects between the text and copyright, where the IGC needed to find appropriate solutions. Individual creativity that was the result of inspiration and gave rise to cultural works was protected by copyright, because the new work belonged to

the author, even if the inspiration came from existing works. This aspect of creativity of individual creations, as compared with works by the community had not been sufficiently evaluated in the text. Appropriate recognition of the public domain was another important key element of any instrument. Whatever was already in the public domain should not be concerned within the instrument. Another aspect was the duration of protection, which should not be unlimited. Article 1.1 should include the definition of TCEs, which was now found in the "Use of Terms". The definition should be in the normative texts and nowhere else, as this was the case with the WIPO Performances and Phonograms Treaty. Furthermore, in this definition, the Delegation wished that the brackets around "literary and artistic" be removed and that the word "creation", be added. Those three words were very important for the Delegation. Regarding Article 3, the text should be limited to paragraphs 3.1, 3.3(a) and Alternative 3.4. Regarding the notion of nations in Article 2, the Delegation was of the view that a solution was already expressed by Article 2.2(a), as it read it: "is expressed in within a community in a territory that is entirely and exclusively coterminous with the territory of that Member State". The Delegation stated that this solution was satisfactory and met the concern of the Delegation of Egypt and other delegations. Regarding Article 6, it supported Option 2, in line with what it had stated regarding the term of protection. In line with the statement made by the Delegation of Sweden regarding the nature of the instrument, it expressed the view that Articles 9 to 12 should be bracketed, because they prejudged that nature.

258. The Delegation of the EU, speaking on behalf of the EU and its Member States, focused on articles in Rev. 1 it had not commented upon yet. Regarding Article 5, it noted the omission of an opening bracket at the chapeau of paragraph 5.1. In paragraph 5.3, the meaning of "subject to limitations" in paragraph 1 was unclear. It also questioned the logic of including the final clause of paragraph 5.3, which stated that this provision should/shall not apply to TCEs described in paragraph 3.2. Clearly exceptions should apply broadly. It therefore asked that this final clause be bracketed. With regard to paragraph 5.5, it asked that the reference to copyright and trademark law be replaced with "intellectual property rights", so that designs, geographical indications and any other appropriate IP rights were fully covered. Regarding Article 6, the operational effect of this instrument was not yet decided and thusly it was too early to take a definite position on Article 6. Nevertheless, it asked that the title be amended so that it included the word "safeguarding". Regarding Article 7, the wording "as a general principle" in the original text was lost in Option 1 of Rev. 1. It requested that the wording be inserted or otherwise bracketed. Regarding Article 8, it wished to bracket the words "rights" in the title and to amend the opening language in Option 1 to read "Appropriate legal policy administrative or other measures", as it would give Member States greater flexibility. Regarding Article 8.2, it asked that the wording "each party" be replaced with the words "the parties may mutually agree". Regarding Articles 9 through 12, it requested that they were bracketed so that the nature of the instrument was not to be prejudged. Articles 9.3 should be deleted. As Article 13 was a wholly new article, the Delegation requested that it be bracketed, pending further consideration of it. The Delegation reserved the right to comment on the text in its entirety at a later stage.

259. The Delegation of El Salvador referred to Article 1 and stated that even though its position was well known, it would again voice its concerns regarding that article. It reminded that El Salvador was characterized by an important diaspora and a generation that had been unfortunately lost. The Delegation was concerned by a definition of the subject matter that would be conceived as handed down from one generation to another in a consecutive way. It thanked the facilitators for including "consecutive or not" in the draft and therefore encompassing its long standing position. Similarly, the Delegation stressed that it could not support the words "but no less than 50 years". Regarding Article 2, it stated that the beneficiaries were indigenous peoples and local communities. It took duly note of the statement made by the Delegation of Egypt with regard to the term "nation" and stated that it would certainly give further thought to what was said. With regard to the scope of protection, it welcomed the wording of the article, but Article 3.4 in particular was problematic and requested further consultations with its authorities. With regard to Article 5, it supported Option 2.

Regarding Article 5.5, it associated itself with the statement just made by the Delegation of the EU, because that would encompass all level of rights. Regarding the term of protection in Article 6, it agreed with Option 1 and supported it. Likewise, it supported Option 1 in Article 7. It welcomed Article 13 and liked to see it included, not only in the TCEs text, but in the TK and GRs texts as well.

260. The Delegation of Nigeria associated itself with the statement made by the Delegation of Kenya on behalf of the African Group. It was concerned by several statements that had been made during the present session. She welcomed the fact that it had been clarified by the Chair and the Delegation of Kenya on behalf of the African Group that the cross-cutting issues exercise had not been about merging texts or "synchronization" in that sense, but looking for similarities, in order to ensure consistency between the TK and the TCEs texts where there were sufficient similarities of issues and concepts. It was the Delegation of the EU that mentioned a merger of the texts for the first time, while no delegation had that in mind. The Delegation was also concerned by the efforts made by some delegations to approach TCEs protection from the perspective of copyright law. The Delegation agreed with the statement made by the Delegation of Italy that there were some overlapping between both. However, the Delegation did not participate in the IGC with the understanding that it was creating an appendix to the Berne Convention. It reminded that the IGC had a mandate to engage in text-based negotiations for an international instrument or instruments on TCEs. The fact that the IGC had the benefit of a copyright system, a trademark system and a design law system, that this instrument could gain from, did not replace the distinct and fundamental purpose that the IGC had been mandated to pursue. The result could be "copyright plus", "copyright less", "copyright even", but not merely "copyright", since it was about TCEs. A third reason for concern was that the notion of the public domain had come up time and time again. The Delegation wished to echo a remark made by the representative of the Tulalip Tribes: was the public domain in jeopardy? The Delegation was unsure whether it was important for the IGC to be concerned about the public domain as an international concept. To date, there was not a single international instrument that defined the public domain. If the IGC wanted to take on that significant task in its mandate, the Delegation would not reject this task *per se*. But this should be done with the understanding that the public domain, as defined in this text, would be a definition that applied to all IP instruments. Until now, those who preceded the IGC in the IP field, as experts in this field of law, saw the wisdom in letting Member States decide what constituted the public domain within their national borders. In reference hereto, the Delegation did not think that the present generation was that much brighter or wiser that it should not borrow from that wisdom. It noted at the same time that this question was not part of the IGC mandate presently. Another reason for concern, was that the issue and term of "safeguarding" had come up again, and several times, during the present session. To "safeguard", in the field of IP law, would mean that there was some existing regime of protection that needed to be safeguarded or protected itself. The delegations' understanding was that the IGC was negotiating an instrument or instruments that would fill in gaps where TCEs and TK that were valuable and valued by indigenous groups and local communities had not received the recognition in an international IP instrument that they rightly deserved. The notion of safeguarding required that there was some convergence at the customary international law level and certainly at national levels that already offered that protection. If that was the case, then clearly the IGC had spent all those years in vain. Regarding the scope of protection, the Delegation of the EU, speaking on behalf of the EU and its Member States, requested that a separated option be retained, combining Article 3.1 and Alternative 3.4. The Delegation of Nigeria noted in this regard that the Delegation of Italy added Article 3.3(a) to this, the EU Member States not being seemingly on the same page about this as a result. In any case, the Delegation observed that Articles 3.1 and 3.4 were basically *status quo* provisions that did imply that what would be protected and not protected in the future by Member States could remain basically the same as in the past. It emphasized that the incorporation of provisions that would allow Member States to keep doing what they had been doing, or use the IP system to the extent that they wanted to or chose to, would not be compatible with the mandate of the IGC. If the IGC was not here to negotiate an international instrument for the protection of TCEs,

this should be made clear. For this reason, the Delegation requested that those paragraph 3.1 and 3.4 be set off as forming an alternative article altogether. It had no preference in terms of bracketing, but stated that they were not part of the Article 3, and neither were they consistent with the mandate. It suggested that discussion and consultations take place about the process under the leadership of the Chair, since it seemed that the IGC was taking the risk to lose its time. Besides, the Delegation would not support the production of instruments which were buried in footnotes and cross-references that nobody would understand. In this regard, discussion about the process could also include the basic rules by which the IGC should produce the instruments.

261. The Vice-Chair concluded the discussion on Rev. 1 in plenary. He called upon the expert group to reconvene and prepare the ground for the production by the facilitators of Rev. 2 of the TCEs text. He then suspended the plenary.

262. [Note from the Secretariat: this part of the session took place after the expert group had met for the second time under Agenda Item 7.] The Vice-Chair reopened the floor on Agenda Item 7 and referred to Rev. 2 of the TCEs text that had been circulated among participants as prepared by the facilitators. He thanked the facilitators for their work and invited them to introduce Rev. 2.

263. Mr. Goss, speaking on behalf of the facilitators, made a special mention of the facilitators who had worked hard to ensure that the text, and particularly the requested brackets, reflected the positions of all Member States without favor. He reminded that the Nagoya Protocol had over 3,000 brackets at the commencement of the final negotiations. Currently, Rev. 2 had around 1,500. He apologized for any omissions or errors in advance. The facilitators had, to the best of their knowledge, captured all interventions though, for clarity's sake, they had modified some text. He highlighted the key changes from Rev 1. In the Preamble/Principles, two new paragraphs had been added, relating to promoting innovation and recognizing the value of the public domain. He said that "Introduction" would also be included in the title. In the Use of Terms section, they had imported definitions for "public domain" and "use/utilization" from the TK text. They had also modified the definition of TCE to include "which may subsist in written, codified, oral or other forms." In the Objectives, there had been no substantive changes except that, for consistency throughout the text, the terms "prior informed consent" had been used. In Article 1, they had included additional bracketed headings, reflecting that there was no consensus on the title. They had added, in brackets, "a unique product of" in subparagraph (b). They had reordered the subparagraphs to reflect the view in the expert group that subparagraphs (a) to (c) were cumulative, and that the concepts were generally agreed, albeit not all the specific words, whereas there was no agreement on the concepts in subparagraphs (d) and (e). They had also placed the previous subparagraph regarding "which may subsist (…)" in the definition, as that was appropriate. They had also split out the "term of years" language, as there was no consensus on including a time period. He asked the IGC if there could be agreement in plenary to remove the word "held" and remove the brackets around "and maintain" in subparagraph (a). In Article 2, the facilitators had changed the heading, reflecting a lack of consensus on protection or safeguarding. The article now referred to "nations" as beneficiaries. There had been a lot of discussion thereon and the language proposed was not final but offered for consideration. They had brought the footnote in Rev. 1 into the main text as paragraph 2, reflecting some emerging consensus thereon. They had also included "cultural and social identity," as requested by a Member State, and had replaced references to specific articles with the word "instrument" throughout the text, to make it more flexible. They had made some changes to paragraph 2.3 for clarity and to remove repetition, as there was confusion about the last subparagraph in Rev. 1. Article 3 reflected two alternative options. The second alternative option incorporated former paragraphs 3.1 and 3.4. The first alternative option reflected a tiered approach constructed in Rev. 1 with the removal of former paragraphs 3.1 and 3.4, as they were now the alternative option. In the first alternative they had made some further modifications, including adding PIC and MATs in relevant sections. They had added a new subparagraph (v) in paragraph 3.1. Also, they had included "protected" before "traditional

cultural expressions." They had added a footnote from the original TCE text on a definition of "use." A number of brackets had also been included throughout the scope of protection. Article 4 had not undergone any substantive changes. In Article 5, they had included an alternative to paragraph 5.1, which came directly from the original TCE text. In paragraph 5.3, the facilitators were struggling with the actual conceptual difference between "subject to limitations in paragraph 1" and "in addition," as they appeared to be saying the same thing. Both options had been retained in brackets. They had also modified language, reflecting interventions in the expert group, including PIC, national protocols, "based on," "borrowed from," in relation to subparagraph (c). With regard to paragraph 5.4, two subparagraphs, (c) and (d), had been added, as requested in the expert group. Paragraph 5.5 included PIC and had added some language to include various forms of IP rights. In Article 6, "safeguarding" was added to the heading. They had used "instrument" rather than direct reference to specific articles and had incorporated "in consultation with beneficiaries" in paragraph 6.1. In Article 7, an additional proposal was added in Option 2, paragraph 7.2, requiring no formalities for secret TCEs. In Article 8, the concept of innocent infringement had been included, as reflected in paragraph 8.5. There had been a lot of discussions regarding its placement, but that article had been deemed the best fit. Paragraph 8.4 was new and had been supported within the expert group. There had been some modification to paragraph 8.1, Option 2. In Article 9, the main change was the addition of the words "to be allowed to continue" at the end of paragraph 9.2. In Article 10, the facilitators had made no significant changes. He noted that there had been a request to place paragraph 10.2 in the Preamble, but there had been no consensus, so it had been retained it in its current location. Article 11 was completely redrafted, as there was a degree of ambiguity in the original version, particularly in relation to paragraph 11.2 in Rev. 1, and the facilitators had replaced it with a more concise paragraph, removing the ambiguity and in part taking some of the wording from the TRIPS Agreement. In Article 12, there were no significant changes. Article 13 had been changed reflecting consensus in the expert group on a degree of flexibility in relation to implementing the provisions. The facilitators had not seen the benefits of a list. They had tried to capture the requirement to provide capacity building for beneficiaries which had been discussed in the expert group. Lastly, since they had tried to capture all the brackets, but as that had been a very difficult task, corrections by delegations were welcome in this regard.

264. The Vice-Chair thanked the facilitators for the comprehensive introduction of Rev. 2. He recalled that, as per the agreed methodology and work program, the plenary would be invited to point out and correct any obvious errors and omissions in Rev. 2. That referred to proposals made by Member States in the plenary or the expert group which were not opposed and had been inadvertently omitted. That also referred to proposals by observers that had received Member State support but were not reflected. Any new proposals or substantive comments, including drafting improvements and other textual proposals, would be recorded as usual in the full report of the session. He invited delegations to indicate clearly whether their intervention related to an error or omission, in which case the facilitator would check their records and upon confirmation, make the amendment. All other statements would be reported in the usual way in the report. At the end of that discussion, the text, as corrected, would be noted and transmitted to the General Assembly taking place in September 2014, subject to any agreed adjustments or modifications arising on cross-cutting issues at IGC 28. That would be the same the IGC had done with the TK Rev 2 under Agenda Item 6.

265. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the facilitators for their work in preparing Rev. 2. It understood the difficult nature of their task and the long meticulous efforts. While it reserved its right to comment on the text at a later date it had a few preliminary comments to make regarding some oversights. With regard the Principles/Preamble, it thanked the facilitators for the inclusion of "Introduction." It requested the copying of the wording of Objectives 3 and 4 to the Introduction but it wished to retain them as Objectives also. That was a change discussed in the expert group but requested in plenary earlier that week. In Use of Terms, it wished to bracket "traditional cultural expressions" and move it to the chapeau of Article 1. That was a change requested in plenary earlier and

discussed in the expert group, and while there was no consensus around that modification, it requested the facilitators to clearly indicate the Delegation's position in the text. It noted *en passant* that the opening bracket before "use/utilization" had been omitted. It wanted to include the definition of "publicly available," as used in the TK text. That hat was a change requested in plenary earlier. Regarding Article 1, as per its earlier interventions, it requested that subparagraphs (a) to (f) be marked as clearly cumulative and joined by the word "and." On Article 3, the provision related to safeguarding had been included as a separate article, however, there was no agreement on that in the expert group, and it asked that it be made a stand-alone option within Article 3, as per its preference and earlier indications. With regard to Article 4, it requested that the words "rights" be bracketed in both the title and in paragraph 4.1, Alternative 2. In paragraph 5.3, it requested that "prior informed consent or approval or involvement of the beneficiaries" be bracketed, because that was a new insertion. In paragraph 5.4, it requested that the chapeau read "regardless of whether such acts are already permitted, the following should/shall be permitted"; that had already been introduced by the Delegation of Sweden in the expert group. It asked that paragraph 8.4 be bracketed. Finally, with regard to Article 13, it noted *en passant* the omission of a closing bracket.

266. The Delegation of El Salvador thanked the facilitators and congratulated them for having reduced in an objective way the provisions contained in Article 13.1. In this regard, it had supported the statement made by the representative of InBraPi. It wondered whether the facilitators had summed up that position in Article 13.1. It recalled that it did not agree with the expression "but not less than 50 years" in Article 1(d), which caused considerable prejudice to its delegation.

267. Mr. Ian Goss, speaking on behalf of the facilitators, said that their intent had been to capture the proposal by the representative of InBraPi and its focus on the beneficiaries.

268. The Delegation of El Salvador said that it could agree, but wished nevertheless to consult with the representative of InBraPi, because although the text captured the essence of the proposal, it could also be improved. It reserved the right to make future comments on it.

269. The Delegation of Indonesia, speaking on behalf of the LMCs, thanked the facilitators for their work and efforts throughout the past two weeks. The Preamble/Objectives had not been discussed thoroughly within the expert group. It wished to bracket paragraphs 9 and 10. In paragraph 9, it sought to clarify that it was not against the principle of balance. The language that was reflected had to be revisited to actually reflect the scope of protection. Under Use of Terms, the proposal by the LMCs had been to provide a footnote for "use" in Article 3. So it was unclear why "use/utilization" was included within Use of Terms. It asked that "traditional cultural expression" be placed before "public domain" because it was the main subject matter being discussed. Under Article 1, it wished to remove the word "held" and open the brackets around the words "and maintained." It also wanted to insert "generated" in paragraph (a), because it reflected Principle 7. Additionally, those elements had to be alternative and not cumulative. Therefore it wanted to insert "or" after each element. Those concerns needed to be reflected within the text itself. In Article 2 and throughout the whole text, it wished to bracket the word "safeguarding." In Article 2.1, it wished to remove "hold." It also wanted to bracket "who create, express (…) social identity." Moreover, paragraphs 2.3(b) and (c) were contradictory and had to be removed. Article 3 showed quite some progress. It was a good approach and a good way to take its problems into account and should be the approach of the IGC, hence it wished to remove Alternative Article 3. It also reserved its rights to further comment on that. Additionally, if the criteria for eligibility were to actually be addressed, it should only be addressed within Article 3 and not anywhere else in the text. "Protected", before TCEs, had to be bracketed, because it indicated a certain level of criteria for eligibility. As an option, it suggested substituting that with "the subject matter." It said that Article 5 should be revisited in light of the discussion on scope of protection in Article 3. That provision was currently too general in nature, for example, regarding the inclusion of the "public domain." It wished to bracket paragraphs 5.3(a), 5.3(b), and 5.4(a). It supported the proposed wording offered by the

Delegation of India for Article 6.1: "shall protect the subject matter identified in Article 1, as long as the beneficiaries of protection continue to enjoy the scope of protection in Article 3." It preferred Option 1 of Article 7. It reserved its rights to make further comments at a later stage.

270. The representative of InBraPi, speaking on behalf of the Indigenous Caucus, thanked the facilitators. She was pleased to see the suggestions made by the indigenous representatives included. Speaking to Article 13, she had submitted her suggestion in writing, which was supported by the Delegation of El Salvador, but the text in Rev 2 did not reflect the phrasing as proposed. She said she would provide the exact text to the facilitators. It was a consensus text, taken from the CBD process. She also encouraged further Member State's support, should there be any.

271. The Delegation of the Islamic Republic of Iran thanked the facilitators for their dedication and commitment. It supported the statement of the Delegation of Indonesia delivered on behalf of the LMCs. With respect to Article 1, the definition of TCEs had to be broad enough to encompass all forms of TCEs. The text should not limit the subject matter of protection by including wording such as "the unique product of" and "distinctly associated," which could exclude some forms of TCEs. Also, the paragraphs in Article 1 should not be cumulative. Currently, the text reflected the position of Member States that demanded a cumulative formulation, and it wanted to have "or" between each paragraph. It preferred a rights-based approach throughout the text. It found the tiered approach of protection a reasonable and flexible solution for the protection of TCEs. That new approach was an achievement of that session and was compatible with the nature of the subject matter. Article 3 lied at the heart of the discussions and other articles, including Article 5, could be defined according to that new approach. In that context, limitations and exceptions for secret TCEs would not be appropriated but could be considered for other forms of TCEs subject to the PIC of beneficiaries. It also expressed concern about introducing concepts like "protected TCEs" and "safeguarding" within the text. Those concepts did not fit into the mandate of the IGC. IP protection was distinct from preservation, safeguarding and promotion of cultural heritage. The IGC was seeking an effective legal framework for the protection of TCEs from an IP perspective. The efficacy of a legal system lied with the availability of robust enforcement mechanisms for the beneficiaries to protect their moral and economic rights through civil and criminal procedures. That legal framework should be capable of preventing any use or modification of TCEs which distorted or mutilated TCEs. On Article 2, and despite extensive negotiation, the IGC was still facing a complicated formulation. The almost agreed and simple formulation from previous TCE texts had now been merged with the criteria of eligibility, which added to its ambiguity. That definition had to remain stand-alone, simply saying that "beneficiaries are local communities or indigenous peoples or as determined by national law." It considered Article 5 to be in brackets. It had to be redrafted in relation to the new approach on the scope of rights and the different categorizations of TCEs. On Article 6, it saw no value of mentioning the duration of protection. It supported the deletion of that article. It wanted to bracket the two new paragraphs inserted in the Preamble.

272. The representative of Copyright Agency Limited, speaking on behalf of the Indigenous Caucus, thanked the facilitators for their work. She also thanked the Member States that had supported the Indigenous Caucus and indigenous and local community representatives. On Article 2, she implored Member States to consider the recognition of the rights of indigenous peoples and local communities as defined in the ILO Convention 169 and in the UNDRIP. In Article 13, her desire was to build capacity building and awareness-raising regarding IP, TK and TCEs in the communities. Concerning Article 5, there should not be any exceptions and limitations for TCEs. She was not against working cooperatively with researchers, museums, libraries and other public cultural institutions, and to share some of them with the wider public, but that had to be done with their participation and FPIC. She said their treasures had been taken by force and under unclear terms and the ones that they still possessed were some of the most precious. For many years, they had been referred to as ignorant or backwards. They had not been allowed to speak their languages and engage in their spiritual practices and had been

forced to adopt foreign beliefs and practices. After such a long history of disrespect, she found it ironic that now some States were seeking to find ways to take more from them without their FPIC. She nevertheless noted that FPIC was included in paragraphs 5.3, 5.4(b), and 5.5, and she thanked the Member States who had supported that.

273. The Delegation of Canada said that the present session had been very productive. It expressed its thanks to the facilitators. It assumed all the text was still in brackets and reserved its right to comment at a later date. As requested by the Vice-Chair, it would focus on revisions and textual changes. Under Principles/Introduction, it wished to add a new Principle 9 that would state: "Affirming that nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities." That was taken directly from the Preamble of the Nagoya Protocol. Under Objectives, Objective 1, in the chapeau, it said that its proposed language "legislative, policy and/or administrative means" was missing. Under Objective 1(c), it wished to replace "sharing of benefits" by "compensation" and to eliminate the second "approval and involvement" as it was redundant. In Objective 3, it wanted to add "or approval and involvement" after the reference to PIC. Under Use of Terms, in the definition of the public domain, it wished to add "tangible" before "intangible." In the definition of TCE, it noticed the use of "and other forms" and asked what other forms were possible. In the definition of "use/utilization," the proposed definition appeared to be more related to TK than to TCEs and that required some adaptation down the road. Under Article 2, it supported Article 2.3, but was reflecting as to whether it would be better placed under Article 4. It wished to add "by the Member State" after the reference to "reasonable efforts." In the expert group, it had suggested adding paragraph 2.3 from Rev. 2 of the TK text, which stated that "the identity of any national authority established shall be communicated (…) to WIPO." It asked that it be added in the final revision of Rev 2. Under Article 3, it was still studying the tiered approach. In paragraph 3.1, it noted that the notion of "as appropriate and according to national law" was not being applied to all subparagraphs. It said that that notion should go into the chapeau, so as to cover all subparagraphs, as it was the case for paragraph 3.2. Under paragraph 3.1(a)(ii) it noted a definition of "use" in the footnote which was different from the definition provided under Use of Terms. It was not sure that it was useful to have two definitions of the same concept in the same instrument. In subparagraph (iii), it said that "approval and involvement" had to go before "mutually agreed terms." In paragraph 3.3, it wished to add "as appropriate and according to national law" in the chapeau, at the end. In Article 4.1, it wished to add "or approval and involvement" after the reference to PIC. In Article 5.3, in the chapeau, it wanted to add "and" before "or." In subparagraph 5.3(b), it argued that display was a form of presentation, and wanted to delete the word "display." The same would be done in subparagraph 5.4(a). Finally, in Article 8.5, it proposed a slight variation of the language, which would state "Member States should/shall not apply sanctions or provide remedies in cases of: (a) incidental use/utilization/inclusion of a protected TCE in another work or subject matter, or (b) use/utilization/inclusion of a protected TCE without knowledge or reasonable grounds to know that it is protected." The second point could address the question of due diligence.

274. The Vice-Chair drew attention to the fact that the exercise was focused on corrections and textual changes. He said that delegations wanting to propose a deletion should register their request by suggesting brackets.

275. The Delegation of Kenya, speaking on behalf of the African Group, thanked the facilitators for their work in coming up with Rev. 2. It stated that it was a major milestone in the IGC's work on text-based negotiations on TCEs. In the Preamble/Principles, it wanted to bracket Principle 10. In Article 3.1(a)(iv), and throughout the text, it wanted to bracket "protected" before "traditional cultural expression." That was a suggestion made in the expert group. In Article 3 Alternative, paragraph 3.1, it wanted to add an opening bracket. It wanted to bracket alternative paragraph 5.1 and paragraph 5.4(a). In Article 8.1, Option 2, it suggested adding the word "provide" after "national law" to make it read better. It wished to bracket Article 9.2, Option 1.

276. The Delegation of Paraguay referred to Article 8.4, the new text suggested by the Delegation of Honduras. It proposed replacing “revocation” with “cancellation” and wanted to expand rights to any kind of property right, including IP. It wished to add “in keeping with national constitutions.” And also, as suggested by the representative of InBraPi, it supported the inclusion of Article 13 into the instrument.

277. The Delegation of Japan fully appreciated the facilitators’ work on Rev. 2 in such a short time. In Article 3.2(d), only the word “false” was bracketed, whereas the whole phrase “false and misleading uses” should be bracketed. With respect to the scope of safeguarding or protection, stipulated in Article 3, it had a preference for the alternative of Article 3. As for the tiered approach, it needed more time to study it. There still remained several issues to be further discussed. For example, the distinction among the three categories of TCEs, how to safeguard each category and utilization by third parties, and so on. Therefore it reserved its right to further comment at a later stage. Regarding the formality requirement, it was of the view that formalities would help to efficiently safeguard TCEs, especially TCEs which existed in foreign countries. It was not easy to investigate how many indigenous people or local communities existed in the world, and which of them belonged to which country. Such a situation could undermine the predictability of the TCEs to be safeguarded. It had a strong preference to require formalities.

278. The Delegation of Thailand thanked the facilitators for their work. It thanked also all delegations for their active and frank discussions and exchanges throughout the meeting, enabling the IGC to have better perspectives on all the aspects discussed. It supported the statement made by the Delegation of Indonesia on behalf of the LMCs. It was happy that the Principles/Preamble and Objectives had received due attention, and now appeared clearly and prominently as part of the text. It also welcomed the Use of Terms as it was useful. It said that the term “TCE” should appear first on the list of terms. It, however, reserved its rights to revisit the Objectives, Principle, and the Use of Terms at a later date. In Article 1(a), it reiterated that the word “generated” should be inserted, because the word was inconsistent with the wording in paragraph 7 of the Principles/Preamble. It agreed that the word “or” be added after each subparagraph of Article 1. On Article 3, it preferred not to have the alternative, as it was not consistent with the tiered approach, however, it wanted to hear further explanations on that, because that might serve as a basis for further discussion.

279. The Delegation of Oman repeated the importance of including nations among beneficiaries. It thanked the Member States that were on the same line. It recognized the importance of Article 13, and proposed again that it be split into two articles: Article 13 on capacity building and Article 14 on awareness-raising.

280. The Delegation of the United States of America believed that Article 1 was cumulative, rather than alternative. It asked that the word “or” after each subparagraph be bracketed. In Article 3, it wished to bracket “inalienable, indivisible, and imprescriptible.” They bore no relationship to Article 6*bis* of the Berne Convention from which they drew supposed inspiration. In Alternative Article 3.1, it wanted to insert “protected” before TCEs. In Article 3.2, after “protection,” it requested that the phrase “under this instrument” be inserted. In Article 13, it appreciated the efforts of the facilitators to move towards conciseness in expression. It said it would be useful to retain the list of options under paragraph 13.3 under which capacity building could take place. The rationale for that was that it was a new provision, and holding on to that language for further consideration at the next session would be useful. It thanked the facilitators for their work throughout the session. The IGC had made substantial progress due to the cooperative spirit among Member States but also to the Chair, the Vice-Chairs, the Secretariat and the facilitators.

281. The Delegation of India joined other delegations in congratulating the facilitators for their work on Rev. 2 in capturing views expressed by different Member States. It made some observations to record its position, which it had not expressed in plenary, though it had

constructively and actively participated in the expert group and “informal informals.” It appreciated that the mandate of the IGC to discuss TK/TCEs cross-cutting issues had resulted in finding new approaches to finding answers to the outstanding issues on the key four articles. In that regard, it was pleased to note that Rev. 2 captured and incorporated the new approach adopted in the TK document produced under Agenda Item 6. That approach accommodated all valuable TCEs maintained and used by the beneficiaries to be included as subject matter of protection and at the same time to suggest solutions to the problems posed by the free availability of some TCEs. The new provisions in Article 3, based on a characterization of TCE and their use, seemed promising to find viable solutions to freely available TCEs. Regarding its comments on Rev. 2, it supported all the changes suggested by the Delegation of Indonesia on behalf of the LMCs. In Article 1, its consistent view had been to make it stand-alone. It was disturbed to see the reappearance of “unique product” which had been debated for a long time, while there had been an understanding to keep it out of the text. Its preference to use the word “linked” was to ensure that the valuable TCEs maintained by the communities received appropriate protection in Article 3. In Article 2, it was its consistent view that there could not be additional conditions to identify the beneficiaries for protection. It wanted to see that all forms of TCEs for which protection was afforded in Article 3 had beneficiaries. Hence it supported the suggestions made by the Delegation of Indonesia on behalf of the LMCs in paragraphs 2.1 and 2.2. It emphasized that Article 3 was the major positive outcome of the present session. It supported the tiered approach. There was still some clarity needed for some of the terms used in that article and also the clear distinction between paragraphs 3.2 and 3.3. Being a new approach, it reserved its right to come back on that issue more constructively. It reiterated that the concept of the public domain which did not have a conceptual idea in the area of IP was not the appropriate concept to determine the nature of TCEs to be protected in that article. It expressed its reservation on the definition suggested in the text. Regarding Article 5, it was its consistent view that the limitations and exceptions should not unreasonably dilute the level of protection afforded to TCEs and the ground for fostering creativity by third parties who were using them without authorization, particularly for commercial gain at the expense of the beneficiaries. Regarding the term of protection, its proposal in the expert group, as presented in plenary by the Delegation of Indonesia on behalf of the LMCs, was not correctly reflected in the text: “Member States/Contracting Parties shall protect the subject matter identified in Article 1 as long as the beneficiaries continue to enjoy the protection under Article 3.” The Delegation also proposed to add “of protection” after “beneficiaries” and “scope of” before “protection.” It reserved its right to come back an all other articles in light of the changes in the document, particularly in Article 3. It believed additional work was needed to further improve the text to meet the concerns of different Member States. Its expectation was that it would be addressed at IGC 28 during the discussion on cross-cutting issues.

282. The Delegation of Peru supported the statement by the Delegation of Indonesia of behalf of the LMCs. The subparagraphs in Article 1 could not be cumulative because there were contradictions among them. It preferred to link them with “or”. Article 2 could be clearer: simply stating that indigenous peoples and local communities are the beneficiaries. The more concepts were added, the more complicated everything became. On Article 13, it supported the proposal made by the representative of InBraPi. Capacity building and awareness-raising were very valuable concepts. The article could be discussed in more details at IGC 28.

283. The Delegation of Brazil associated itself with the statement delivered by the Delegation of Indonesia on behalf of the LMCs. It thanked the facilitators for their hard work. It said that it was the first session at which the tiered approach was being discussed and that represented progress. It hoped that in future sessions all delegations would be able to engage in the discussion of the tiered approach, leading to further progress and to advancing negotiations. It wished that the criteria of eligibility be placed only in one part of the text, and not in Articles 1, 2 and 3 as it was currently the case. So, if needed, the criteria for eligibility should be placed in Article 3 only. In Article 8.5, it asked that the new insertion proposed by the Delegation of Canada “or provide for remedies” be placed in brackets, as it had not been discussed in full in

the expert group. It reserved its right to come back and discuss the document in full, in future sessions.

284. The Delegation of the Russian Federation proposed that, under Use of Terms, the text in the footnotes be moved up to the body of the text of the definition of TCEs. It also noted that the definition of "use/utilization" referred to uses outside the traditional context. However, the same word "use" in Article 2 referred to use by the beneficiaries. Hence the same word was not used in the same sense in separate instances. Lastly, the subparagraphs in Article 1 should be cumulative.

285. The Vice-Chair read out the draft decision under Agenda Item 7 and it was approved. He then closed the agenda item.

Decisions on Agenda Item 7:

286. The Committee developed, on the basis of document WIPO/GRTKF/IC/27/5, a further text, "The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2". The Committee decided that this text, as at the close of this agenda item on April 4, 2014, be transmitted to the WIPO General Assembly taking place in September 2014, subject to any agreed adjustments or modifications arising on cross-cutting issues at the Twenty-Eighth session of the Committee, taking place in July 2014, in accordance with the Committee's mandate for 2014-2015 and the work program for 2014, as contained in document WO/GA/43/22.

287. The Committee also took note of documents WIPO/GRTKF/IC/27/INF/7, WIPO/GRTKF/IC/27/INF/8, WIPO/GRTKF/IC/27/INF/9 and WIPO/GRTKF/IC/27/INF/10.

AGENDA ITEM 8: ANY OTHER BUSINESS

288. The representative of the Copyright Agency Limited, speaking on behalf of the Indigenous Consultative Forum, stated that it came from afar to reaffirm that TK and TCEs of indigenous peoples were the essence of their cultures and that they had been provided to us as an inheritance by the creator of the universe. Their value went beyond the economic rights that were the gods of the IP system. The TCEs were indivisible and inalienable, because they were intrinsic and linked integrally to our spirituality, our identity and the cultural heritage left to them by their ancestors. Indigenous peoples had created, maintained, modified and transmitted them according to their uses, customs and traditions, which constituted the customary law of each indigenous people and each local community. The rights over the TCES of the indigenous peoples were still being discriminated against, marginalized and undermined by unfair privatization of the rights of indigenous peoples and local communities by states and private companies. TK and TCEs had been in recent years on the agendas of various institutions, such as the WTO, the CBD, the FAO, UNESCO and the UN Human Rights Commission, because

this was a key issue. It reminded the Member States that the mandate of the IGC was to ensure the effective protection of GRs, TK and TCEs. Twenty-seven sessions of the IGC were a high price to pay for not achieving minimum consensus.

AGENDA ITEM 9: CLOSING

289. The Delegation of Uruguay, speaking on behalf of GRULAC, said that the present session had made important progress with the TK and TCEs texts. It wanted to point out that, for GRULAC, both of these texts that would be transmitted to the GA constituted the basis for future negotiations. It seemed to GRULAC that the focus and the methodology proposed by the Chair to deal with cross-cutting issues were fundamental elements in the discussions. It congratulated the Chair on his initiatives and the way he had led the plenary and the expert group. With regard to IGC 28, it proposed that the Committee continue with its general discussion on cross-cutting issues regarding the texts under negotiations. GRULAC noted with satisfaction that the text on TK included an article referring to capacity building and awareness-raising. It emphasized the cross-cutting nature of this issue and the importance to discuss it at the next session. The inclusion of such an article would signal that Member States were responding to vulnerable groups in their society in terms of capacity building, which was for them is crucial. Any effective international instrument should involve awareness-raising on the part of society at large to cope with issues such as misappropriation of TK and TCE, as well as GRs. It expressed its gratitude to the Chair and Vice-Chairs as well as to the facilitators for their leadership and contribution during the present session. The outcome was bringing the IGC closer to an instrument or instruments which would ensure the effective protection of TK and TCEs.

290. The Delegation of the Indonesia, speaking on behalf of the LMCs, believed that the IGC had had constructive and fruitful discussions throughout its session. It recognized that progress had been made in our discussions of cross-cutting issues and the draft texts on TK and TCEs. It would be wise of Member States though, to take into account that some issues still remained pending. It was worthy to note that the IGC had made progress by following new approaches and constructive ideas during its discussions. The Committee had managed to identify and discuss, in depth, the cross-cutting issues relating to TK and TCE. It had also put to good use the tier-of-rights approach that had surfaced during the Bali Consultative Meeting. It believed that the exchange of thoughts and ideas gathered during the discussions on the tiered approach could offer a good basis for advancing further negotiations on both cross-cutting and particular issues of the topics at hand. It recalled the decision of the GA regarding the renewal of the IGC mandate for 2014-2015. The IGC was requested to expedite its work on text-based negotiations in finalizing a *sui generis* international instrument(s) to effectively protect TK and TCEs. Within this context, Member States needed to reaffirm their good faith in furthering the negotiation process with open and full engagement. Consistency and persistence were imperative in fulfilling the IGC mandate. It reiterated the firm position of the LMCs on convening a Diplomatic Conference in 2015. Furthermore, it believed that while the instruments could not be entirely isolated from other existing IP regimes, it was of the view that the ideological mindset and framework of thinking of contemporary IP regimes could not be applied fully to the TK and TCE texts. It expressed its appreciation to the Chair of IGC for his tireless efforts and leadership in guiding the IGC meeting. It was confident in his ability to continue to lead the Committee in our progress forward. It thanked the three Vice Chairs who had assisted the IGC during the negotiation process as well as the WIPO Secretariat, including the interpreters for their assistance. It believed that the IGC hard work was invaluable and eminent in our endeavor to ensure effective protection of GRs, TK and TCEs.

291. Mr. Nicolas Lesieur, speaking on behalf of the facilitators, thanked the IGC participants for the support they had granted, as well as the Secretariat, including the interpreters and catering, for the assistance provided to the facilitators.

292. The Vice-Chair, on behalf of the Chair and Vice-Chairs, offered special thanks to the Friend of the Chair and facilitator, Mr. Goss, and to the other facilitators, Ms. Bagley, Mr. Lesieur, Mr. Sobion and Mr. Suchanandan, for their invaluable support. He expressed his gratitude to the Regional Coordinators and the Indigenous Caucus. In closing, the Vice-Chair thanked all delegations and observers, as well as the Secretariat and interpreters, for their support.

Decision on Agenda Item 9:

293. The Committee adopted its decisions on Agenda Items 2, 3, 4, 5, 6 and 7 on April 4, 2014. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated before June 4, 2014. Committee participants would be invited to submit written corrections to their interventions as included in the draft report before a final version of the draft report would then be circulated to Committee participants for adoption at the Twenty-Eighth session of the Committee.

[Annex follows]

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