

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

Twenty-Ninth Session
Geneva, February 15 to 19, 2016

REPORT

Adopted by the Committee

1. Convened by the Director General of the World Intellectual Property Organization (“WIPO”), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “the IGC”) held its Twenty-Ninth Session (“IGC 29”) in Geneva, from February 15 to 19, 2016.
2. The following States were represented: Algeria, Albania, Angola, Argentina, Australia, Azerbaijan, Bahamas, Bangladesh, Barbados, Benin, Bhutan, Bolivia (Plurinational State of), Brazil, Burundi, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Côte d’Ivoire, Cuba, Czech Republic, Denmark, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, Germany, Ghana, Greece, Guatemala, Holy See, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Japan, Jordan, Kazakhstan, Latvia, Lebanon, Malaysia, Mexico, Monaco, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherland, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Senegal, South Africa, Spain, Sweden, Switzerland, Tajikistan, Thailand, Turkey, Ukraine, United Kingdom, United States of America, Uruguay, Vanuatu, Venezuela (Bolivarian Republic of), Zambia and Zimbabwe (88). The European Union (“the EU”) and its 27 Member States were also represented as a member of the Committee.
3. The Permanent Observer Mission of Palestine participated in the meeting in an observer capacity.
4. The following intergovernmental organizations (“IGOs”) took part as observers: African, Caribbean and Pacific Group of States (ACP Group), African Intellectual Property Organization (OAPI), African Regional Intellectual Property Organization (ARIPO), Eurasian Patent Organization (EAPO), European Patent Organisation (EPO), General Secretariat of the Andean Community, International Organization of La Francophonie (OIF), Food and Agriculture Organization of the United Nations (FAO), Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC Patent Office), South Centre (SC), United Nations Conference on Trade and Development (UNCTAD), and World Trade Organization (WTO) (12).
5. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: Assembly of Armenians of Western Armenia; American Intellectual Property Law Association (AIPLA); *Asociación Kunas unidos por Napguana*/Association of Kunas United for Mother Earth (KUNA); Biotechnology Industry Organization (BIO); *Centro de Culturas Indígenas del Peru* (CHIRAPAQ); Chamber of Commerce and Industry of the Russian Federation (CCIRF); *Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos* (CAPAJ); Coordination of African Human Rights NGOs (CONGAF); CropLife International; CS Consulting; Culture of Afro-indigenous Solidarity (Afro-Indigène); Friends World Committee for Consultation (FWCC); Health and Environment Program (HEP); Incomindios Switzerland; Indian Council of South America (CISA); Indian Movement “*Tupaj Amaru*”; Indigenous Peoples’ Center for Documentation, Research and Information (doCip); Indigenous ICT Task Force (IITF); Intellectual Property Owners Association (IPO); International Center for Trade and Sustainable Development (ICTSD); International Chamber of Commerce (ICC); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Trade Center for Development (CECIDE); Knowledge Ecology International (KEI); MALOCA Internationale; Massai Experience; Secretariat of the Pacific Community; Tebtebba Foundation – Indigenous Peoples’ International Centre for Policy Research and Education; Tulalip Tribes of Washington Governmental Affairs Department; and Traditions for Tomorrow (30).
6. The list of participants is annexed to this report.

7. Document WIPO/GRTKF/IC/29/INF/2 Rev. 2 provided an overview of the documents distributed for the Twenty-Ninth 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-Ninth session of the Committee.

AGENDA ITEM 1: OPENING OF THE SESSION

10. The Director General, Mr. Francis Gurry, opened the session. He recalled that in October 2015, the General Assembly (“the GA”) had adopted a new mandate for the 2016-2017 biennium. The renewed mandate requested the Committee to continue to expedite its work with a focus on narrowing existing gaps with open and full engagement, including text-based negotiations with the objective of reaching an agreement on an international legal instrument(s), without prejudging the nature of the outcome(s), relating to intellectual property (IP) which would ensure the balanced and effective protection of genetic resources (“GRs”), traditional knowledge (“TK”) and traditional cultural expressions (“TCEs”). The work program for the biennium comprised six sessions. Four sessions would be held in 2016: two sessions on GRs and two sessions on TK. In 2017, there would be two sessions on TCEs. The present session was the first session under the renewed mandate and addressed GRs. He recalled that the last session to address GRs had been IGC 26, taking place in February 2014. That session had identified core issues, reduced the numbers of options and streamlined the text on GRs. The consolidated text was contained in document WIPO/GRTKF/IC/29/4. Despite the progress made, much work was still needed with a view to isolating the core issues, pruning away text that was not directly material and creating further convergence on the core issues. Other documents for the session included document WIPO/GRTKF/IC/29/5 “Joint Recommendation on Genetic Resources and Associated Traditional Knowledge”, submitted by the Delegations of Canada, Japan, Norway, the Republic of Korea and the United States of America; document WIPO/GRTKF/IC/29/6 “Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources”, submitted by the Delegations of Canada, Japan, the Republic of Korea and the United States of America; document WIPO/GRTKF/IC/29/7 “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”, submitted by the Delegations of Canada, Japan, Norway, the Republic of Korea, the Russian Federation and the United States of America. The Director General also acknowledged the substantial contributions made by indigenous and local community experts to the process. The Director General mentioned that the WIPO Voluntary Fund had run out of money. It had not been able to fund indigenous and local community representatives since IGC 26 in February 2014, when it had only been able to fund one person. He called upon Member States to contribute to the Fund and to identify ways to raise contributions. He also reminded delegations of the need to ensure the participation of indigenous peoples and local communities (“IPLCs”) within the IGC’s negotiations and the importance of the Fund in facilitating this. Finally, the Director General acknowledged the presence of the Special Rapporteur on the Rights of Indigenous Peoples, Mrs. Victoria Tauli Corpuz and welcomed Mr. Preston Hardison from the United States of America and Mr. Pita Kalesita Niubalavu from Fiji, who would participate in the session’s Indigenous Panel.

AGENDA ITEM 2: ELECTION OF OFFICERS

Decision on Agenda Item 2:

11. *Upon the proposal of the Delegation of Switzerland, seconded by the Delegation of India, and the Delegation of Bahamas, on behalf of the Group of Latin American and Caribbean Countries (GRULAC), the Committee elected as its Chair, Mr. Ian Goss of Australia, unanimously and by acclamation, for the 2016-2017 biennium. As Vice-Chairs for the same period, upon the proposal of the Delegation of Austria, seconded by the Delegation of Latvia, on behalf of the Group of Central European and Baltic States (CEBS), the Committee elected Mr. Jukka Liedes of Finland, and upon the proposal of India, seconded by the Delegation of Bahamas, on behalf of GRULAC, the Committee elected Ambassador Robert Matheus Michael Tene of Indonesia.*

12. [Note from the Secretariat: The Chair, Mr. Ian Goss, was chairing the session from this point]. The Chair extended his appreciation to all the delegations for their support and congratulated the elected Vice-Chairs. He hoped that he could honor the trust shown in him. He also recognized that the negotiation of the mandate at the last GA had been hard fought, reflecting the divergences of interests and positions amongst Member States. He believed that the key task for the Vice-Chairs, Member States and himself was to find common ground on core issues and pragmatic solutions that took account of the interests of all. He wished that the skill sets and experiences of everyone would help move forward to deliver tangible outcomes and also assist with building bridges between Member States. He warmly thanked the outgoing Chair, His Excellency Ambassador Wayne McCook from Jamaica, for his stewardship of the Committee over the past four years and for the guidance he had provided. The Chair hoped that he could live up to the legacy of Ambassador McCook. Ambassador McCook's wise counsel, drive, enthusiasm and professional and respectful approach to managing the Committee would be remembered. The Chair acknowledged the Regional Coordinators, who worked tirelessly to manage the interests across their groups which placed high demands on their time. They were a key conduit for the Chair in communicating with Member States and resolving issues between groups. He looked forward to their support in the coming months. The Chair thanked the GA Chair, His Excellency Ambassador Gabriel Duque from Colombia and the Director General for their support in renewing the mandate of the IGC and in resolving IGC related issues prior to IGC 29, such as the seminars. He also thanked the WIPO Secretariat and interpreters for their work. The Chair acknowledged all observers and their direct interests in the negotiations. The observers included indigenous observers whose interests were reflected in the United Nations Declaration on the Rights of Indigenous Peoples, in particular Article 31, industry representatives who needed to adhere to any normative decisions taken by Member States and were key to delivering the social and economic benefits to Member States through the development of innovative products and services, and civil

societies who would be looking to protect the interests of the broader public. The key to the success of any policy initiative would be balancing these interests. It was very important that the observers engaged with Member States during these negotiations and the seminars. It was also important for the observers to take the time to understand the perspectives of Member States and other stakeholders, and raise with them their specific concerns. Interventions should also be based on the working documents without any preconceived views. The Chair intended to engage informally with all stakeholder groups throughout the week and discuss how to work together to deliver balanced outcomes taking account of the interests of all groups. Particularly, he asked the observers to consider how they could contribute to the seminars. The Chair reinforced key elements of the mandate and how it differed from the previous mandate. The key variations from the previous mandate of paragraph (a) were “without prejudging the nature of the outcome(s)” and “relating to intellectual property”. As the latter point indicated, the negotiations were related to the IP system which should be the focus of the IGC’s work. Though there were other international agreements/forums intersecting with the IGC’s work, the primary focus was on the IP system. Paragraph (b) was obviously reflected in the approach taken in his proposed working method. There was a different approach to the work program reflected in paragraph (c) and the table, which involved two key elements/issues: (1) The IGC would in this biennium deal with the subject matters in turn, with two meetings on GRs, two meetings on TK, followed by two meetings on TCEs. The Committee would only be required to provide a factual report to the 2016 GA, which would enable the Committee hopefully to avoid the protracted discussions in previous GAs; (2) The work program also required that the IGC, at the end of the first meeting on each subject matter, elaborate an indicative list of outstanding/pending issues to be tackled at the next session. Regarding paragraph (d) of the renewed mandate, it would be important that Member States would share national experiences to better inform the deliberations during the discussion on the core issues. However, the Chair noted that examples, studies, seminars or workshops were not to delay progress or establish any preconditions for the negotiations. He referred to the seminars under paragraph (e). He understood that it had been agreed between regional groups that there would be three seminars in the biennium. It would be important that Member States and observers took the opportunity to engage in those seminars to gain a shared understanding of core issues and the different perspectives in a more informal environment. Under paragraph (f), the Committee was requested to submit to the GA in 2017 the results of its work on international legal instrument(s) relating to IP which would ensure the balanced and effective protection of GRs, TK and TCEs. The GA in 2017 would take stock of progress made and decide on whether to convene a diplomatic conference or continue negotiations. It would also consider the need for additional meetings, taking into account the budgetary process. This detailed the intent or objective of the IGC’s work. The Chair mentioned paragraph (g) which stated the Committee might consider the conversion of the Committee into a Standing Committee and, if so agreed, make a recommendation to the GA in 2016 or 2017. The Chair emphasized that it was important to have a clear understanding of the renewed mandate agreed by consensus. It wished to set the tone for future meetings and discuss expectations. He said expectations went both ways. Member States would have expectations of the Chair and the Chair would have expectations of Member States. From the Chair’s view, the expectations of Member States were that he was impartial. His role was to manage the process in order for Member States to reach outcomes. The Chair would be inclusive and open, and listen to the interests and views of every Member State in a respectful and considered way, ensuring that every Member States’ views were heard. The Chair would manage the meetings in an efficient and constructive manner. The work should be focused on substance and expert discussions, particularly after 28 sessions of the IGC. The Member States would expect that the Chair would demonstrate flexibility, and he expressed that he was willing to change processes and procedures if they were clearly not working. The Chair would at times have to be firm to remain efficient and effective. However, Member States should also expect the Chair to be fair and friendly in performing his role. This was what the Chair described as the three Fs: firm, fair and friendly. Lastly, the Chair should be approachable. If delegations had concerns or questions, they could raise them directly with

him or through the Vice-Chairs. The Chair could not address issues he was not made aware of. The Chair's expectations of Member States were that delegations should be respectful to each other and engage in good faith. Delegations should operate in a friendly, constructive and open manner, and focus on substance, not process, because IGC 29 was a working session. Delegations should engage with each other so that a mutual understanding of policy positions and approaches could be developed. The Chair noted that there might be different perspectives and positions on aspects of work, but he believed that all delegations shared the common goals. The Chair detailed the ground rules for an efficient working session. Only opening statements by the Regional Groups would be provided for, and the Chair would also allow the EU and the Like-Minded Countries ("the LMCs") to do so. General opening statements by individual States might be handed to the Secretariat and would be reflected in the report. The IGC should reach an agreed decision on each agenda item as it went along. On Friday, February 19, the decisions as already agreed would be circulated for formal confirmation by the IGC.

AGENDA ITEM 3: ADOPTION OF THE AGENDA

Decision on Agenda Item 3:

13. *The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/29/1 Prov. 3 for adoption and it was adopted.*

14. The Chair opened the floor for the Regional Groups to deliver opening statements. [Note from the Secretariat: Throughout the session, many delegations which took place for the first time congratulated the Chair and two Vice-Chairs for their election.]

15. The Delegation of Greece, speaking on behalf of Group B, congratulated the Chair for his election and the Vice-Chairs whose supporting role would be valuable. It was confident that the Committee would make progress under the Chair's leadership. It thanked the WIPO Secretariat for its dedication to bringing the work of the Committee forward. The GA in 2015 had agreed to renew the mandate. The Group recognized the importance of GRs, TK and TCEs, and reiterated that the protection relating to those subjects should be designed in a manner that supported innovation and creativity and also recognized the unique nature of those subjects. The new mandate provided that the Committee would continue to expedite its work, with a focusing on narrowing existing gaps including, but not limited to, text-based negotiations. The primary focus should be to reach a common understanding on core issues, including the definition of misappropriation and the objectives. To inform the work, the Committee was to use "an evidence-based approach, including studies and examples of national experiences, including domestic legislation and examples of protectable subject matter and subject matter that is not intended to be protected". It hoped that, with the new mandate, the IGC would develop a common view of objectives and advance in a meaningful way. The 2015 WIPO seminars on IGC-related subjects had proved to be a useful exercise. It was anticipated that the same format would be followed. Open and full engagement would help in establishing a common understanding on core issues before entering in text-based negotiations. Intensive text-based negotiations sometimes tended to draw too much attention to the language in a superficial manner and hide the fact that a common understanding of objectives and principles had not yet been reached. In this regard, the various approaches taken during the previous sessions of the IGC had been a good first step to find coherent solutions to the common issues. Further work was needed to reach a shared understanding of policy objectives and guiding principles. The new mandate provided a good structure and the Group was looking forward to continuing the work of the Committee. It also recognized that since 2001 when the Committee

had begun to meet, a significant amount of work had been accomplished in supporting this Committee. However, there remained a lack of common understanding on policy objectives and guiding principles that caused divergent views and substance. The Group welcomed the fact that Member States had come to an agreement on the issue of the number and the duration of the IGC seminars, which would allow more time for Member States to work towards a shared understanding on objectives and principles. It remained committed to contribute constructively towards achieving an acceptable result.

16. The Delegation of India, speaking on behalf of the Asia-Pacific Group, wished to put on record their appreciation for the support provided by the Secretariat in preparing for the meeting. It was important to acknowledge the role of the GA Chair, Ambassador Gabriel Duque, prior to the meeting. Through these years, the mandate of the IGC had been repeatedly extended and renewed. The Committee might have paused, but had not stopped, and the Committee would continue its journey with perseverance until a just and equitable solution was founded to address the concerns of all Member States. The Asia-Pacific region was known for its abundance, its mega-diversity, its traditions and TK. These assets and strengths continued to be an essential factor in its societies and cultures. That was why great importance was attached to the issues discussed at the IGC. The Asia-Pacific Group believed that the international IP legal system should develop and evolve in a balanced manner to ensure its sustainability. Most of the Member States from the Group considered that no balance would be struck without having a legally binding instrument on important questions of GRs, TK and TCEs. For those countries, the conclusion of such a binding treaty or treaties would provide the necessary effective protection against misappropriation and ensure their sustainable and legitimate use. The misappropriation of GRs and associated TK could be adequately addressed through the establishment of a mechanism that guaranteed appropriate benefit-sharing. Utilization or exploration of those resources should be based on prior informed consent ("PIC") reached through mutually agreed terms ("MAT"). The Group recognized the importance of establishing databases and other information systems with IP offices and it would be helpful for the IP offices to avoid the granting of erroneous IP rights especially for GRs and associated TK. It was necessary for the IGC to explore the possibility of establishing an effective mandatory disclosure requirement which would protect GRs, their derivatives and associated TK against misappropriation. IGC 1 had taken place in 2001 and the IGC had reached the proverbial "sweet fifteen". It marked a critical time for a teenager. It was the time to say goodbye to adolescence and juvenility, and time to embrace maturity and wisdom. Latin America countries had a remarkable tradition celebrating 15 years with a traditional ceremony, which in Spanish was called "Quinceañera". It was a ceremony which had its origins in Aztec culture around 500 B.C. It was a tradition of good omen. The Group hoped that this year would bring good luck to the IGC and Member States could reach mutual understanding. The Group would contribute in an effective, efficient and constructive manner towards achieving a satisfactory conclusion.

17. The Delegation of Latvia, speaking on behalf of the Group of Central European and Baltic States ("CEBS"), congratulated the Chair and two Vice-Chairs for their election, and was convinced that their knowledge of the IGC matters, together with their diplomatic skills, would be determinant for the successful guidance of the work of the IGC. It was looking forward to engaging with them. Member States at the 2015 GA had reached agreement on the new IGC's mandate. The present session was the first one to implement that decision. The focus would be on narrowing the existing gaps with a view to reaching a common understanding on the topics. Looking at the process in the long term perspective, the accomplishment of the work of the IGC would be defined by a collective vision which had not only to be clear but shared by all stakeholders. It highlighted that the consequences of the possible legal instrument or instruments needed comprehensive examination in order to better understand the implications of such a possible developments in the larger context, especially the effect on the patent system. The Group acknowledged the difficulty ahead. There were a multitude of views and

concerns. Positions of all stakeholders had to be taken into consideration in order to achieve progress. In this respect, the Group looked forward to new and innovative approaches, working methods and fruitful discussions. The Member States of the CEBS Group were committed to engage in a positive and constructive manner in the process.

18. The Delegation of Nigeria, speaking on behalf of the African Group, welcomed the resumption of negotiations in the IGC. The Group believed that the time between IGC sessions was adequate for stakeholders to reflect and to renew their vigor and commitment to meaningful engagement. The subject matter was complex though issues could be resolved with good faith and constructive engagement. The consolidated text on GRs discussed in February 2014 was significantly advanced and it hoped that the session would make great strides towards purposeful progress on the pending issues. It emphasized its commitment to an outcome that would yield an international minimum standard ensuring the protection against misappropriation. It was necessary to cooperate with good faith to successfully progress in the IGC. The African Group was looking forward to continuing discussions on its proposal contained in document WO/GA/47/16 on the conversion of the IGC into a Standing Committee. It would engage constructively.

19. The Delegation of Bahamas, speaking on behalf of the Group of Latin American and Caribbean Countries ("GRULAC"), thanked the Chair for the role that he played as the facilitator of the IGC negotiations to assist in being able to reconvene the IGC with a clear mandate for the 2016/2017 biennium. With the depth of knowledge and experience that the Chair had, GRULAC was looking forward to constructive and fruitful discussions in the coming week. Discussions among Member States with regard to the IGC had been ongoing since 2000. In 2009, Member States had agreed that the IGC should begin formal text-based negotiations with the objective of reaching agreement on one or more international legal instruments ensuring the effective protection of GRs, TK and TCEs. With the new mandate for the biennium and the agreed workplan, the priorities of GRULAC were to ensure: (1) the Committee focused on narrowing existing gaps by coming to a common understanding of the core issues to be addressed, thereby facilitating agreement by all Member States on an international legal instrument(s) that would ensure the balanced and effective protection of GRs, TK and TCEs; and (2) the effective use of the time allotted for the IGC meetings that were scheduled over the biennium. Efforts must be made to achieve progress by the end of each scheduled meeting. Therefore, it had proposed elaborating, after each session, an indicative list of outstanding/pending issues that needed to be dealt with at the following session of the IGC. It was hoped that this would allow steady progress towards the goal of a balanced and effective international legal instrument. During IGC 29, discussions would be focused on GRs and reference would be made to document WIPO/GRTKF/IC/29/4. GRULAC was looking forward to the discussion of the core issues in relation to policy objectives, subject matter and key normative issues. It was very thankful to the Secretariat for the Informal Information Session that had been held on January 28, 2016. The Secretariat had listed thought-provoking questions related to the disclosure requirement which would be an excellent guide for discussions. Thus, it proposed that the discussions on the disclosure requirement should be focused on determining: (1) what should be the subject matter of disclosure; (2) what should be the content of the disclosure; (3) what should be the nature of the obligation to disclose; (4) what should trigger disclosure; (5) how would the requirement be implemented, verified and monitored; (6) should there be exclusions from disclosure; (7) who would have standing to assert a claim or initiate action for non-compliance with the disclosure requirement; (8) what was the relationship of the disclosure requirement with the PCT and PLT; (9) what should be the consequence of non-compliance; and (10) should strict liability apply. It reiterated its hope that the work of IGC 29 and IGC 30 would result in the attainment of an effective international instrument on GRs that would be for the benefit of all Member States.

20. The Delegation of China expressed its willingness to work together with all Member States on substantive issues with the view to resolving the pending issues to achieve a balanced and effective IP system to protect GRs, TK and TCEs. The Delegation of China hoped the cooperative spirit would be continued throughout the session and wished for a successful meeting.

21. The Delegation of the EU, speaking on behalf of the EU and its Member States, stated that the new mandate provided a fresh start and an opportunity for a new approach. The Committee would focus on narrowing existing gaps in reaching a common understanding of the issues. Neither the work nor working methods would prejudice the nature of the outcomes. The primary focus would be reaching a common understanding on core issues. Importantly the work would be evidence-based which included studies and examples of national experiences. The Delegation supported the view that the work would be guided by solid evidence with implications and feasibility in social, economic and legal terms. The IGC should aim to have realistic results accepted by all stakeholders. The agenda contained four important documents. Until recently, negotiations had focused almost exclusively on one of those four documents, namely document WIPO/GRTKF/IC/29/4. It believed that the new mandate provided new opportunities to move beyond the confines of the often stale discussions in the past. Therefore, the Delegation believed that equal consideration and time should be given to all issues and documents.

22. The Delegation of Indonesia, speaking on behalf of the LMCs, reiterated their commitment to work constructively with the Chair and Member States.

23. [Note from the Secretariat: the following opening statements were submitted to the Secretariat in writing only.] The Delegation of Benin, speaking on behalf of the Least Developed Countries (“LDCs”), welcomed the resumption of the work of the IGC pursuant to the mandate granted to it by the 2015 GA to continue consultations on outstanding issues and to consider options relating to the adoption of one or more legal instruments which would ensure the effective and balanced protection of GRs, TK and TCEs. It appreciated the constructive and proactive approach taken by Member States during the negotiations which had led to the definition and adoption of the mandate of the IGC. It called on Member States to adopt the same attitude in order to make significant progress in the consultations on matters currently before the IGC, in particular GRs, which would be discussed at the present session. The people of developing countries, particularly those of LDCs, had significant GRs. Their legal exploitation and the fair and equitable sharing of the benefits they yielded would contribute considerably to improving their living conditions. The regulated exploitation of GRs required the establishment and effective implementation of international norms which invested owner communities with IPRs over GRs and associated TK, while also offering the global economy a legal framework for the exploitation of GRs, to complement the CBD. The LDCs invited all participants to support the beneficial assistance to LDCs in their efforts to promote their socio-economic development, so that the results of the discussions would offer meaningful support to the international protection of GRs through a binding legal instrument. Such an instrument would help to prevent the erroneous granting of IPRs over GRs and would make for the sustainable exploitation of these resources on the basis of PIC of their holders, who would ultimately share in the benefits generated by such exploitation. The LDCs remained optimistic that the ongoing process would lead to the convening by the 2017 GA of a diplomatic conference for the adoption of one or more legal instruments. Accordingly, it wished to restate its recommendation that the IGC be transformed into a standing committee so that, should the need arise, it could continue its work beyond the current mandate which ended in 2017, without seeking a renewal of its mandate. The LDC reaffirmed its full willingness and commitment to contribute to the success of IGC 29.

24. The Delegation of El Salvador expressed its satisfaction at the resumption of the ICG's work and its expectation of the concrete results that would undoubtedly be achieved under the Chair's leadership. It stated that, for many years, indigenous peoples in El Salvador were vilified and hidden from view. It underlined that they had been forcefully and lethally repressed, most seriously in 1932, and had been stripped of their beliefs, their customs, their language, their land and its resources, with which they had a symbiotic relationship. It highlighted that nowadays the Government of El Salvador had made a historic commitment by recognizing and protecting the rights of indigenous peoples in Article 63 of the Constitution stating that "El Salvador recognizes indigenous peoples and shall adopt policies to maintain and develop their ethnic and cultural identities, world view, values, and spirituality." Indigenous peoples had been classified as a priority population in the government's Five-year Development Plan for 2014-2019. It stated that this plan also laid out a number of strategies and lines of action under the cross-sector component of the recognition of indigenous peoples' rights. It emphasized that the fourth strategic axis of the National Intellectual Property Policy was geared towards the "protection of biodiversity, heritage, and cultural expressions and knowledge of indigenous peoples". It observed that, at the international level, El Salvador had been an active participant at multilateral meetings that addressed the situation of indigenous peoples and the protection of biodiversity, such as the Permanent Forum on Indigenous Issues, the UN World Conference on Indigenous Peoples and the CBD. The Delegation stressed that, at the ICG, it intended to work constructively in the drafting of an international instrument that would adequately protect its genetic resources and associated TK. It noted that such an instrument should be fully consistent not only with IPR, but also with efforts to promote innovation and scientific and technological research. It hoped that the present session would be productive and would draw it closer to that goal.

25. The Delegation of Japan stated that a new start to find out an effective and balanced solution for GRs related issues could be done under the Chair's guidance. The Delegation participated in the discussion with a constructive spirit by solidifying its ideas in the form of various proposals, and it emphasized the importance of taking effective measures against the misappropriation of GRs and TK associated with GRs. The Delegation highlighted several points in order to find a solution to the current situation, and stated that a clear distinction between two different factors inherent in the issue of the misappropriation of GRs, namely, the inadequate compliance with the access and benefit-sharing ("ABS") system and the erroneous granting of patents, should be made. The former should not be dealt with under the patent system. The Delegation said that the IGC should be focused on the issue of erroneous granting of patents, especially the utilization of databases for prior art searches, given that WIPO had a crucial role to fulfill as an organization specializing in IP. The Delegation of Japan, together with the Delegations of Canada, Norway, the Republic of Korea, the Russian Federation and the United States of America, would offer a brief explanation of document WIPO/GRTKF/IC/29/6. It highlighted that an expert from the Japanese Patent Office had explained at the second seminar in 2015 that databases enabled patent examiners to efficiently find a critical document among thousands of patent and non-patent documents. It stressed that it was essential to utilize databases in the patent examination process in order to ensure and raise the quality of patent examination in the area of GRs. The Delegation stated that the mandatory disclosure requirement for ensuring compliance with the ABS system could unnecessarily damage legal certainty and predictability, and discourage R&D activities utilizing GRs, although the requirement did not have a direct link with the patent system. It noted that the seminars should be useful opportunities to share experiences and practices among stakeholders in order to provide a factual basis for discussions in the IGC, and it was willing to actively contribute as much as it could to make discussion at the IGC move forward.

26. The Delegation of the Republic of Korea stated that there were abundant and diverse GRs and associated TK in the Republic of Korea. It therefore considered the IGC discussions as very important and that the spirit of fair and equitable benefit-sharing arising from these

resources should be highly respected. It supported most of the contents contained in the opening statements delivered by the Delegation of India, on behalf of the Asia-Pacific Group, but mentioned that it had some different opinion or idea in how to prevent the misappropriation of those valuable resources. It expressed some concerns that disclosure requirements were presenting an excessive burden and unexpected obstacles to those wishing to utilize the patent system which was approved as the core momentum for innovation. The users and stakeholders of a series of meetings in the Republic of Korea had expressed concerns which could lead to avoiding patent systems, bypassing the IP regime altogether due to the legal uncertainties caused by disclosure requirements. It underlined that IP policy and the patent system could not be separated from users, and the system should be more convenient for users to encourage its active use. It stated that the most effective form of protecting GRs and associated TK in patent system was to prevent erroneously granted patents through the establishment and use of the databases. It preferred in terms of outcomes of the IGC to have a non-legally binding instrument. It stressed that all aspects of the proposals or options, and users' opinions and the potential ripple effect on industry and other related areas, should be considered. It hoped that all Member States would be open-minded but sincere in discussions to create new international norms.

27. The Delegation of South Africa aligned itself with the statement delivered by the Delegation of Nigeria, on behalf of the African Group. It stated that Member States should be able to reach a successful conclusion of the IGC negotiations. It thanked the WIPO Secretariat for the preparatory work done for the present session. The Delegation considered WIPO as the nodal point in the UN system on IP issues. In recent years, IP had proved to be hugely popular and yet it was an increasingly complex subject. It was highly concerned that after almost 16 years of deliberations in the IGC, there was still no agreement in sight and that reflected poorly on WIPO's normative initiatives and the Member States' commitment to a fair and equitable global IP system, which was underpinned by a global innovation network, where creativity and innovation were properly rewarded, and the fruits thereof fairly shared by all the peoples of the world. It highlighted that the main objective of the GRs text should be the prevention of misappropriation of GRs and associated TK and that that could best be achieved by the introduction of a mandatory disclosure of both origin of GRs and source of TK. It said that the importance of mandatory disclosure requirements could not be overemphasized as that, if effected, would allow for the country of origin (within the CBD context) of the GRs and the source of TK used in the patent to have fair and equitable sharing of benefits arising from their utilization and a PIC procedure to be in place. South Africa had established a mandatory disclosure obligation in its Patent Act of 1975; however, the provision at national level was largely ineffective owing to the absence of an internationally binding obligation. It therefore mentioned that, without mandatory obligations, national disclosure of origin requirements would not be recognized and enforced by other countries in which IP was applied for. It noted that if the IGC treated GRs separate from TK, it would highlight the conceptual differences regarding the protection that indigenous communities had sought through the systems of IPRs. It stated that at WIPO it could not be the protection of GRs which should constitute the subject matter of the normative negotiations, and said that the scope of the work at WIPO focused on the work of the intellect, the TK associated with GRs. It added that that isolated treatment by in large did not assist to secure appropriate IP protection sought by indigenous communities. It stated that separation was artificial and was an attempt to undermine the holistic approach to the protection of GRs and associated TK. No additional studies or fact-finding would advance discussions as the three texts on TK, TCEs and GRs and associated TK were fairly mature. The Delegation highlighted that it was only political will to recognize the rights of indigenous people and local communities to the protection of their knowledge under the IP regime that was needed. It stressed that the texts submitted by developed countries as sets of non-binding general guidelines for the protection of GRs and associated TK was a feeble attempt to derail discussions on a legally binding instrument. Opening those previously acknowledged texts would bring up a process which would be parallel but contrary to the IGC process, and it would

render the IGC both ineffective and clearly inadequate to move much beyond the information gathering, capacity building and initial analysis activities that it had undertaken thus far. The Delegation and the African Group always maintained that databases were an important issue that could be addressed once an international binding treaty was established. It added that defensive measures were already included in Article 3 of document WIPO/GRTKF/IC/29/4, and to have parallel discussions on the same subject would duplicate discussions. Databases were only one measure of protecting GRs and associated TK. The Delegation would resist any move away from the work of the IGC on a consolidated text and binding norm-setting. It noted that the terms of reference for studies by the WIPO Secretariat measuring the merits of mandatory disclosure requirements had already been carried out. It observed that document WIPO/GRTKF/IC/29/7 displayed a biased approach by focusing only on the erroneous granting of patents instead of also taking into account the impact of misappropriation on indigenous communities. Those documents were inappropriately submitted and should not be tabled at the IGC. It underlined that, on the issue of seminars, the risk of removing the urgency of working towards a finalized text should be cautioned, and those seminars for sharing national and regional experiences and information on activities other than norm-setting might further delay the text-based work. It stressed that the current mandate was solely on text-based negotiations. The Delegation supported a normative policy approach based on establishment of a disclosure regime. It highlighted that its position was always underpinned by the need to introduce a mandatory disclosure requirement justified in several submissions made by either the African Group or the LMCs. In relation to substantive issues, there was now consensus amongst mandatory disclosure proponents, which were represented across all regional groupings as to the nature of the disclosure regime. It stated that the Nagoya Protocol left several critical issues open to interpretation and national implementation, and that the substantive and procedural triggers for information should be provided and evaluated. Those triggers included disclosure of the country of origin, the relevant relationships between GRs and associated TK and the subject matter of IP at the international and national stage of application procedures, in pre-grant and post-grant administrative challenges and in judicial proceedings. Disclosure of documentary information would necessitate compliance with PIC for access and equitable benefit-sharing requirements. It had participated meaningfully in the IGC negotiations and had contributed to the leadership shown by the Africa Group. It would remain optimistic of achieving an international text as it was when the IGC had been conceived in 2000.

28. The representative of the Andean Community expressed its intention to work actively towards achieving a positive result in this matter, which was of the highest importance for biodiverse Andean countries. He stated that it was a fitting moment to acknowledge the efforts made by Member States in sustaining the interest to continue tackling the issues before the IGC and to broaden its mandate. It was equally necessary to recognize the great dedication and professionalism of the Secretariat which had approached that multi-faceted issue with circumspection but with great determination and should be thanked for their organizational skills, which had allowed the IGC to continue its work. He thanked the countries that had contributed to the WIPO Voluntary Fund and it hoped that the Fund would be duly replenished and that past donors would soon renew their commendable pledges of support. It was essential to ensuring that the direct beneficiaries of the systems created through the deliberations of the IGC could take part in its work and added their valuable contributions. He previously acknowledged the IGC's work over the years and said that that work had demonstrated the link between human creative capacity and the environment and established the existence of this creativity in other fields such as culture, with particular regard to TK and TCEs of indigenous and local communities that endured in many countries, for example, in the Member States of the Andean Community. He welcomed the progress made in the area of GRs, as recorded in document WIPO/GRTKF/IC/29/4. He hoped that with the present session significant progress would be made to get appreciably closer to a document that would regulate that important matter in a balanced way, particularly those topics that were central to the negotiations, such as the disclosure requirement, misappropriation and the erroneous granting of IPRs. He also

welcomed with gratitude and interests the studies and initiatives undertaken by experts from a number of fields, groups and countries which all contributed to a serious and informed debate, helping to ensure that the joint recommendations were made in complete consensus, and were, in that sense, a means of advancing the negotiations. The representative noted that document WIPO/GRTKF/IC/29/INF/10 containing a technical review of some of the IP questions relating to the draft instruments being negotiated, and he agreed with Professor Anaya on the need to maintain a human rights-based approach for a congruent understanding and articulation of the different substantive issues in the texts under consideration, particularly as concerns TK and TCEs. It was inevitable to acknowledge that the objects of that protection spring from the deep-seated identity and ancestral culture of the peoples who created this knowledge and these expressions, and that safeguarding this link was a corollary of recognizing the human rights of those communities and peoples. WIPO was an organization whose goal was the integration and harmonious and sustainable development of its Member States with a view to improving the quality of life of their peoples, and he called respectfully on the participants of the IGC to show their greatest strength by seeking consensus on the various relevant topics which had been the subject of many years of negotiation. The representative wondered whether it was just for a right holder to seek to benefit from the exploitation of natural resources, both tangible and intangible, as well as whether the TK of indigenous and local communities deserved the same protection afforded to the knowledge generated by the progress of science and technology, and he would answer positively to both questions. The Andean Community had created of an array of standards that placed it at the forefront of the protection of TK, access to GRs and the promotion and protection of TCEs, which included Andean Community Decision 486 on industrial property, Decision 391 on access to GRs, and Decision 760 on the protection and promotion of the tangible and intangible Andean cultural heritage. Those decisions were supranational legal instruments, with the force of law in Member States, having direct, automatic, immediate and mandatory effect in their legal systems, including primacy over national laws where conflicts arose. He offered WIPO the assistance of the skilled team of the Secretariat General of the Andean Community which was willing to work with WIPO to conduct statistical studies; provide capacity building activities; and develop norms, public policies and institutions to protect, preserve and promote GRs and their associated intangible component, relying on IP. Its norm-setting experience may be of use to other Member States. The Andean Community had been inspired by the work being done in one of the Member States against biopiracy and hoped to be able to replicate that successful experience by creating an Andean biopiracy observatory, which might also serve as a model for other countries. He would endeavor to ensure that IGC 29 was the memorable occasion on which Member States switched from defending their positions to pursuing common interests based on a technical, diplomatic and political consensus that was fair, valid and effective, thereby converting IP into a tool for the well-being of all. He underlined that, by creating that legal certainty, it would be repaying a historical debt owed to the indigenous and local communities that had shared their ancestral knowledge. That debt was also owed to those Member States that had shared their natural resources, which in many cases were of unfathomable richness. It was also owed to those Member States that had boosted and continued to boost humanity's well-being through technological development.

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

Decision on Agenda Item 4

29. *The Chair submitted the revised draft report of the Twenty-Eighth session of the Committee (WIPO/GRTKF/IC/28/11 Prov. 2) for adoption and it was adopted.*

AGENDA ITEM 5: ACCREDITATION OF CERTAIN ORGANIZATIONS

30. The Chair referred to the list of 18 organizations that had requested accreditation in accordance with the outlined criteria and procedure (document WIPO/GRTKF/IC/29/2).

31. The Delegation of India, on behalf of the Asia-Pacific Group, requested the postponement of the decision whether to accredit the Bureau of Consultation for West Papua Indigenous Community Development.

Decision on Agenda Item 5:

32. *The Committee unanimously approved the accreditation of seventeen organizations listed in the Annex to document WIPO/GRTKF/IC/29/2 as ad hoc observers, namely: Action jeunesse pour le développement (AJED-Congo); Actions pour la défense des droits des peuples de la forêt et de l'environnement (ADPE); Agencia Internacional de Prensa Indígena (AIPIN); Associação dos Camponeses para o Desenvolvimento Agro-Peuario e Pescas Tala-Hary (ACDAPTH); CS Consulting; Fondation Makambi pour le développement; Gur A Baradharaw Kod Torres Strait Sea and Land Council (Torres Strait Islander) Corporation International Centre for Environmental Education and Community Development (ICENECDEV) Korea Institute of Oriental Medicine (KIOM); ONG femmes et enfants en détresse (FEED) Phuthadikobo Museum; Rassemblement des Africains Conscients, Intègres, Nationalistes, Engagés et Solidaires : Association (RACINES); Union des jeunes autochtones du Burundi pour le développement communautaire (UJEDECO) Union des peuples autochtones pour le réveil au développement (UPARED); Union nationale des organisations non gouvernementales de développement (UNONGD); Villages unis (United Villages); and White Bridge. The Committee decided to postpone the accreditation of the Bureau of Consultation for West Papua Indigenous Community Development*

*for consideration at the Thirtieth
Session of the Committee.*

AGENDA ITEM 6: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES

33. The Chair recalled that, since the establishment of the Voluntary Fund in 2005, different contributions had been made by the SwedishBio, France, the Christensen Fund, Switzerland, South Africa, Norway, New Zealand, and Australia. The Voluntary Fund had operated successfully and was transparent, independent and efficient. However, the Fund was depleted. The Chair called upon Member States to consult internally and contribute to keep the Fund afloat. The Voluntary Fund was important to the credibility of the IGC which had repeatedly committed itself to supporting indigenous participation. Document WIPO/GRTKF/IC/29/INF/4 provided information on the current state of contributions and applications for support, and document WIPO/GRTKF/IC/29/3 provided information on the appointment of members of the Voluntary Fund Advisory Board. The IGC would later on in the week be invited to elect the members of the Advisory Board. The IGC would, therefore, revert to this question later. The Chair proposed that His Excellency Ambassador Tene, the Vice-Chair serve as Chair of the Advisory Board. The outcomes of the Voluntary Advisory Board's deliberations would be reported later in the current session in document WIPO/GRTKF/IC/29/INF/6.

34. In accordance with the decision of the IGC at its seventh session (WIPO/GRTKF/IC/7/15, paragraph 63), a panel of presentations took place during a suspension of the IGC session on the following topic: "Intellectual Property, Genetic Resources and Associated Traditional Knowledge: Indigenous and Local Community Perspectives". The Chair acknowledged the presence of the keynote speaker Mrs. Victoria Tauli Corpuz, United Nations Special Rapporteur on the Rights of Indigenous Peoples, Philippines. He also welcomed the two other panelists: Mr. Preston Hardison, Policy Analyst, Tulalip Tribes, United States of America and Mr. Pita Kalesita Niubalavu, Principal Solicitor, Oceanica IP Lawyers, Fiji. He invited the Chair of the Panel, Mr. Raymond Fryberg, representative of Tulalip Tribes, to come to the podium. The presentations were made according to the program (WIPO/GRTKF/IC/29/INF/5) and were available on the TK website as received. The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat which is reproduced, as summarized, below:

"The theme of the Indigenous Panel was *Intellectual Property, Genetic Resources and Associated Traditional Knowledge: Indigenous and Local Community Perspectives*. The keynote speaker was Mrs. Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, with two respondents, Mr. Preston Hardison, Policy Analyst, Tulalip Tribes, USA and Mr. Pita Kalesita Niubalavu, Principal Solicitor for Oceanica IP Lawyers and consultant to the Secretariat of the Pacific Community and the Pacific Islands Forum Secretariat, Fiji. The panel was chaired by Mr. Raymond Fryberg, Sr. of the Tulalip Tribes, who reminded IGC participants that contributions to the Voluntary Fund were needed.

Mrs. Tauli-Corpuz's presentation mentioned work on TK, GRs, and ABS in other international instruments and fora. She then focused on the recent Paris Agreement under the UNFCCC, which refers to the rights of indigenous peoples and the importance of "respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws..." She also referred to the SDGs which recognize the importance of respect for human rights in their implementation. She urged the parties in the IGC to adopt a legally binding treaty that would provide effective protections for the rights of indigenous peoples and local communities over their GRs, TK and TCEs. She referred to the Technical Review, prepared by James Anaya (document WIPO/GRTKF/IC/29/INF/10), and summarized its contents. The Special Rapporteur

ended her presentation by urging flexibility in the IP system through accommodating indigenous rights, needs and expectations.

Mr. Hardison began his presentation with a historical description of the “Great Debate over the Conquest of the New World” between Bartolomé de las Casas and Juan Ginés de Sepúlveda which took place before the Junta of Valladolid (1550-1551) addressed the policy of Spain towards indigenous peoples in the New World. The analogy with the work of WIPO was that the mistakes of Valladolid must be avoided, so as to ensure that protections of the rights of TK and associated GRs holders should be effective, not just words on paper. Whether TK is subject to violent treatment, such as being placed directly in the public domain, or through leakage into the public domain over time through instruments of the IP system, both policies would lead to assimilation, loss of property rights and loss of control over TK and GRs. The UDHR was an example of rights that all members of the UN are obligated to respect. The major conclusion is that universal human rights must be taken into account in the IGC negotiations. The rights contained in UNDRIP are not “special” rights, but the interpretation of fundamental human rights in the context of minority status and self-determination. The foundation of these rights comes from existing human rights instruments such as the Charter of the UN, the ICESCR, the ICCPR and the Vienna Declaration and Programme of Action. The WIPO Development Agenda recommendations are framed solely in terms of the IP system, and in the absence of the participation of the holders and owners of TK and associated GRs. Of concern are elements of the WIPO Development Agenda, such as the importance of the public domain and freedom of expression which work against human rights, such as the right to control the utilization of TK contained in Article 31 of the UNDRIP. On the renewal of the WIPO IGC mandate, he commented on the wording “balanced and effective protection.” Balancing tests are common where the State has the authority to balance the rights and interests of individuals and civil society groups. However it may not be appropriate in all circumstances. Human rights involved issues where the balancing test is not appropriate. Balanced consideration should not be conflated with balancing tests. He pointed out that access agreements often take the form of contracts, and there are some limitations to contract law. In private law, such contracts must be monitored and enforced by IPLCs, which require capacity and resources. A more fundamental problem in some jurisdictions may be conflicts between contract law and copyright law. Disclosure of origin puts the burden of documentation on patent applicants, not IPLCs. Databases put the burden on them to document their knowledge. In cases where databases are compiled from existing literature, IPLCs have expressed concerns about the protection of TK in the databases. Members have held that publicly available knowledge is in the public domain, while others hold that some forms of widely available knowledge may be protected. There are questions related, among others, on how such databases are compiled, who bears the costs, and on safeguards as to access.

Mr. Niubalavu focused on the context in the Pacific. In 1999, Pacific Community leaders had developed two model laws, the Model Law on Traditional Knowledge & Traditional Expressions of Culture and the Model Law on Traditional Biological Knowledge, Innovation and Practices (TBKIP). These Model laws were to form the basis of laws for the 22 Pacific countries; however, few of the countries had adopted laws on TK, and there was inadequate protection of TK associated with island and marine resources. Misappropriation is a major issue in the Pacific and existing laws do not provide adequate protection, as they do not have extraterritorial application. There are a number of arguments to support the protection of TK associated with GRs through an international instrument. Article 31 of UNDRIP affirms this approach as a component of human rights. An international legal instrument would contribute to the prevention of biopiracy. Biopiracy leads to use without benefit-sharing which contributes to economic and community development. Benefit sharing would contribute to tradition-based creativity and innovation,

including commercialization. The Pacific is rich in GRs and most people are not opposed to the development of their GRs, as long as this is done in partnership. Without such agreements, the Pacific Islands would continue not to benefit from the utilization of their biodiversity. Indigenous peoples are hoping for the development of international mechanisms. TK associated with GRs could provide the world with multiple values - economic, scientific, and commercial. He ended by reminding that the CBD and the UNDRIP provide minimum standards for recognizing the rights of IPLCs.

The panel was then opened to questions. The Delegate from Australia asked about a Pacific case study on the commercialization of red algae, in particular whether patent applications had been filed. Mr. Niubalavu replied that patents had been filed in the USA.

A representative of the Indian Council of South America was concerned that indigenous peoples had been called "local communities" in the proceedings. Indigenous peoples are not local communities, but nations, he stated. Indigenous peoples should be able to patent their own TK. The issue of patenting TK should be approached with very great caution.

A representative from the HEP expressed concern that the negotiations had been going on for 15 years without completion. She pointed out that misappropriation was occurring in Africa as well.

Mr. Niubalavu responded that, in Fiji, bio prospectors make contracts with the universities. He suggested that one does not have to wait on an international instrument to develop national responses. Fiji had established an office in the Department of Natural Resources to deal with this and meet obligations under the CBD and the Nagoya Protocol. The Fiji government was involved in the negotiation of bioprospecting contracts with universities and other entities, and ensured benefit sharing with the knowledge holders.

On the question relating to "local communities", Mrs. Tauli-Corpuz said that local communities had their own TK, GRs and TCEs, as did indigenous peoples, and although their rights may differ, they deserved protection. She referred to a recent World Bank meeting in which many African countries had expressed the importance of safeguards for local communities, and she called for expanding the safeguards to indigenous peoples. Indigenous peoples had been developing their own mechanisms for protection, such as community protocols to help regulate the actions of bio prospectors.

The Delegate from the USA asked Mr. Niubalavu if it was his position that TK associated GRs contained in publications remained protected even if the knowledge was readily available, and if TK associated with GRs with an origin in another country would be protected? Whether knowledge contained in a publication that predates the CBD will have retroactive protection? This raised the issue of how Fiji would go about determining the origin of TK associated with GRs, and issues related to not making the proposed regime under WIPO retroactive. Mr. Niubalavu responded that there were many older publications containing TK. While it was likely the intention of communities to make such information available to help other communities improve their health and other aspects of their well-being, the availability of the knowledge also opened them up to exploitation. This was why databases of TK associated with GRs were not recommended. Mr. Hardison responded that the work of the IGC would need to address the issue of retroactivity. He asserted that TK was not simply information. It could have its origin in time immemorial, from hundreds to thousands of years old, and was central to the dignity and identity of IPLCs. Indigenous peoples had often made statements to the IGC that for indigenous peoples; it was not Western IP law that defined their knowledge, but their customary laws. Customary laws often put an emphasis on inalienable obligations to knowledge under their traditions, and these obligations do not expire with time. This was the problem with

the “public domain”. If they did decide to share, they expected that the shared knowledge should be used in an appropriate way. IPLCs had shared much TK without understanding the consequences. Policies and laws that failed to recognize and respect their aspirations regarding their knowledge and their customary laws would run the risk of assimilation.”

35. The Advisory Board of the WIPO Voluntary Fund met on February 16 and 17, 2016 to select and nominate a number of participants representing indigenous and local communities to receive funding for their participation at the next session of the IGC. The Board’s recommendations were reported in document WIPO/GRTKF/IC/29/INF/6 which was issued before the end of the session.

36. The Chair strongly encouraged delegations to consider putting funds into the Voluntary Fund.

37. The representative of KUNA, speaking on behalf of the Indigenous Caucus, stated that when the WIPO Voluntary Fund was established for accredited IPLCs, the GA had recognized the importance of including these representatives in the IGC’s deliberations. He thanked the governments, organizations and individuals who had in good faith made financial contributions to support the participation of indigenous peoples in the process. The current negotiating texts recognized the necessity of the effective participation of IPLCs in implementing the terms of any instrument or instruments resulting from this process. IPLCs were the principal holders and owners of GRs, TK and TCEs that were the subject of the negotiations. IPLCs had to fully and effectively participate in the negotiation of the texts. However, looking at the low number of indigenous representatives, this was largely due to lack of funding and this could not continue. If the number of participants did not increase, the interests and rights of IPLCs would not be adequately addressed. The failure of the effective participation of IPLCs would cast a long shadow on the legitimacy of the IGC process and any diplomatic conference. IPLCs had developed a good working relationship with the Committee. The representatives had sought to progress, not to impede, the conclusion of the deliberations. The representative urged Member States to contribute funds supporting the equitable, regional and gender balanced participation of IPLCs in completing the IGC negotiations. The representative also urged Member States to include representatives of IPLCs in their delegations to further improve their input.

38. The Delegation of the United States of America (“USA”) stated that, as a follow up to its pledge made in September 2014, it was in the process of executing its contribution of \$10,000 to the Voluntary Fund. Knowing that \$10,000 would not go far, it hoped to have an update on its efforts to execute this pledge at the next session of the IGC.

39. The Chair stated that hopefully others would note the contribution of the USA and follow the same path.

40. The representative of Tupaj Amaru called upon Member States to contribute to funding the participation of indigenous peoples.

Decisions on Agenda Item 6:

41. *The Committee took note of documents WIPO/GRTKF/IC/29/3, WIPO/GRTKF/IC/29/INF/4 and WIPO/GRTKF/IC/29/INF/6.*

42. *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.

43. *The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Fayssal ALLEK, First Secretary, Permanent Mission of Algeria, Geneva; Mr. Parviz EMOMOV, Second Secretary, Permanent Mission of Tajikistan, Geneva; Mr. Nelson DE LEÓN KANTULE, representative, Asociación Kunas unidos por Napguana/Association of Kunas for Mother Earth (KUNA), Panama; Mr. Raymond FRYBERG, representative, Tulalip Tribes of Washington, United States of America; Mr. Carlo Maria MARENGHI, Intellectual Property and Trade Attaché, Permanent Mission of the Holy See, Geneva; Ms. Mary NARFI, Executive Officer, Ministry of Tourism, Trade, Commerce & Ni Vanuatu Business, Port Vila, Vanuatu; Mr. Pita Kalesita NIUBALAVU, Consultant, Pacific Islands Forum Secretariat, Fiji; Mrs. Marcela PAIVA, Counsellor, Permanent Mission of Chile, Geneva.*

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

AGENDA ITEM 7: GENETIC RESOURCES

45. The Chair recalled that he had, prior to the session, consulted with Regional Coordinators and interested delegations on the work program and working methodology. A draft proposal in writing as to work program and methodology had been circulated on February 12, 2016. He emphasized the draft methodology and work program were flexible, dynamic and subject to improvisation throughout the session. The Chair stated that he intended to begin the discussion of the core issues in plenary. If there was text in document WIPO/GRTKF/IC/29/4 pertaining to the issue under discussion, it would be placed on the screen for information only. It was not intended to conduct live drafting in the plenary. However, if there was a clear agreement on a particular change to the existing text, he might allow the change to be introduced on the screen. The plenary remained the decision-making body and the discussions would be reported as usual. At the end of each day, he would brief the plenary on his views on the outcomes of the day, any issues that might be considered as outstanding/pending issues for discussion at the

next session, and the plan for the following day. The Chair had invited Ms. Margo Bagley of Mozambique and Ms. Emelia Hernández of Mexico to be the facilitators and to work with the Vice-Chairs. Based on the plenary discussions the Chair might invite the facilitators to undertake drafting. Any text prepared by the facilitators would be presented to the plenary and only new facilitators' text which received the plenary's agreement would be entered into document WIPO/GRTKF/IC/29/4. The Chair might, depending on progress made in the plenary, establish one or more open-ended informal working groups or "informal informals" to tackle a particular issue. One of the Vice-Chairs who would be assisted by the facilitators would chair each of such working groups or informal informals. The results, if any, of such working groups or informal informals would be reported on by their respective chairs to the plenary. Any text put up on the screen, if any, or any drafting and informal work, would be carried out in English, although there would always be interpretation provided in the six languages in plenary. The Chair emphasized that the plenary would decide on whether to accept any revisions or new text proposed by the facilitators or working groups or informal informals. Core issues were listed in Annex A to the methodology and program paper, which the Chair summarized. The Chair suggested starting with "policy objectives" and "subject matter". The Chair then individually identified the working and information documents for the session.

46. The Delegation of Greece, speaking on behalf of Group B, reiterated that further work needed to be done to reach a shared understanding of policy objectives and guiding principles, which would help in establishing a common understanding on core issues before entering into text-based negotiations. It understood, at the end of the week, there would be an indicative list of outstanding/pending issues.

47. The Chair introduced the first core issue to be discussed, namely policy objectives, and he summarized the article on policy objectives in document WIPO/GRTKF/IC/29/4. The IGC had narrowed the objectives to one main The Chair emphasized that the CBD dealt with the protection of GRs and associated TK, including ABS under the CBD. From his perspective, the key question in relation to the policy objectives related to the intersection between the IP system and regimes/mechanisms related to the protection of GRs and associated TK. He noted that there was no consensus on the objectives reflected in the working document, and that document WIPO/GRTKF/IC/29/4 had objectives which appeared to relate to the prevention of the erroneous granting of patents. It would be useful if delegations could refine and narrow the current objectives. The Chair asked the facilitators to consider all comments on this issue, and hopefully bring forward a revised objective(s) for consideration by the plenary.

48. The Chair opened the floor for discussion on the policy objectives.

49. The Delegation of Australia considered that one of the objectives was to enhance the efficacy and transparency of the international patent system. Measures such as establishing minimum and maximum standards for disclosure of how and where GRs and associated TK were obtained when an invention was developed from them would support this objective and would promote innovation and promote confidence in the IP system.

50. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that a policy objective, in relation to GRs and the patent system, should be to enhance the transparency of the patent system to facilitate the possibility of ABS through the disclosure of country of source or origin of GRs and, pending further discussions, possibly TK associated with GRs, and thereby assisting providers of GRs to monitor and keep track of their GRs, possibly subject to any ABS arrangement. It considered that to avoid duplicating provisions already provided by the Nagoya Protocol, it would need to get a clear understanding on the full range of existing measures contained in the Nagoya Protocol as well as the measures implementing the Nagoya Protocol. It emphasized that ABS including requirements of PIC or MAT were being dealt with in separate systems. The Delegation further pointed out that the erroneous granting

of patents should be prevented, and to achieve this, patent offices should have access to the appropriate information on GRs and TK associated with GRs.

51. The Delegation of the USA recognized the achievements of Ambassador McCook in the IGC, especially his dedication to bringing practical and real world examples. Within the new mandate of the IGC, a primary focus of the IGC was to reach a common understanding on core issues, including a definition of misappropriation, beneficiaries, subject matter and objectives, including consideration of exceptions and limitations and the relationship with the public domain. The Delegation had agreed to delete the text relating to beneficiaries in the last IGC session dedicated to GRs, and noted that IGC 29 would be more focused on GRs than on TK and TCEs. The most effective means to start was to define common objectives. Throughout the history of the IGC, the Delegation's core concern was over patents that had been granted for inventions that were not novel or inventive. It believed that if Member States shared that concern, they could agree on a shared objective. The Delegation identified a first shared objective as "Member States, in protecting genetic resources and traditional knowledge associated with genetic resources, should aim to: Prevent patents from being granted erroneously for inventions that are not novel or inventive with regard to genetic resources and traditional knowledge associated with genetic resources, which could protect indigenous peoples and local communities from the limitations of the traditional use of genetic resources and their traditional knowledge associated with genetic resources that might result from the erroneous patenting thereof." It noted that such formulation did not fully encompass the shared objectives because by describing the issue as a matter of the proper granting of patents, the Delegation had not sufficiently expressed why they undertook that work. It stated that they were initially concerned about IPLCs such as farmers facing patent infringement suits for their traditional uses of GRs. It proposed that another objective of the work at WIPO needed to be to promote or incentivize research and the development of tools to fight new diseases and, for example, to find clean energy and biofuels, safer cosmetics and new, healthier foods. The Delegation proposed another objective as "Ensure that patent offices have the appropriate available information on genetic resources and traditional knowledge associated with genetic resources needed to make informed decisions in granting patents." Regarding the objectives contained in document WIPO/GRTKF/IC/29/4, and as to the objective of enhancing transparency, the patent system already promoted transparency and, therefore, it did not support transparency as an objective. The Delegation invited the Delegation of EU to give an update on the EU's process of implementing the Nagoya Protocol to discuss any lessons learned and any concerns that could be shared with respect to the effect of implementation of the Nagoya Protocol upon research in the EU.

52. The Delegation of Japan distinguished between two different factors, the issue of the misappropriation of GR, namely inadequate compliance with ABS system, and the erroneous granting of patents. It added that the former should not be dealt with in the patent system. The focus of the IGC should be on the erroneous granting of patents, especially on the use of databases for prior art searches given that WIPO had a crucial role as an organization specializing in IP.

53. The Delegation of the Russian Federation thanked Ambassador McCook who had chaired the IGC in the past. The Delegation emphasized that document WIPO/GRTKF/IC/29/4 should firstly concentrate on preventing the erroneous granting of patents based on GRs and associated TK, for which there were no relevant criteria as regards inventive step, and preventing misappropriation of GRs. Member States had affirmed that GRs were not themselves the result of intellectual activity and, therefore, could not directly be protected as IP. The Delegation proposed to concentrate the policy objectives on matters closer to IP to be able to draw up an instrument which would encourage both innovation and the development of society as a whole, in the context of GRs and associated TK which were already known and could be directly used in an invention or in the creation of an invention.

54. The Delegation of Switzerland supported the statement made by the Delegation of Australia.

55. The representative of Tulalip Tribes wished to further study the proposals of the Delegation of the United States of America, and said that they might propose objectives that might not be shared by the holders of TK. He emphasized that TK holders had many objectives for the use of their knowledge such as innovation, but also protection from exposure of their knowledge. The representative wished to insert the language “where appropriate and at the request of the TK holders and with their PIC” to the text. He did not have a fundamental objection to seeing the TK getting in front of the patent examiners. The representative stated that the burden was put on the users of TK and GRs through the use of disclosure of origin.

56. The Delegation of Latvia, speaking on behalf of the CEBS, stated that regarding the policy objectives the instrument should enhance transparency of the patent system to facilitate ABS through the disclosure of the country of source or origin of GRs.

57. The representative of CAPAJ underlined that policy objectives had to be understood both from the points of view of countries and representatives of indigenous peoples. He aligned himself with the statement made by the Delegation of the Russian Federation. Knowledge generating new GRs had proven throughout history that GRs evolved as a collective intellectual activity, including interactions between human beings and the territory where indigenous peoples lived. The representative highlighted that such GR products were handed down to indigenous peoples by their ancestors who had been committed to carrying on with these creativities, creations and innovations. The representative highlighted that the Takana territory located between the Plurinational State of Bolivia and Peru had a great diversity of environmental habitats. For example, there were 60 different varieties of corn or maize and hundreds of different subspecies of potatoes. The representative preferred the term “TK associated with GRs” because the production of GRs was the result of human action.

58. The Delegation of Egypt stated that it was the sixteenth year in the life of the IGC, and it hoped to use one single year to achieve an international instrument which would be legally binding. Document WIPO/GRTKF/IC/29/4 did not mention “protection” especially in the objectives, and it proposed the objectives be as follows: “Protection of GRs and TK by preventing its illegitimate misappropriation.” The Delegation stated that paragraph (a) should stipulate disclosure to patent offices of GRs used and TKs adopted in the inventions that had been inspired by them. Regarding transparency and ABS, access to GRs and TK should be reflected in the objectives as follows: “No GRs or TK may be accessed in any manner in the absence of the prior informed consent of the authority, the state, the indigenous peoples or local communities who were the legitimate owners of these TK and GRs”. The text should not simply refer to benefits which had a material and financial value but should also include the possibility of benefiting from technologies used in the field of GRs and TK. It underlined that even if the financial resources might vary, the technology prevailed and was the foundation of all actions. The Delegation advised to separate discussion for each objective.

59. The representative of HEP mentioned that the Ambassador McCook had helped much in the IGC, and that the IGC had not achieved its objectives. Regarding the general policy objectives, and in particular disclosure, there was a concern about the legal framework and, in particular, on how local populations should prepare themselves to disclose. She emphasized that disclosure was ambiguous, in particular if the framework was not open to local communities. They could be subjected to some pressure or have some apprehensions because researchers had more means. She raised the question as to how to reconcile disclosure requirements in a context of health. Document WIPO/GRTKF/IC/29/4 was too cumbersome.

60. The Delegation of the Plurinational State of Bolivia stated that document WIPO/GRTKF/IC/29/4, including the policy objectives and the normative issues, had received the support of many Member States for a long time. Document WIPO/GRTKF/IC/29/4 should be the basis of the work of the IGC. The IP system should prevent the undue misappropriation of GRs and associated TK and the present session could bring clarity in that regard. It was necessary to increase transparency, knowing IP systems had some limitations particularly in relation to GRs and TK.

61. The Delegation of Brazil stated that paragraphs (b) and (c) of document WIPO/GRTKF/IC/29/4 were fully in line with its understanding of the policy objectives sought by the IGC, namely enhancing transparency in the IP system and ensuring mutual supportiveness with other international agreements on the protection of GRs. It requested further information from the proponents of paragraph (a) on how they understood that document WIPO/GRTKF/IC/29/4 could ensure that the patent office would get that appropriate information. Information should be provided by the person who was filing the patent. It supported that erroneous patent rights should be avoided, and wondered how the proponents would see that as feasible or obtainable with this international legal instrument. It aligned itself with the comments made by the Delegations of Egypt and the Plurinational State of Bolivia that the IGC should primarily focus on document WIPO/GRTKF/IC/29/4.

62. The Delegation of the USA referred to the statement made by the Delegation of Brazil related to paragraph (a) about how it could be ensured that IP offices had the necessary or appropriate information on GRs and associated TK to prevent the granting of erroneous IPRs, and to the question raised by the Delegation of Brazil on whether this information should come from the applicants. The USA had a requirement under Rule 54 for applicants to provide any information that was material to the patentability of the invention, that had to be provided to the IP office, and such information was valuable for prior art to be accessible by the patent office from another source. That was the reason why the Delegation co-sponsored two joint recommendations that addressed databases. It would revert in more detail about those proposals in relation to defensive measures. The Delegation addressed a question that was raised by the representative of HEP about how disclosure would be accomplished and what mechanisms would be used. It shared the apprehension identified by HEP. From its experience, the disclosure requirements that had been implemented in national law did not seem to accomplish the objectives in terms of either facilitating ABS or preventing the erroneous granting of patents. Therefore, it wished better understand how those proposals would work in terms of mechanisms. The formulation of policy objectives, contained in document WIPO/GRTKF/IC/29/4, collapsed objectives and mechanisms. Paragraphs (b) and (c) were mechanisms, and the Delegation preferred to delete paragraphs (b) and (c). It wondered, with respect to the brackets around "IP", why the subject matter had been expanded to copyrights, trademarks, industrial designs or integrated circuits, which did not appear to be appropriate. It requested additional information as to how GRs were relevant to these other areas of IP law. It believed that the focus of the work should be on the patent system, and the other two options should remain in brackets or be deleted. In the USA, the Copyright Office was separate from the Patent and Trademark Office, and copyright offices did not grant rights but registered rights. The inclusion of copyright within the scope of document WIPO/GRTKF/IC/29/4 would incorrectly suggest that such information would be appropriate for copyright offices.

63. The Delegation of Ghana was pleased that the current session was emphasizing work that had been achieved so far and that there was a focus on the draft text with the objective of improving that text. At the same time, the Delegation was willing to work on issues such as databases. The Delegation proposed a slight change to paragraph (a) of the policy objectives, suggesting that the disclosure requirement would enable patent offices to have access to appropriate information on GRs for the appropriate enforcement of patent rights, and not

necessarily to avoid erroneous patents. Previously some delegations had not supported the reference to erroneous patents. There was a need to give patent offices information to ensure the effective enforcement of patent rights. Another objective would be to ensure transparency in terms of paragraph (b), and in paragraph (c), the disclosure requirement would also enhance the promotion of patent rights under the current instrument as well as other international agreements.

64. The Delegation of India stated that if the objective in the chapeau was to prevent misappropriation of GRs, paragraph (a) should actually provide the means to prevent misappropriation. The patent office would need access to appropriate information from the patent applicant about the source and origin of the genetic material without which the patent office would not be able to undertake the responsibility of preventing the misappropriation of GRs. Databases were generic, containing all kinds of information about the TK, and did not refer to any particular patent application. The discussion on databases was not about GRs, and therefore did not serve the purpose of preventing misappropriation of GRs. The Delegation wished to have additional language on databases, and stated that the disclosure of source and origin of genetic material was absolutely imperative in order to make this policy objective operational.

65. The representative of FWCC asked the Delegation of the USA whether there were studies regarding national disclosure requirements which were not currently achieving their stated objectives, and how these had worked.

66. The Delegation of Nigeria supported that transparency was a core objective. It asked the Chair to clarify whether there was conflation between the objectives of the disclosure requirement and the objectives of the instrument. Transparency might create interest in disclosure from Member States, and there were other reasons for which disclosure would be important, including for countries that were implementing the Nagoya Protocol. It might be helpful to draw some distinction between what Member States would want to do with the disclosed information at the national level and what this instrument was intended to do. Member States should at least converge on transparency. The more information was disclosed about an invention or a particular property right, the better the system was overall and not just the patent system but the innovation ecosystem.

67. The Chair highlighted the focus of the instrument on the IP system as indicated in the mandate.

68. The Delegation of Namibia stated that, regarding the erroneous granting of patents, a handful of countries were making sure that patent examiners had access to appropriate information. It argued that the appropriate information that they needed access to was the legal provenance of GRs and associated TK used in claiming an invention. If it was required under national laws to have PIC and conclude MAT with the providers of GRs or associated TK, that should be a criteria for patentability. The absence of a legal right to utilize the resource or knowledge in the first place would mean granting a patent based on a fundamental transgression of the law, which would undermine the credibility of the IP system as well as make it an accomplice to theft. That should not be the intention of the four or five countries which were putting that in place. All Member States could agree on the usefulness of databases and available information from a prior art perspective. It emphasized its preference for a disclosure of the origin or the source of GRs or TK being claimed and taken from the perspective of legal provenance.

69. The Delegation of Vanuatu said that it was the first IGC meeting it attended for the past 15 years. Modern life stemmed from the TK of the ancestors. Regarding the policy objectives, paragraph (a) should mention that when there was access to appropriate information, there

should be laws in place. The Delegation supported the statement made by the Delegation of Namibia. A proper system should be in place for patent offices. Without such system, patent applicants would not be able to come up with the source or origin of the TK.

70. The Delegation of Niger stated that, contrary to the position of the Delegation of the USA, the discussion on policy objectives and misappropriation could not be reduced to patents. It preferred to keep "IPRs" because plant varieties also derived from GRs. In some countries, plant varieties were not patentable even though those plant varieties did use GRs in order to obtain plant breeders' certificates, and that was the case covered by OAPI.

71. The Delegation of Pakistan aligned itself with the statements made by the Delegations of India and Nigeria regarding the disclosure of source of GRs in terms of subparagraph (a) under the discussion on policy objectives.

72. The Delegation of Australia preferred to remain focused on patents as GRs were difficult enough without addressing many other IPRs. It found UPOV to be the primary international body to look after the protection of plant varieties and to establish a framework for the protection of plant varieties, which had in place mechanisms for applicants to explain where they obtained their GRs. It, therefore, wondered whether the IGC had the jurisdiction to influence UPOV, without discounting that GRs were very important part of plant variety innovation.

73. The Delegation of Namibia agreed that the majority of the cases of misappropriation had happened through the patent system and emphasized that there were other cases where trade names had been stolen where indigenous knowledge about the properties of a particular resource was used for promotional material and the material was not sourced from the provider of that resource. As biology and engineering became more and more conflated, those might be examples of bio-inspired design that would constitute misappropriation of GRs unless those GRs were legally obtained with PIC and used as in MAT. It mentioned that other rules applied to copyright, integrated circuits and other forms of IP, and it would not presume that that instrument would change those rules entirely or usurp the authority of those rules but it would definitely be inadequate if there was no reference to IP in general.

74. The Delegation of the Plurinational State of Bolivia stated that the work of the IGC had to be comprehensive and not just focused on the patent system. The Delegation noted that biopiracy would be continuing in other systems such as UPOV. If UPOV had mechanisms to prevent that, it should not be worried about including criteria on disclosure of source or origin. The issue of GRs did not obey the simple logic of copyright, and it was generally through the patent system where GRs were misappropriated.

75. The Delegation of China said that although the focus of the discussion could be on patent rights, if IPRs could be kept as a wider basis, it would be conducive to the discussion and for the full protection of GRs.

76. The Delegation of the USA, in answer to the question by the FWCC, said that there might be studies available, but it did not point to any study in particular even though there was at least one country that had amended its national laws because of the harmful effects on innovation that the national ABS system had caused. The Delegation preferred that those countries self-identify themselves.

77. The representative of ICC stated that IP was a very broad area, and that a definition of scope would be needed. If there was a concern on the inclusion of plant variety rights, maybe patents and plant variety rights would be good. The representative also highlighted that including IP as a whole would generate more complexity. The more complicated it was, the more danger there was that the IGC would continue for another 15 years or even more.

78. The Delegation of Nigeria answered to the questions raised by the representative of FWCC and by the Delegation of the United States of America. Any legal regime would have successes and failures. It recalled the studies that had been done on the successes of disclosure regimes and mentioned a fairly comprehensive study by St. Mary University Law School in the UK. Nigeria had had several important successes such as with sickle cell disease that was particularly endemic in black populations. After having had disclosure of a GR and associated TK, it was able to negotiate an agreement in which a Nigerian was co-owner of a patent to deal with the sickle cell crisis. The Nigerian had been ramping up drug production based on traditional medicines, and the country also had a Traditional Medicine Act. The Delegation emphasized that the benefits, both in terms of innovation and returns to the indigenous communities, had been quite beneficial. There were places where the system had not yet matured or might not be working well, but there were also really good examples of countries in which they had worked.

79. The Delegation of Australia responded to the question about the studies done on existing patent disclosure requirements and referred to an article “The Chinese Patent Law and the Protection for Genetic Resources”, published in the magazine “IP in the Life Science Industries 2014” commencing at page 113. The abstract of the study was as follows: “New clauses on the protection of genetic resources were added to the amended Chinese Patent Law four years ago. So far, it appears that the new filing requirements – in particular, the genetic resources form – are not placing an undue burden on applicants.” The Delegation pointed out that the terms of reference contained in document WIPO/GRTKF/IC/29/7 were rough and required polishing, but could be useful for the IGC’s work if those questions were refined and answered intersessionally in order to avoid being a barrier to further discussions.

80. The representative of Tulalip Tribes supported the statement of the Delegation of Namibia emphasizing that paragraph (a) conflated two different approaches on the issues related to disclosure requirements and databases. The representative noted from previous interventions some concerns on the effects of disclosure requirements on users, but did not find an equal concern on the potential impacts of database on the TK holders. He believed that the current policy objectives were framed in terms of the needs of the patent system, but they should reflect the needs of the TK holders. Disclosure requirements would reduce significantly the need to collect TK, and the term “ensuring” was very threatening and dangerous to TK holders because it included potentially coercive measures that could be put into place to compile databases of TK and GRs.

81. The Delegation of Egypt proposed a clear, stronger and more appropriate text in the introductory paragraph or the chapeau as follows: “The objective of this instrument is to protect GRs and associated TK through the following: (a) Obliging the applicant for the patent to provide the sources from which he obtained the information so that the IP offices have all the necessary information so as to avoid the grant of erroneous patents. (b) Ensuring access to GRs and associated TK through PIC so as to make use of the technology used. (c) Strengthening complimentary with the international agreements on the protection of GRs and their derivatives or associated TK, in particular the CBD, the Nagoya Protocol and other agreements and conventions on IP.”

82. The representative of CAPAJ stated that the principle of transparency was universally accepted because it guaranteed more solidarity in respect of any decisions taken. The Delegation of the Plurinational State of Bolivia had emphasized a holistic vision. In that country, the herbal knowledge of the Kallawaya nation had been declared as the cultural heritage of mankind. Many industries had used this knowledge and had not disclosed its source because industry saw it from a commercial or financial point of view. He emphasized the holistic vision of the Kallawaya that aimed at protecting and ensuring that the herbs increased and persisted and

could be used for traditional medicine. The representative of CAPAJ hoped that this holistic vision, shared by the Delegation of the Plurinational State of Bolivia, might motivate interventions by other delegations.

83. The representative of the Andean Community highlighted that the Andean Community was made up of four countries that were members of UPOV, and that those countries were not only biodiverse but also agrobiodiverse with richness in culture, which meant that the indigenous peoples in those territories had made many contributions through their TK. The representative referred to the statement made by the Delegation of the Plurinational State of Bolivia about the link with IP and patents leaving out plant varieties which might be of direct application. He also referred to the statement made by the Delegation of Australia stating that the UPOV system had already resolved, to some extent, the matter of disclosure. . He said that sharing experiences in the IGC as regards the disclosure of GRs through UPOV would be of interest. It was important to recognize the contributions of indigenous peoples when they provided their knowledge. The scope should be comprehensive in order to cover the interests of all parties involved.

84. The representative of IFPMA underlined the importance of the discussion in the IGC in order to understand exactly what policy options could be chosen, including preventing the erroneous granting of patents, and investigating or ensuring ABS. He highlighted that natural product R&D remained very challenging for the industry as a natural product, by definition, was incredibly complicated because it did not often result in a marketable product, and, therefore, any additional problems inserted into the patent system would create problems for them. The implementation of the CBD continued to make its members nervous about additional legal uncertainty. IFPMA had positive examples of technology transfer agreements between the industry and GR providers that had resulted in a good sharing of knowledge, but most of them had not resulted in a marketable product that patients could use. IFPMA did also submit cases where its members had experienced problems such as getting the required certificates for PIC and benefit-sharing and on how those countries were trying to respond to the more dynamic situation to accept the needs of natural product development. IFPMA was willing to engage by giving practical examples and empirical evidence where it could, but the representative emphasized that he needed to have a full understanding of the objectives that the IGC was trying to achieve through that process and then identifying whether or not the patent system was the most appropriate area to achieve those objectives. He highlighted risk factors that the members of IFPMA faced while developing natural products. One was reliability of supply, as developing such products required a huge amount of resources to be able to develop a pharmaceutical for the required testing, with a lot more clinical trials done on humans before proving that the product was both safe and effective, and that there were certain elements associated with natural products that increased those kinds of risk factors. Many of the larger companies had exited natural product R&D because of those additional risk factors. The members of IFPMA were worried about injecting further levels of legal uncertainty and legal risk into the patent system, which might act as a disincentive for drug development. The objective of the IFPMA members was to develop products and medicines for the benefit of mankind and to ensure that they got access and benefits to those who supplied the products. The problem for the IFPMA members was often that bioprospecting was done separately in geographical scope and time, and, in most cases, there were many different links in the chain between the first point of acquisition and a product maybe being developed for a pharmaceutical, which if found to not to be compliant could result in the investment by the end researcher or developer being lost as well as that patent being revoked. He expressed the preference of IFPMA for due diligence, and said that IFPMA was willing to investigate when necessary. The IFPMA members were wondering whether or not the patent system was the most appropriate mechanism to achieve that shared objective and they maintained the concern about disclosure requirements. The IFPMA members were willing to share the empirical evidence and national experiences that they accumulated and to continue to engage in fruitful discussions.

85. The Delegation of South Africa thanked the Chair to have promoted virtues of fairness, friendliness and firmness, which would be needed in the present session. It emphasized the concerns previously shared by the representative of IFPMA and wondered whether they were about the erroneous granting of patents or about the disclosure of the origin of GRs and TK associated with them. For the latter, it wondered whether the concerns were about misappropriation and the means to prevent it. The mandate asked Member States to ensure a balanced and effective protection of GRs, TK and TCEs, and if the patent system had been adequate for those three types of issues, the IGC would not need to discuss the erroneous granting of patents. The PCT meetings were the appropriate place to safeguard the patent system, while the IGC was looking at TK, TCEs and GRs. The Delegation raised a second set of issues on how disclosure provided disincentives to the IP system and recalled the evidence-based approach where the onus and the burden should be placed on the stakeholders that were saying that the disclosure was a burden to the system. It considered that those stakeholders needed to provide arguments to see the merits of their cases, not in terms of the objectives but in order to incentivize innovation and to protect those incentives and IP. The Delegation asked how disclosure would erode those principles of the IP system. It noted a very good spirit and consensus amongst the proponents of disclosure, and also noted that very few countries were pushing the issue of disclosure as an impediment. The Delegation saw the balanced protection to include both positive and defensive measures, in particular around the use of databases. It noted that the other side of the argument would be to see that they were complementary not competitive. It asked the proponents of preventing the erroneous granting of patents to see the virtues of disclosure requirements for openness in the engagement on this issue in order to have a balanced protection.

86. The representative of South Centre aligned herself with the industry representatives and others that increased legal certainty and the use of the IP system were beneficial for all stakeholders and to ensure continued access to GRs and their adequate use. The work of the IGC would help towards that purpose. She considered that one of the means to prevent misappropriation was to prevent the granting of patents of questionable validity, and preferred to use the language of whether the patent was “valid” or “invalid” versus “erroneous”. There were various ways to improve the patent examination process such as improving prior art search that was mentioned in paragraph (a) in the policy objectives, and through more rigorous application of patentability criteria, in line with the language in Article 2 of document WIPO/GRTKF/IC/29/4. In numerous jurisdictions there were new limits placed on defining the scope of patentability protection and allowable scope of claims on the genetic material. Landmark decisions by, for example, the United States Supreme Court and the Australian High Court, ruling that naturally occurring GR material could not be patented, would be useful for the IGC. A number of materials on the disclosure requirement at a national level in developing countries could be shared by South Centre, but in terms of developed country experiences, the South Centre could share the case of Switzerland and how the Swiss disclosure requirement had perhaps not shown to be as efficient as it could be, precisely because the regional approach would be more useful as most patent applications went through the EPO rather than through national applications. She favored a broader scope of application of disclosure requirements not limited to national applicants.

87. The Delegation of Norway expressed its gratitude to Ambassador McCook for his great efforts and the engagement that he had shown in the IGC. The Delegation supported the delegations that favored the focus on the patent system, and stressed that the main discussion point on GRs was disclosure. There were divergent views on whether the end result of the IGC should include a disclosure requirement. If those who supported disclosure wanted to see success, it was more realistic to start off with focusing on the patent system, as the most natural subject for a disclosure requirement. Including the IP system in general would make this exercise too uncertain and complex, likely leading to no disclosure requirement at all, neither in

the patent system nor in any other part of the IP system. Plant varieties, which had been mentioned as the most relevant IP right next to patents by the Delegation of Australia and other delegations, fall under UPOV and should be dealt with exclusively in that fora. The Delegation supported the statements made by the Delegations of Australia, Switzerland and Nigeria that the aim of the instrument should be to ensure efficacy and transparency in the patent system.

88. The Delegation of the USA thanked the Delegation of Nigeria for providing the example of a patented treatment for sickle cell anemia in Nigeria. It noted that, in 1992, research had commenced between the Nigerian National Institute for Pharmaceutical Research and Development and a traditional health practitioner, building upon indigenous medical knowledge. They had agreed upon an MOU establishing clear provisions that pre-dated the patent and a formula for benefit-sharing. The traditional health practitioner was paid \$115,000, and the U.S. company that undertook the work subsequently went bankrupt and the Nigerian government took over production of the drug in Nigeria. The Delegation requested an update as to payments made to the family of the traditional medicine practitioner, and noted that U.S. patent 5,800,819 provided much background on the research in Nigeria and related to a composition made from a medicinal plant but it provided no information as to where the plant was sourced. The Delegation referred to the statement made by the Delegation of India on databases related to TK but not GRs. It noted that there were databases that related to both GRs and the traditional uses of GRs, such as the Indian TKDL. The Delegation answered to the question of the Delegation of South Africa on how disclosure requirements might cause harm, and pointed out that the demandeurs had the burden of establishing the effectiveness of their proposed solutions and the ability of their solutions to meet the common objectives.

89. The Delegation of the Republic of Korea considered the protection of GRs and TK associated with GRs was very important. Regarding the very purpose of the IP system, the most effective, practical and feasible form of protection of GRs and associated TK in patent system was to prevent erroneously granted patents through the establishment and the use of databases. Its position was based on the country's national experience of using databases, and it hoped that that should be one of the main policy objectives of the IGC instruments.

90. The Delegation of Indonesia stated that it was open to any proposals that would support, assist and strengthen the text-based negotiations on document WIPO/GRTKF/IC/29/4. The objective of the instrument was to tackle misappropriation and misuse. It valued the importance of having a database system for preventing the erroneous granting of patents that should be complementary to the disclosure requirement. The instrument should not be limited to the issue of patents so as to make the future IP system balanced.

91. The Delegation of Nigeria reacted to the intervention made by the Delegation of the United States of America which did not reflect most recent developments. The bankruptcy of the American company had had nothing to do with the exploitation of the GRs. The use of GRs could traverse categories beyond patents which was critical to the IGC dialogue. In that particular instance, trade secrets were involved as well, and there had been, since then, the use by American hospitals of some of the compounds used to treat sickle cell disease. The applicable legal regimes in Nigeria concerned both the Nagoya Protocol and traditional medicines combined. The deeper question was how the disclosure regime might interact with areas of IP beyond the patent system, and one of the core concerns for the Delegation was that simply having databases that recorded or even indicated associated TK was problematic where that TK was also a trade secret or where that TK might be held according to cultural norms that might not be amenable to being treated as prior art. It stated its preference to think about the interests of TK holders and the epistemic knowledge systems that were involved when dealing with GRs and associated TK. It was easy for a country which was not rich in biodiversity to consider that that knowledge was simply irrelevant, immaterial or lacked economic value. The use of those resources in those communities was in combination with knowledge about the

medicinal and therapeutic properties of those plants, and it, therefore, considered that GRs and associated TK were critical. Cases in which associated TK was a trade secret raised questions about the ways in which the policy objectives of enhancing transparency would also reveal either compliance or non-compliance with particular legal regimes that were implicated.

92. The Chair closed the discussion on policy objectives, and opened the floor for comments on subject matter.

93. The representative of Tulalip Tribes preferred GRs, their derivatives, in brackets, and associated TK because this was more inclusive. He did not retain the phrasing “TK associated with GRs”, because it limited the scope of application. He said that there was also value in TK associated with derivatives.

94. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that it preferred, pending a full discussion of TK in respect of GRs, to use the terminology “TK associated with GRs”. Derivatives should be excluded from the text. It recalled that plant breeders’ rights were being dealt with at UPOV. The Delegation considered that the subject matter concerned patent applications for inventions directly based on GRs.

95. The representative of CAPAJ said that derivatives were also a creative means. He supported the statement made by the representative of Tulalip Tribes that derivatives should be added to that article. He preferred to include derivatives and associated TK as a whole.

96. The Delegation of Egypt stated that the appropriate expression should be TK and its derivatives. GRs could relate to both of them. It considered that the expression would be more comprehensive in that way.

97. The representative of HEP stated that she did not have any preference between the proposed options in the text, especially because of the multiple meanings that those words could have in anyone’s mind. She referred to the glossary for the term “derivatives”. She wondered for example whether sacred or secret TK could be recognized as derivatives. She preferred that the text focus on a definition of TK associated with GRs.

98. The Delegation of South Africa wondered whether it was the GRs or the TK that should come first in the quest for innovation and patenting in terms of epistemology. It highlighted that the IGC negotiations focused on products of the intellect, namely knowledge. It stated that the IGC had been inclined to give primacy to GRs. But actually primacy should be given to TK as knowledge. It expressed a preference therefore for “TK and its associated GRs and derivatives”. The Delegation illustrated an evidence-based approach by referring to the case of Hoodia and said that when the research on Hoodia had started in 1952, it had not been about an anti-slimming drug but rather about a product which tended to cater for quenching thirst among the traditional people. Eventually it became an anti-slimming drug and therefore a derivative from the primary knowledge. The Delegation made also the point of a sweetener that had been named by indigenous communities as a “sweet mouth”, referring to a tree. It said that the Centre for Social Science Research from University of Cape Town, South Africa (CSSR) looked at the case and decided to take it through to taste and see whether it had any sugar effects, before it decided to patent it as an alternative to sweetener. The CSSR concluded said that this product was a derivative of the GR, but also a derivative of TK. The Delegation pointed out that both examples showed the blend between TK and associated GRs and its derivatives that could not be delinked.

99. The Delegation of Thailand stated that the subject matter of the instrument should include associated TK and derivatives, and that the international instrument should apply to any IPR, and not be limited to patents.

100. The representative of the Andean Community referred to the statement made by the Delegation of South Africa, and especially to the indissociable link between innovation, GRs, derivatives and associated TK. She considered that protecting only GRs, but not their derivatives, was similar to close the main door to the house, but to leave open the back door and all the windows. She reminded that the link between GRs, their derivatives and associated TK, and their protection were included in the national laws of four countries from the Andean community.

101. The representative of South Centre stated that plant varieties should be included as subject matter under this provision, and underlined that the system of plant variety protection of UPOV was not followed by all Member States of WIPO. Some WIPO Member States had their own *sui generis* system of plant variety protection in compliance with Article 27 of the TRIPS Agreement. The representative reminded that WIPO had to provide technical assistance on IP matters falling under the scope of the TRIPS Agreement, including plant variety protection, by virtue of the cooperation agreement between WIPO and WTO.

102. The Delegation of Ghana made two proposals regarding Article 1. The first was to simplify the provision by noting that the instrument would apply to TK and associated TK. It said that in looking at the instrument, it had noted a specific definitional section preceding Article 1. Therefore a more appropriate place for GRs, derivatives and the like would be to work on the definition within that section. Secondly, it had noted that the current definition merged two definitions, one for associated TK and the other for TK associated with GRs. It suggested looking at the common elements between both definitions and come up with a single definition. The Delegation supported the use of “associated TK”, and stated that in the new definition, it would be useful to include GRs, and then its derivatives if any.

103. The Delegation of Switzerland stated that it preferred the term “TK associated with GRs” and supported the deletion of the reference to derivatives throughout the text. Regarding the scope, it stated that the instrument should apply to patents rather than IP more generally. Regarding the trigger, it supported the terms “directly based on”.

104. The Delegation of Brazil expressed its preference to associated TK, and noted that it shared the positions of many other developing countries on subject matter. It refrained from making further comments at that stage, noting the absence of consensus in this regard.

105. The Delegation of Latvia, speaking on behalf of CEBS, stated GRs and “TK associated with GRs” should be the sole subject matter. It did not favor the inclusion of “derivatives”. The text should only relate to patents and not to the IPRs in general.

106. The Delegation of Japan preferred the term “TK associated with GRs” because it corresponded to the title of Article 12 of the Nagoya Protocol in terms of disclosure requirement. It referred to the definition of derivative provided for by the Nagoya Protocol, even though it was not used in the main text for fears that such inclusion could have expanded the subject matter of the Nagoya Protocol and weakened its legal certainty. The Delegation proposed that disclosure, if any, should only relate to patents.

107. The Delegation of Australia wished the subject matter to be formulated in a short and elegant way. It was open to new proposals, such as the one made by the Delegation of Ghana. It asked the facilitators to include it in their drafting. It recognized that the subject matter of the instrument would apply to GRs and their derivatives, between brackets.

108. The Delegation of the USA was uncomfortable with the term “derivatives” because it would expand the scope of the text and made it unclear what the subject matter would be. It

preferred to avoid legally binding terms such as “shall”, “must” or “rights” because it was not committed to a legally binding instrument. It noted that the aim of Article 1 was unclear and considered that that article might not be necessary at all. It suggested either bracketing or removing that Article. It wished to discuss the definition of misappropriation at a later stage in the present session. It recalled that this issue was part of the IGC mandate and an important one to be discussed.

109. The Delegation of Indonesia stated that the subject matter of the instrument put in Article 1 should be in line with the objectives. It recalled its position as expressed during the informal meetings that took place on the margins of IGC 26 and IGC 28. Regarding Article 1.1, it preferred to maintain the word “IP”, as the instrument should cover not only patent but also other IPRs. It supported the proposals made by the Delegations of Australia and Ghana. Such proposals could narrow the gap among Member States by simplifying Article 1.

110. The Delegation of the Russian Federation stated that the text should cover TK based on the use of GRs. It preferred to remove “derivatives” from the text or put them between brackets because its meaning was unclear. It advised to set aside time for a discussion as to the appropriateness of having derivatives included in the text at all.

111. The Delegation of Namibia highlighted that there were two different concepts behind the two expressions “GRs and associated TK” and “TK associated with GRs”. It agreed with the Delegation of Japan that said that Article 12 of the Nagoya Protocol talked about TK associated with GRs. He added that that the correct term was “TK being used without its associated GRs”. It added that on the contrary the concept of “GRs and associated TK” would evoke the idea of a GR being used with its associated TK. It might be therefore appropriate to make the distinction. The Delegation reminded that the CBD devoted quite a lot of time on the question of derivatives. The definition of derivatives as contained in Article 2 of the Nagoya Protocol eventually defined derivatives as “a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity”. It highlighted that focusing on the naturally occurring biochemical compounds was particularly relevant in the context of IP, because they would directly affect, for example, patents on composition of matter. The Delegation requested therefore that derivatives remained in the text and that Member States found a solution that dealt with derivatives as an integral part of the utilization of GRs. It referred to the negotiations of the Nagoya Protocol that had solved several issues by defining the meaning of the utilization of GRs. The Delegation reminded that the forthcoming instrument might include mutually supportiveness as one of its objectives, as the discussion on that subject had made clear it therefore proposed to define utilization in a similar way as in the Nagoya Protocol, reminding that the Nagoya Protocol focused on the use of GRs and associated TK for research and development. The Delegation preferred to maintain the focus on IP in general, even if the vast majority of cases would probably involve patent applications. It referred to the case of IP embodied in trade secrets that had been raised by the Delegation of Nigeria. It asked whether a trade secret involving the illegal use of a substance or a resource would still be protected as such.

112. The Chair noted that definitions of “utilization” and “derivative” from the CBD were incorporated but bracketed in document WIPO/GRTKF/IC/29/4.

113. The Delegation of Bangladesh mentioned that the definition of derivatives incorporated in Article 2(e) of the Nagoya. It was of the view that the inclusion of GRs necessarily led to the inclusion of derivatives. It noted that misappropriation of derivatives and associated TK were unacceptable, just as the misappropriation of GRs. The subject matter of the instrument should be GRs, their derivatives and associated TK.

114. The Delegation of Vanuatu supported the statements made by the Delegations of Australia and Ghana in this regard.

115. The Delegation of South Africa emphasized the importance of discussing the issue of the relationship between TK and GRs and bracketed derivatives, within a mandate that focused on IP. It noted that reducing the discussion to patents would go against a mandate that call for narrowing gaps with the view to develop an agreement on legal instruments. It wondered whether departing from the mandate would justify making a point of order.

116. The Chair asked Member States whether they had a preference for patents or IP as an element to reach a common understanding.

117. The Delegation of Malaysia favored the term “associated TK” regarding the subject matter of the instrument, and supported that a reference to IP instead of patents would be more appropriate as to the scope of protection. It wished that derivatives be kept in the text as they were.

118. The Delegation of Indonesia aligned itself with the statements made by the Delegations of South Africa and Malaysia regarding IP or patent. It stated that the reduction to patents would not reflect the protection that was granted by other IP regimes such as copyrights and designs. A *sui generis* system that would cover all forms of IPRs, would accommodate all the interests involved.

119. The Delegation of Egypt aligned itself with the Delegation of Namibia. It emphasized the definition of derivatives provided for by the Nagoya Protocol. It reminded derivatives were often referred to in IP-related documents. It noted that the 1991 Act of the UPOV Convention had dealt with derivatives of original species. The Delegation preferred “IP” compared to patents.

120. The Delegation of Canada noted that the views expressed so far by delegations in had already been well known. Ways should be found instead to encourage and promote discussion that could help to reach a common understanding on core issues rather than restating the existing text. Regarding derivatives, there was already a definition in the glossary taken from the Nagoya Protocol. The Delegation noted that the Delegation of the USA had mentioned that that definition was not necessarily clear and potentially overly broad, but reminded that such interventions had been made in the past to that effect. It highlighted that one of the discussion topics was to draw the line on what ought to be included in the instrument. The Delegation was concerned that a discussion in an IP context in general would be overly broad and include elements much beyond the original GRs. “Derivatives” raised all kinds of problems. The Delegation expressed its preference for limiting the instrument to patents, and focusing the discussion on how to consider the relationship between GRs and other types of IP, such as trademarks and designs, rather than hearing Member States discussing IP versus patents. It also indicated that the relationship was clear with patents to many Member States but not so clear with other IPRs. It encouraged the proponents of IP to express how they saw that relationship was working, for example with trade secrets that were considered as an alternative to filing or registering inventions.

121. The Delegation of China stated that GRs, TK and TCEs were connected and independent at the same time. Each issue should therefore be given a different focus. It said that the discussion on whether the wording should be “associated TK” or “TK associated with GR” should take place when TK comes to order. That would make sure that the discussion on GRs keep focus. The Delegation did not mean to exclude completely TK from the discussion of GRs. But the Delegation emphasized that due consideration be given at the appropriate time to the different cases regarding TK associated with GRs, as it could be held by IPLCs, by nations or other entities. It also expressed preference for the term IP, in order to ensure flexibility.

122. The Delegation of Ghana answered the question previously raised by the Delegation of Canada about the context in which disclosure would be required or relevant in a context that would not relate to GRs. It referred to the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action (the 1982 Model Provisions) and 1984 Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, both related to folklore. It mentioned that disclosure went far beyond 1982 and 1984 and underlined that the disclosure requirement further emanated from the CBD and the Nagoya Protocol. It proposed to refer to the 1984 WIPO Draft Treaty in which disclosure of source had been required and quoted the relevant text as follows: "In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place in which it has originated." It noted that an identical disclosure requirement had been provided in 1982 Model Provisions.

123. The Chair closed the discussion on subject matter. He noted that there were still outstanding issues relating to policy objectives and subject matter. He hoped the IGC would make substantive progress and he wished to unravel the rationales behind the positions of Member States. Member States had, so far, not achieved much of a common understanding on policy objectives and subject matter. His intent was to work with the facilitators to review the material on policy objectives and subject matter, and, as a result, articulate some key points that had been discussed. The Chair recalled his open door policy and was pleased as to the frank exchange that had taken place.

124. [Note from the Secretariat: The following took place on the next day, February 16, 2016]: The Chair stressed that the Vice-Chairs worked together as a team. The Vice-Chairs would also chair any informals with the support of the facilitators. The Chair hoped that IGC participants had had a chance to consider discussions from the previous day and set out his proposed program for the morning, including his comments on the discussions from the previous day asking the proponents to introduce documents WIPO/GRTKF/IC/29/5, WIPO/GRTKF/IC/29/6 and WIPO/GRTKF/IC/29/7. The Committee would then continue discussions of core issues, as reflected in the working methodology, within the plenary. After lunch, the Chair would ask the facilitators to present their views on the discussions from the previous day and any ideas they might want to bring forward for participants to consider overnight. He wanted to be inclusive and to understand Member States' views about how the meeting was progressing. It was clear to him that to make progress, the Committee needed to move past the restatement of well-worn positions. As detailed in the mandate, the focus should be to come to a common understanding on core issues. There was a desire for Member States to indicate their strong positions on those issues. It was clear to him that the Committee was struggling to move away from long held views, and to attempt to understand the rationales behind divergent positions. When looking at those divergent positions, the Committee needed to consider the underlying policy interests that they reflected and to attempt to look at them from those perspectives. That was what coming to a common (shared) understanding was. Many of those Member States and IPLCs supporting enhanced transparency in the IP system were the owners of the GRs and associated TK, or TK associated with GRs. They clearly had a legitimate interest that those resources be appropriately accessed and that they receive fair and equitable returns for their use by third parties, which was a key focus of the work under the CBD and the Nagoya Protocol. The key question in relation to those policy interests was whether there was a gap in the IP system in relation to that issue, and if so, what was the best mechanism to address that gap. Many countries, both developed and developing, had already decided there was such a gap and had introduced domestic disclosure regimes to address the gap. There were over 20 different regimes and growing. A key issue was whether an international system, which would set standards in the area, should be introduced. There were also the policy interests

which reflected the concerns of those wishing to utilize those resources, to develop future products and services for the social and economic benefit of all. There were concerns relating to regulatory burden and cost, timely and efficient accessibility to those resources and legal certainty. In addition, there was an interest from some industry groups in a mechanism that would allow them to disclose that they have acquired GRs and associated TK legitimately to insulate them from claims of biopiracy. Those different policy perspectives were reflected in the two divergent policy positions detailed in the working documents and discussed the day before: Increasing transparency in the patent/IP system and minimizing the grant of invalid or erroneous patents. Those two policy objectives had led to essentially three approaches, as reflected in the working documents: establishment of an international disclosure regime, which set international standards; defensive non-normative measures focused on ensuring patent offices had the appropriate information and processes to prevent the granting of erroneous or invalid patents; and, a third position which recognized that those two approaches could be complementary to each other. To make progress and reach a common understanding, the Committee needed to, first, understand those different policy perspectives and recognize their legitimacy, from both sides, and develop a solution which bridged those different policy interests. The Chair noted that the Committee had actually come part of that way, if one considered where the disclosure proposal had moved from over the years, from an initial substantive patentability requirement, to a non-substantive requirement, with no obligation on IP offices to verify the contents of disclosure. The Committee had started to bridge the gaps. The Chair hoped that the IGC could move part of the way in achieving that during the week, recognizing that IGC 29 was an introduction only and would be followed by further work at IGC 30. One of the outputs of IGC 29 was to identify outstanding/pending issues to be tackled/solved at IGC 30, and between sessions there would be a seminar where one could perhaps talk more freely and frankly about some of those outstanding/pending issues. He believed that there had been some positive interventions the day before, such as the intervention from the Delegation of Ghana on subject matter, which perhaps offered a pragmatic solution to that particular issue. He stressed that the previous day the Committee had started to engage on substance. On the issue of subject matter, the Chair noted that there were clearly two outstanding issues: patents vs. IP, and derivatives. On the former, there appeared to be a clear focus on the patent system as a key area where GRs and TK intersected with the IP system. This did not mean that there might not be an intersection with other areas. To make progress, the Committee needed to consider what would be the priority for the IGC. Member States needed to consider where it might be necessary to compromise. He asked Member States to engage and tie in positions with the rationale for those positions. When talking about policy objectives, considering that a number of states had domestic policy regimes, it would be interesting to know the policy analysis made when they introduced those. The Chair asked the proponents of documents WIPO/GRTKF/IC/29/5, WIPO/GRTKF/IC/29/6 and WIPO/GRTKF/IC/29/7 to introduce those documents. He did not intend to open them for discussion at that time.

125. The Delegation of the USA introduced document WIPO/GRTKF/IC/29/5. The Delegation hoped that the proposed joint recommendation could be used as a confidence building measure to help the Committee to 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 GRs and associated TK. As one of the twenty most mega-diverse countries, the USA recognized the value that biodiversity contributed towards society. The USA and the co-sponsors of the joint recommendation supported the objective of utilizing national laws to promote biodiversity, as well as fair and equitable benefit sharing. They also supported requirements for PIC and MAT. The proposal facilitated clear procedures for obtaining authorized access to GRs in exchange for equitable monetary or non-monetary benefits, with PIC and MAT. The Delegation believed that patent offices should have the kinds of information available to enable examiners to make proper decisions on patentability, which included comprehensive prior art relating to GRs. Patents should only be granted for inventions that were new, involved an inventive step and met standards of utility. In

that regard, national databases of GRs and related TK helped to prevent the erroneous granting of patents and played a pivotal role in addressing patent quality concerns. It emphasized that the proposal would help to address concerns relating to the erroneous granting of patents while complementing the existing patent system. It invited other delegations to express their support for the proposal and welcomed additional co-sponsors. It looked forward to discussions on the proposed joint recommendation during the week.

126. The Delegation of Japan introduced document WIPO/GRTKF/IC/29/6. One key and important issue was to avoid erroneous granting of patents. Almost all delegations recognized the importance of that issue. The Delegation hoped that WIPO would focus on that issue as the IP specialized organization. In the introduction of the document, it was explained that the erroneous granting of patents could be effectively addressed by improving databases for storing GRs and non-secret TK associated with GRs that were used for prior art or reference material searches, as well as through utilizing certain existing institutional systems, such as information provision systems and the invalidation trial system more efficiently. It also proposed a one click database search system for its convenience. The one click database system could include the following: Concerning how to collect information, each participating Member State would, as it deemed necessary, collect information on GRs and non-secret TK associated with GRs within its territory and store that information in its database. In developing a national database, Member States could consult with relevant indigenous stakeholders in the territory prior to putting indigenous TK and GRs from tribal lands into the databases. The proposal also included a simple text search function. To offer a solution to the language barrier problem, translation should be provided. Concerning the issue of prevention of third party access, the site would be made accessible only from registered Internet Protocol addresses. IP offices that conducted examinations had specific Internet Protocol addresses; access to the WIPO portal site would be restricted to those specific Internet Protocol addresses. The proposal acknowledged that future work was necessary, on issues such as the structured data to be stored in databases, the allowable format of prior art or reference material, or the accessibility to the WIPO portal website. The Delegation believed that almost all delegations recognized the importance of those issues and was sure that prior art search databases would play an important role in the discussion.

127. The Delegation of Canada introduced document WIPO/GRTKF/IC/29/7. The proposal raised a number of questions relating to the disclosure requirement, the answers to which would inform and advance the work of the Committee. For example, under existing disclosure regimes: What triggered disclosure of the source/country of origin of a GR and/or TK associated with GRs? What was the role of the IP office? What were the consequences for a failure to disclose or for a fraudulent disclosure? The proposed study which would update the one that was conducted in 2004, 12 years ago, would provide an up to date practical, in depth and evidence based information on existing national laws, practices and experience. The Delegation believed that that information combined with the information shared during the IGC meetings would provide the necessary evidentiary base for the Committee to reach a mutual understanding on the core issue of disclosure. It invited other delegations to express their support for the proposal. It would be pleased to meet with any interested delegation to discuss their views.

128. The Delegation of Brazil, in commenting on the Chair's summary, emphasized that the mutual supportiveness between the international treaties that protected GRs with the IP system was of paramount importance for its country, and it understood that that should be part of the text. The Committee should not overlook the fact that there had already been a very strong international framework on the protection of GRs, and that should be mentioned in the text. Regarding the subject matter of instrument and the scope, the Delegation sought clarification from the Chair on how he intended to proceed, regarding the mention to IP/patent rights.

129. The Chair agreed on the importance of the international framework that was already in place and considered as very valid the point raised by the Delegation of Brazil about complementarity or mutual relationship. He was sure the facilitators would have noted that. On the subject matter, he believed that it was probably going to be necessary to discuss that issue within an informal format. He noted that there were two strong divergent positions in relation to transparency and the granting of erroneous or invalid patents; and that might be an outstanding issue that would be taken forward. He recalled that to make progress, some compromise was necessary. The Committee needed to think about what the priorities and the focus were.

130. The Delegation of Bahamas, speaking on behalf of GRULAC, said that the joint recommendations formulated in documents WIPO/GRTKF/IC/29/5 and WIPO/GRTKF/IC/29/6 reflected only one point of view, but not the priorities and concerns of GRULAC or the IPLCs. It added that those joint recommendations prejudged the nature and outcome of the negotiations in its view. It reiterated that the IGC negotiations on GRs should be focused and based on document WIPO/GRTKF/IC/29/4; which contained a balance of interest among all stakeholders. With regard to document WIPO/GRTKF/IC/29/7, GRULAC noted that the WIPO Secretariat had over the last 15 years carried out various studies. It asked to have a list of those studies for review, noting that those studies might simply need updating and not necessarily another study.

131. [Note from the Secretariat: after several requests in this regard, the Chair, in the interest of flexibility, announced that he would allow statements on documents WIPO/GRTKF/IC/29/5, WIPO/GRTKF/IC/29/6 and WIPO/GRTKF/IC/29/7, provided that they were short and succinct.]

132. The Delegation of Ghana pointed out that document WIPO/GRTKF/IC/29/6 focused on the use of databases and urged the Committee to view that document as simply a complement to what had been achieved in document WIPO/GRTKF/IC/29/4, and not necessarily as an alternative. It also noted that the Delegation of the USA appeared to indicate that the sole purpose in the use of the databases was to prevent the grant of erroneous patents. The Delegation saw in the reference to patents only an undue restriction of the scope of the work of the Committee, which focused on other aspects of IP as well, such as copyright. It shared the comments made by the Delegation of Bahamas, speaking on behalf of GRULAC, and specifically noted that a technical study had been prepared by WIPO in response to a request from COP 7 of the CBD. It was a very detailed and extensive analysis of the specific issues raised by the Delegation of Canada. The Delegation did not see the need to reinvent the wheel. That would serve no purpose but to stall the negotiations of the Committee.

133. The Delegation of Nigeria, speaking on behalf of the African Group, thanked the Delegations of the USA, Japan and Canada for their presentations of documents WIPO/GRTKF/IC/29/5, WIPO/GRTKF/IC/29/6 and WIPO/GRTKF/IC/29/7. The African Group considered that the ideas proposed in those documents were complementary to document WIPO/GRTKF/IC/29/4, since they were reflected in that text, and would form part of the discussions. As the Delegation of Bahamas, on behalf of GRULAC, had said, documents WIPO/GRTKF/IC/29/5 and WIPO/GRTKF/IC/29/6 attempted to prejudge the outcome, which the mandate did not give any right to do at that point. It wished the proponents of those proposals to engage more in the discussions being held on document WIPO/GRTKF/IC/29/4, and raise those concerns when those items came up.

134. The Delegation of the Republic of Korea, as a co-sponsor, wished to support document WIPO/GRTKF/IC/29/6, and hoped that databases would be instrumental in preventing the erroneous grant of patents. It could not overemphasize the importance of protecting GRs and TK in the face of erroneously granted patents. It highlighted that the most effective form of protection for TK and GRs associated with TK was the establishment and use of database systems. From 2005 to 2009, the Korean Intellectual Property Office (KIPO) had worked to establish a database of TK and GRs associated with TK. The database included a vast amount

of knowledge from documentation on old medicine and also included a wide range of articles and patent documents. It contained TK from the past and the present and GRs information related to TK. The database was presented online through the Korean TK portal. It had been made publicly accessible. Patent examiners at KIPO were obligated to search that database for prior art and that method had been used successfully and efficiently in the protection of TK and GRs associated with TK. The Republic of Korea also shared that database with the EPO in August 2012, at their request. The Delegation believed that was a very practical and feasible method for reducing the number of erroneously granted patents in each Member State.

135. The Delegation of Indonesia thanked the co-sponsors of documents WIPO/GRTKF/IC/29/5, WIPO/GRTKF/IC/29/6 and WIPO/GRTKF/IC/29/7. It had had a discussion in the morning with the Delegation of the Republic of Korea regarding databases and erroneous patents, and would like to engage with the Republic of Korea in the Asia-Pacific Group regarding those proposals. It supported the statement made by the Delegation of Bahamas, speaking on behalf of GRULAC, and also the statement of the Delegation of Ghana regarding the methodology of the discussions. The Delegation was of the view that the Committee should focus on the mandate and document WIPO/GRTKF/IC/29/4, as had been mentioned by the Delegation of Nigeria, speaking on behalf of the African Group. The Delegation pointed out that some terms, such as associated TK and secret TK, and conditions had been discussed at the IGC, and acknowledged in documents WIPO/GRTKF/IC/29/5, WIPO/GRTKF/IC/29/6 and WIPO/GRTKF/IC/29/7. It was of the view that those documents could be complementary to the discussion of document WIPO/GRTKF/IC/29/4, and some of the terms and conditions referred to be further developed in the implementation of an instrument or instruments to protect GRs, TK and TCEs.

136. The Delegation of the EU, speaking on behalf of the EU and its Member States, referred to the study as proposed in document WIPO/GRTKF/IC/29/7 and highlighted that the Committee's new mandate in paragraph (d) stated that the work would be evidence-based, which included studies and examples of national experiences. It firmly believed that the work of the IGC had to be guided by solid evidence on implications and feasibility, in social, economic and legal terms. It thanked the proponents of the study, which brought together the broad range of questions which should be addressed in a study on disclosure requirements. It supported the terms of reference and believed that the study could be conducted swiftly with the aim of shedding light on many national experiences with disclosure requirements. Duplication of work should, however, be avoided and, where possible, studies by other organizations, such as WTO and AIPPI, should be taken into account. It supported as well the joint recommendation contained in document WIPO/GRTKF/IC/29/5. That proposal merited further examination as the objective of preventing the erroneous grant of patents enjoyed broad support amongst WIPO Member States, and could be low hanging fruit ready to be harvested. In relation to document WIPO/GRTKF/IC/29/6, the Delegation believed that it provided interesting food for thought for the discussions. It asked the proponents to provide more details on how the database would work in practice and how third party's access could be provided.

137. The Delegation of the USA supported the comments made by the Delegation of Japan, as a co-sponsor, on document WIPO/GRTKF/IC/29/6. That proposal was a valuable supplement to the work of the IGC. It was essential that the Committee further engaged on that proposal and continued to provide constructive, substantive comments in order to address questions and concerns raised in past sessions on the proposal. The Delegation looked forward to discussing the database system, including the issues raised and other issues in an effort to improve it. It believed that the proposal helped to address concerns relating to the erroneous grant of patents. It supported the comments made by the Delegation of Canada regarding the proposal contained in document WIPO/GRTKF/IC/29/7. In accordance with the mandate, as noted by the Delegation of the EU, speaking on behalf of the EU and its Member States, the IGC should have discussion based on facts, including studies. It noted that the co-sponsors of document

WIPO/GRTKF/IC/29/7 had reintroduced an amended version of the study. In past sessions and throughout the present session, the IGC had had constructive discussions about national laws and how disclosure requirements and ABS systems functioned. Those discussions had helped to progress the Committee's work on the text. That study would carry forward that work without slowing down the work of the Committee. The Delegation pointed out that it would welcome the support of other members for that proposal. It expressed appreciation for the comments of the Delegation of Ghana, and noted that the database proposal was intended to be a stand-alone proposal. It emphasized that the codes of conduct referenced in the joint recommendation were important and would be appropriate, regardless of a Member State's position on a disclosure requirement. As to the study, it supported the suggestion of the Delegation of Bahamas that WIPO provide a list of prior WIPO studies and update the studies. It expressed its appreciation for the comments of the Delegation of the EU, speaking on behalf of the EU and its Member States.

138. The Delegation of the Russian Federation believed that documents WIPO/GRTKF/IC/29/5 and WIPO/GRTKF/IC/29/6 should be discussed further in the Committee. Such recommendations could help experts to carry out a more effective prior art search, which would help to reduce the likelihood of erroneous patents. Those documents could complement the work of the Committee. Regarding document WIPO/GRTKF/IC/29/7, the Delegation had more than once requested additional information on disclosure requirements, since that information would be very useful for advancing the work of the Committee.

139. The Delegation of Brazil supported the statement made by the Delegation of Bahamas, speaking on behalf of GRULAC, as well as the statements made by the Delegations of Ghana and Nigeria, speaking on behalf of the African Group. With regard to studies, it pointed out that the IGC had been having discussions already for 15 years. Perhaps the best way was to see what had already been done and, if there was need for additional information, update what had already been implemented in the Committee. With respect to the joint recommendations, it was clear that the nature of a recommendation prejudged the outcome of the discussions, and should not be the basis of the discussions. The Delegation wished to continue the discussions based on document WIPO/GRTKF/IC/29/4, which did not prejudice any outcome.

140. The Delegation of India said that its country was one of the few which had implemented disclosure requirements, and also had a database which was used to challenge the grant of erroneous patents. Its experience had been that the current database was not a complete document and could never be. It emphasized that its country was actually using disclosure requirements to strengthen the database and make it more comprehensive. From that perspective as well, it was very important that the IP applicants disclosed the source of GRs and associated TK. The Delegation supported the statement made by the Delegation of Ghana in this regard. It pointed out that studies, if any, should not be prejudicial to the work of the Committee. It noted though, that there was enough evidence on the table already. The Committee was set up in the first place after WIPO had conducted extensive fact finding missions and had found out that there had been ample evidence of misappropriation taking place. The Delegation did not see how the study as proposed in document WIPO/GRTKF/IC/29/7 was going to help. Evidence of misappropriation was coming out on a daily basis and a separate study was not required to establish the fact that it was a major problem being faced at that juncture.

141. The Delegation of Egypt thanked the three countries that had presented documents WIPO/GRTKF/IC/29/5, WIPO/GRTKF/IC/29/6 and WIPO/GRTKF/IC/29/7. It wondered whether there was a need for a new study or further studies. It believed that, when the Committee dealt with the topics concerned in those three documents in the context of the discussions regarding document WIPO/GRTKF/IC/29/4, those three delegations could have referred to them at that time. It recalled that the goal was to have a common understanding.

142. The Delegation of Nigeria thanked the Delegations of the USA, Japan and Canada, for their presentations, as well as the other co-sponsors. It echoed the statement made by the Delegation of Bahamas, speaking on behalf of GRULAC, and emphasized the importance of focusing on the current text and incorporating any insights from those documents into the discussion reflected in the Chair's program of work. It also thanked the Delegation of the EU, speaking on behalf of the EU and its Member States, and agreed that duplication should be avoided. The Delegation considered useful to have a list of studies that had already been done and a list of databases that already existed, how they were currently being utilized, and what those proposals might add to that. It was also important to have a better understanding of how databases would work in practice. It emphasized that its experience and the experience of other countries such as India was that databases often were incomplete. It had some structural concerns about the proposals, such as timing. The proposals reflected in part how a mandatory disclosure requirement might or could be implemented, rather than a way to actually get to a mandatory disclosure requirement. The Delegation highlighted that the text-based discussions were its primary emphasis. It wished to know what the patent offices of the proponents had done in regard to the elements contained in those proposals. It wondered whether the patent offices of Canada or Republic of Korea had reached out to patent offices in countries that had disclosure requirements, and what the results had been. It believed that it was necessary to discuss why erroneous grant of patents had occurred and in what way a mandatory disclosure requirement could address that phenomenon. It was concerned about the application of the utility requirement and the novelty requirement, and how those had played a role in the erroneous grant of patents and the misappropriation of GRs and TK. Its concern was that some of the proposals were perhaps beginning from the wrong premise. If there was an erroneous grant of patents, the question was why and how a mandatory disclosure requirement might help to get to a point of an international minimum standard to assuage some of the concerns that resulted from the lack of transparency in the patent system.

143. The Delegation of the Islamic Republic of Iran supported the statements made by the Delegations of Bahamas, speaking on behalf of GRULAC, Nigeria, speaking on behalf of the African Group, as well as Indonesia, India and Brazil. It was of the view that the Committee should focus on its mandate to expedite its work, and that document WIPO/GRTKF/IC/29/4 should be further negotiated. It was doubtful about the added value of a study after 15 years of discussions.

144. The Delegation of Norway as a co-sponsor referred to document WIPO/GRTKF/IC/29/7. As touched upon by the Delegation of the EU, on behalf of the EU and its Member States, the new mandate stated that the Committee should use an evidence based approach, including studies and examples of national experiences. As a lot of the information currently available was not up to date, that proposal should be of interest to the Committee as a whole. As touched upon by other delegations, the consequences of disclosure requirements were not clear to all parties. It had been questioned whether such a requirement contributed to secure compliance with ABS legislation. It was not known to what extent disclosure requirements were burdensome for patent offices and patent applicants and introduced more uncertainty in the patent system. The proposed study was aimed at shedding light on those issues. It should be of great interest to those delegations which supported a mandatory disclosure requirement, including the Delegation of Norway, to obtain more information on what effects national disclosure requirements might have had, both with regard to securing compliance with ABS legislation and with regard to possible negative effects on innovation and for patent applicants. Such information might help the Committee exclude any flawed elements and ensure that a disclosure requirement achieved the aim without being too burdensome for applicants or a hindrance to innovation. It would assist the Committee in framing the disclosure requirement in a way that struck a fair balance between the different interests of the stake. Some delegations had expressed the view that the proposal for a study was aimed at delaying

the discussion on the disclosure requirement. The Delegation saw no reason to fear that a study would have such an effect. The discussions that had taken place on that topic at earlier sessions had shown that the IGC was still far away from reaching an agreement on the disclosure issue. Since the delegations that opposed the introduction of a disclosure requirement called for more information, it was more likely that a study would contribute to progress rather than delay the process. If the Committee was to reach agreement on an instrument that contained a mandatory disclosure requirement, it was necessary to convince the opposing delegations that such a solution was the most favorable one. The best way to do so was by providing information and data showing that such a requirement was beneficial and in the interest of all parties. As other delegations had stated, the study should take into consideration the work that had already been done in the area to avoid duplication and unnecessary use of time.

145. The Delegation of Peru supported the statement made by the Delegation of Bahamas, speaking on behalf of GRULAC, and those members who had supported its statement. It reminded that the WIPO Secretariat had made a study in 2004. In the meantime, a lot had been done both in WIPO and outside it. The Committee would be in a better position to see whether a study would be useful once an inventory of the conducted studies or resources was made. It would be important to include in that inventory not only what had been done at WIPO, but also at WTO, the CBD and around the Nagoya Protocol. It emphasized that in any case, the nature of the outcome of the IGC negotiations should not be prejudged. In this regard, it believed that documents WIPO/GRTKF/IC/29/5 and WIPO/GRTKF/IC/29/6 only presented one part of the problem and one vision of it, and they were precisely prejudging the outcome. The Delegation found that document WIPO/GRTKF/IC/29/4 incorporated various options and was a much fairer point of departure. It supported the discussion of the core issues as the methodology to be followed, since the purpose was to expedite the text based negotiations.

146. The representative of Tupaj Amaru pointed out that the discussions revealed that the negotiating process involved three players: the states of the North that possessed the technology and large pharmaceutical companies, the states of the South that had the resources, and the IPLCS that had TK associated with those GRs. There had been in the past many alternative proposals and those proposals had not contributed to consolidating the text under discussion. He supported the statements made by the Delegations of Nigeria, speaking on behalf of the African Group, and Indonesia. The proponents should make proposals in the context of the discussions on document WIPO/GRTKF/IC/29/4.

147. The Delegation of China thanked the proponents for their introduction and supported the statements made by the Delegations of Brazil, India, Bahamas, speaking on behalf of GRULAC, and Nigeria, speaking on behalf of the African Group. Discussions should return to the text-based negotiations. It believed that databases and disclosure requirements were not opposite to each other. The Committee should take into account which option was cheaper and easier to apply.

148. The Delegation of South Africa supported the statements made by the Delegations of Nigeria, speaking on behalf of the African Group, Bahamas, speaking on behalf of GRULAC, India and China. It pointed out that discussions focused on databases of prior art, while databases could cover more than prior art. They could cover information that was secret and the like. Its country had passed a law which covered databases on prior art and involved the amendment of IP laws. It was in the process of passing another act to protect TK. The Delegation recalled that its national recording system on indigenous knowledge was a database that promoted innovation and inventiveness, aspects that were articulated by the Delegation of the United States of America as objectives of the IP system. In that database, the information was confidential, but could be given to patent offices. South Africa had also developed a third element which focused on GRs, which was the South African pharmacopeia. It was a digital

library of information, like the TKDL from India. It was necessary to make a distinction between databases and digital libraries. The Delegation stressed that a key element was the burden that was being pushed on indigenous communities to develop those databases. Those databases were very expensive, they involved complex processes and not every country would have the resources and the means to invest in them. It was necessary to be careful in shifting the burden of the users to the suppliers. The databases were needed by patent offices in developed countries, and they should be committed to putting resources in that. The Delegation of Nigeria had rightly asked how the studies had been used in the past. It was not enough to keep calling for studies and to list them. The Delegation wondered to what extent those studies had been taken up in the work of the IGC and whether they could be an evidence based demonstration of something. Regarding document WIPO/GRTKF/IC/29/7, it cautioned about the terms of reference. There was nothing about misappropriation in those questions. For instance, what went wrong with the system? Why were developed countries granting erroneous patents? What within the system allowed for such a thing to happen? The Delegation recalled the appeal of the Chair not to keep entrenched positions, but to begin instead to look for common ground. It was necessary to understand what kind of uncertainties disclosure would create and why were IPLCs, developing countries and some developed countries pushing for a disclosure requirement. The Committee needed to find a space to talk to one another, not speak across frozen positions. What was needed in the Delegation's view was to harmonize a system to create legal certainty, so that pharmaceutical companies were not pushed across a myriad of standards which they would find impossible to meet.

149. The Chair appreciated the final comments made by the Delegation of South Africa in relation to building bridges and coming to a shared position. Interests did intersect and the Committee had to come to a common position around those.

150. The representative of SPC thanked the WIPO Secretariat for the opportunity provided to meet and discuss these issues in the Pacific, at the WIPO Practical Workshop on IP and TK, TCEs and GRs held in Apia, Samoa in December 2015. Regarding the issue of having a database in place, most of the Pacific countries were not in the financial position to carry out a national exercise to gather all that TK. He also noted that some Pacific island countries had been trying to record their TK for ten years and they were still carrying out, they were still trying to gather information from the different islands within a nation. A few countries had pointed out the issue of being vulnerable to further exploration by others and the issue of databases being easily accessed. He noted that databases would not cover GRs and that they would only be able to cater for TK.

151. The representative of ARIPO supported the statements made by the Delegation of Nigeria, speaking on behalf of the African Group, as well as by those delegations who alluded to the fact that some of those issues had already been discussed in past IGC sessions. He recalled that the Delegation of India had highlighted clearly that the issues of databases were not really implemented in isolation of the legal framework. He reminded that South Africa had taken a similar approach. He considered that it was very important to approach those issues in a more methodological manner and put in place a legal system before considering the issue of databases. The approach that had been taken by the proponents of the documents, in particular the Delegation of the USA, was that databases would stand alone. He recalled that the Chair had highlighted that the objective was to identify the gaps in terms of IP and also addressing mischief being carried out around the world in terms of misappropriation and use of other people's knowledge. In order to make progress, the IGC should focus its attention on the substantive issues in document WIPO/GRTKF/IC/29/4, and ensure that an international legal framework was created, within which complementary mechanisms, such as the ones that had been proposed in documents WIPO/GRTKF/IC/29/5 and WIPO/GRTKF/IC/29/6, could be then established. He urged the Committee to focus on substantive articles, to fine tune the Consolidated Document before the Committee, and not to spend time with studies. By doing

that, he hoped that, at the end of the biennium, the Committee would be able to find solutions and move towards a diplomatic conference.

152. The Chair stated that the discussions that had taken place on documents WIPO/GRTKF/IC/29/5, WIPO/GRTKF/IC/29/6 and WIPO/GRTKF/IC/29/7 had been beneficial. He appreciated the positive engagement of Member States and hoped that they would engage intersessionally on those issues, recognizing that there were clearly divergent views. The Committee would come to those issues later when discussing the core issues, since defensive measures and databases were part of the core issues. The proposal for the study would also need to be considered more formally later. The Chair pointed out that Member States would like to know what studies had already been done. He wondered whether it would be useful for the Secretariat to provide a list and maybe a portal where IGC participants could access those studies.

153. The Delegation of Australia considered the idea of a list to be very useful both for the discussions at the IGC and also in terms of national policy development.

154. The Delegation of South Africa believed that it would be a useful exercise, provided it went beyond the listing of the documents. The issue was how had those studies been used to improve the work of the IGC. Just packing up studies and not using them would not be useful. The focus should be on the uptake of those studies in policy and normative work.

155. The Delegation of Canada supported having a list of all the studies that had been conducted since 2001. It believed that there had been a lot of changes in the IP system, and more Member States had mandatory disclosure requirements. It welcomed the opportunity to update the last study that had been conducted on such mechanism.

156. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported the setting up of a list of the studies that had been conducted so far.

157. The Delegation of Nigeria welcomed the need to have those studies pulled together and made accessible and put in place. It warned that it was necessary to be careful because of the timeline and the tight schedule. Those studies would be resources for Member States, but should not cause potential distraction to the Committee from its focus on the Consolidated Document.

158. The Chair recalled that the mandate was clear. Those studies were not to delay progress or prejudge any outcome and they were resources to assist Member States.

159. The Delegation of Australia wondered what role Member States would play in the development of such a review, whether or not Member States could contribute suggestions of studies that they were aware of, and also whether or not Member States could contribute information about their own systems and policy analyses that they could have done for their national work. That would need to be considered, though a quick decision was needed. It was fully supportive of the review proceeding in time, if not for the current week, which would be difficult, but certainly before the next IGC session.

160. The Chair pointed out that it was necessary to be efficient. The idea would be to include WIPO studies that had been done and related studies that the Secretariat was well aware of.

161. The Delegation of Vanuatu supported the idea of getting the studies and information about what had been done. As it had already been mentioned, in the Pacific they had different views on the database. The list should be for information only.

162. The Delegation of Greece, speaking on behalf of Group B, supported the suggestion of the Chair to set up a list of the studies conducted so far.

163. The representative of Tulalip Tribes supported such a list. It would be useful also to have a list of laws, for example, of compliance, where compliance mechanisms had been introduced, and also a list of databases. It would be very important to complement any work on disclosure with some work on databases, because there was very little factual information. He supported the text based approach and pointed out that whatever went into that list should not interfere with the text based negotiations.

164. The Delegation of Indonesia emphasized that a study, if any, should not prevent or delay the negotiations process. It was interested to read and study any resource, since that information would support and enrich the negotiations of the GRs text. It acknowledged the importance of having databases and was currently developing databases. But the core issue was the legal framework around databases. The Delegation urged the Committee to pursue discussions and to negotiate document WIPO/GRTKF/IC/29/4 which would provide such framework.

165. The Delegation of the USA supported the proposal for a list of studies. It noted that there was a list of WIPO studies on the WIPO website. It suggested to update the list, but also to include other studies such as the Queen Mary IP Research Institute's study that the Delegation of Nigeria had referenced before, so that the IGC could have an updated list of studies that was broader than just those conducted at WIPO. It supported the proposal of the representative of Tulalip Tribes to include a list of databases.

166. The Delegation of South Africa, in line with the representative of Tulalip Tribes and the Delegation of the United States of America, advocating the extension of the coverage of the list to databases, requested to look at the studies that had focused on the erroneous granting of patents and misappropriation, in order to have a balanced perspective on what was occurring.

167. The Delegation of Egypt had no objection as to having a list of studies, but that should not prevent the Committee from further considering document WIPO/GRTKF/IC/29/4 without any further delay. It pointed out that after 16 years of discussions, most delegations already have had access to the necessary studies and knew which ones had been used for their work during that time.

168. The Delegation of Indonesia seconded the proposal from the Delegation of South Africa regarding the importance of having a list that included databases, and studies regarding misappropriation and misuse. Those studies or documents should not be discussed in the next IGC, but rather be used as a reference and for information. It would be useful that the Secretariat update that information for every meeting of the IGC.

169. The representative of CISA stated that the IPLCs wished to be included and participate actively as far as the envisaged list was concerned.

170. The Delegation of Brazil supported the statement made by the Delegation of Egypt in respect of the fact that the Committee should focus on substantive discussions. It wished to refer back to the proposal made by the Delegation of Bahamas, speaking on behalf of GRULAC, of having a list of the studies that had been presented to the Committee and had already been done by the Secretariat. That was the reasoning behind the proposal. The idea was not to include databases or other elements, or other studies of other sources, and make a very long list. The objective of the list should only be to provide additional information to Member States. Very limited information on what WIPO had produced on the subject in the last 15 years would suffice, though it understood that a lot had been done on the subject. The

Delegation noted that the Delegation of Canada stated that the proposal of the study was meant to update the study conducted by the WIPO Secretariat in 2004.

171. The Chair closed the discussions on that item, and opened the floor for comments on disclosure requirements, in particular subject matter and the content of disclosure.

172. The Delegation of Indonesia highlighted the importance of including a mandatory disclosure requirement in the forthcoming instrument. Such a provision would be the core element of protection for GRs and would take fully into account the relevant developments made in other fora. The Delegation was particularly concerned about the utilization of GRs taking place beyond national jurisdictions. Those should also be subject to disclosure requirements. Disclosure requirements should equally apply to patent applications based on GRs obtained within the national jurisdiction on land, in the territorial sea, the exclusive economic zone and the continental shelf, as well as the high seas. It maintained that view as, until that day, the legal regime applicable to the use of marine biological diversity beyond areas of national jurisdiction was still being negotiated under the auspices of the UN General Assembly. It wished also to ensure that the draft text being negotiated at the IGC did not prejudice the outcome of those negotiations. It also requested that mutual supportiveness between the forthcoming instrument and other international agreements take into similar fora outside of the IPRs system. It believed that it was crucial that that provision did not reduce or influence the rights and responsibilities of Member States in other international agreements, especially with regard to the CBD and the ongoing discussion on an instrument on the conservation and sustainable use of marine biological diversity beyond national jurisdiction. The Delegation reserved its right to comment on each particular issue of disclosure requirement during the discussions. It wished to have Committee focusing on document WIPO/GRTKF/IC/29/4.

173. The Chair recalled that it was important that the Committee focus its attention on the core issues. He wished to try to avoid general statements. The objective was to get a shared understanding on the core issues. Notwithstanding that, he recognized that the Delegation of Indonesia, due to its geographical location, had some significant interests in relation to the issues it raised.

174. The Delegation of Nigeria, speaking on behalf of the African Group, reiterated that the objective of the African Group was to enhance transparency through the establishment of minimum international standards for the mandatory disclosure of the source and origin of GRs and associated TK. It asked the Chair when the IGC might move to informal settings, since it believed that working in smaller numbers and in expert groups would significantly advance the work of the Committee.

175. The Chair pointed out that he had established a working method based which had been agreed on. He would, however, meet with Regional Coordinators to review the working method. He asked the Delegation of Nigeria whether the African Group had an agreed position in relation to the content of the disclosure.

176. The Delegation of Nigeria, speaking on behalf of the African Group, stated that its group wished to include indication of the source and origin of the GRs and associated TK. It also wished to include information about whether the patentee had concluded ABS or PIC agreements. When the source or origin was not known, that could be noted and then the burden could be on the receiving office to act.

177. The Delegation of the EU, speaking on behalf of the EU and its Member States, emphasized that the policy objective should be to enhance the transparency of the patent system to facilitate the possibility of ABS through the disclosure of country of origin or source of

GRs and, pending further discussions, possibly TK associated with GRs. In relation to that policy objective, the Delegation had proposed a mechanism under which it could contemplate agreeing on a requirement to disclose the origin or source of GRs in patent applications. However, it stressed that a disclosure requirement which discouraged, undermined or created legal uncertainty in the use of the patent system would not facilitate the sharing of benefits and would not be in anybody's best interest. Therefore, the system would have to contain safeguards as part of an overall agreement to ensure legal certainty, clarity and appropriate flexibility. The aim of the disclosure requirement would be to enhance transparency of the patent system and thereby facilitate the possibility of ABS, which was being dealt with in separate systems under the CBD and the Nagoya Protocol or the multilateral system of the ITPGRFA. The disclosure requirement should be confined to patent applications and not to IP in general. It emphasized that plant breeders' rights were being dealt with by another organization, namely UPOV, and should be excluded in the discussions at WIPO. The disclosure requirement foreseen concerned a formal requirement. The applicant should, when the invention was directly based on a specific GR, declare the country of origin or, if unknown, the source of the specific GR to which the inventor had had physical access and which was still known to him. No additional research on the part of the applicant could be required. It clarified that the term "source" referred to any source from which the applicant had acquired a GR other than the country of origin, such as a research center, gene bank or botanical garden. The Delegation did not support the inclusion of requirements related to ABS on MAT, as that was being dealt with in separate systems.

178. The Chair pointed out that the Delegation of the EU, on behalf of the EU and its Member States, had put some clear positions on the table and that it could be a good time to reflect on those and ask any clarifying questions, bearing in mind that the purpose was to gain a shared understanding of the core issues. He announced that he would allow Member States to ask questions to the Delegation of the EU reflecting its substantive statement. The Delegation of the EU, on behalf of the EU and its Member States, obviously did not necessarily have to answer but could take on notice.

179. The Delegation of South Africa asked what sort of safeguards the Delegation of the EU had in mind, what it considered as a trigger and how would the EU and its Member States gather the information that was needed to track that.

180. The Delegation of the EU, speaking on behalf of the EU and its Member States, explained, regarding safeguards, that if the patent applicant failed or refused to declare the required information and, despite being given the opportunity to remedy that omission, did not comply, then the application should not be further processed. If the information provided was incorrect or incomplete, effective, proportionate and dissuasive sanctions had to be implemented outside the field of patent law. Regarding the trigger, it indicated that the trigger would be an invention that was directly based on a specific GR. It would elaborate that later, because it wished to hear the views of other delegations regarding trigger.

181. The representative of Tulalip Tribes referred to the statement made by the Delegation of the EU, on behalf of the EU and its Member States, in that ABS was dealt with in other regimes. He noted that the IGC was negotiating a separate potential treaty or instrument, and that all Member States of WIPO were not necessarily parties to the Nagoya Protocol. He considered that PIC would be a materially important element in the evaluation of patent applications. He wondered how the Delegation of the EU, on behalf of the EU and its Member States, felt in this particular regard.

182. The Delegation of Australia addressed to the Delegations of the EU, on behalf of the EU and its Member States, and Nigeria a question regarding the issue of country of origin. It wondered whether the formulation proposed by the Delegation of the EU, on behalf of the EU

and its Member States, where the applicant would be required to disclose the country of origin if known, addressed the ambiguity of the terms “country of origin” that the delegation of Nigeria raised. If the CBD definition of “country of origin”, which it paraphrased as “a country where a genetic resource is found *in situ*”, was adopted, the applicant would be able to mention a range of different countries in a situation where the GR was found growing in a range of different countries. To require the disclosure of a country of origin rather than the source would give an applicant the opportunity to pick up an option that would spare him the need to comply with a national regime implementing ABS. The Delegation asked whether it was proposed to adopt the term “origin” as it was used in the CBD.

183. The Delegation of Nigeria thanked the Delegations of South Africa and Australia, as well as the representative of Tulalip Tribes, for their questions on safeguards, ABS and PIC. It also wished to have clarity on the parameters listed by the Delegation of the EU, on behalf of the EU and its Member States, regarding the source of GRs. To respond to the question raised by the Delegation of Australia, it pointed out that, in terms of origin and source, sometimes the origin might not necessarily be the natural source of the GRs. It was necessary to include both origin and source, in order to ensure accountability and transparency and meet the need to trace utilization, including when the user had been able to take a GR from its natural origin and then placed it on a second place as a source, after having used it for some purposes.

184. The representative of ICC noted that the Delegation of the EU, on behalf of the EU and its Member States, proposed that origin and/or source should be revealed. He believed that, if one actually had access to a genetic material, one presumably knew where one got it, namely its source. It was not good enough to say that one found it in the fridge, it was necessary to keep better records than that. However, the origin was a mixed question of fact and law, and both the facts and the law might be unclear, which would be very discouraging. An example of the lack of clarity of the law was the question of genera and species. If one made an invention relating to potatoes, one could work with a sample of a particular variety of potatoes. The historic origin of the potatoes genus was somewhere in the Andes; however, the specific sample used for the invention might not be generic and could be a sample of the King Edward variety of potatoes, which had as country of origin, according to the CBD, Lincolnshire in the United Kingdom. He wondered which of those should be declared and also whether that depended on whether the invention was generic applying to potatoes generally or specifically applying to the King Edward variety. In his view, the Delegation of the EU, on behalf of the EU and its Member States, had emphasized the importance of a practical and efficacious method that could be put in practice. He supported the general approach of the Delegation of the EU, on behalf of the EU and its Member States, and believed that it would be much easier to concentrate on source rather than origin.

185. The Delegation of Indonesia thanked the Delegation of the EU, on behalf of the EU and its Member States, for the statement made clarifying its position on disclosure requirements. It asked the Delegation of the EU how it saw the relationship between geographical indications and disclosure requirements and whether it considered geographical indications as another form of disclosure requirements. It believed that the legal framework of geographical indications could be used to circumscribe the debate and provide for legal clarity to the discussions on origin and source.

186. The representative of ARIPO noted that the Delegation of the EU, on behalf of the EU and its Member States, had highlighted that it wished the disclosure requirement to be restricted to patent applications. He wished to know whether that reference to patent applications was due to the fact that patents were more known. He noted that the products life cycle was shortening and that there was a trend in the whole IP system where a significant number of applications were being filed for utility models. He wished to know from the Delegation of the EU whether it would agree to broaden the scope up to IPRs. He recalled that the Delegation of Ghana had

alluded to the fact that there was a link between copyright and GRs, and that the Delegation of Indonesia had raised the issue of geographical indications.

187. The Delegation of Namibia noted that the Delegation of the EU, on behalf of the EU and its Member States, had stated that the obligation to disclose would be triggered by the applicant having had physical access to the GRs. It highlighted the speed at which technology for genetic manipulation was evolving at that moment, and noted that basically most genetics was being turned into information and was being manipulated from an information base rather than from a physical access base. One could anticipate that this way of conducting research would keep proceeding faster and faster, as had been the case with computers, which had completely transformed the world. It was very clear that the explosion of genetic technology would very soon turn genetics mainly into processing of information. In the Delegation's view, a disclosure regime, like the one of the EU, which would only apply if the applicant had had physical access to the resource, would exempt applicants who used GRs as they are translated in genomic sequences, a GR from any disclosure requirement. That would mean that those subsequent users would be given a free reign to commit biopiracy. It asked the Delegation of the EU whether that was an unintended consequence that it had not thought through, or the result of a policy that had been thought through.

188. The representative of CAPAJ understood that the Delegation of the EU, on behalf of the EU and its Member States, was taking into account the principle of due diligence. In this regard, he believed that making reference to the source only, for instance a botanical garden, was not sufficient. He considered that it would also be necessary to disclose the country of origin.

189. The Delegation of Ethiopia pointed out that plant varieties were mostly the result of the application of traditional breeding technologies owned by indigenous communities, nations and nationalities. The same could be said of many biotechnology products. Those issues were not covered by UPOV. It wished to know how the Delegation of the EU proposed to deal with the TK which resulted in plant varieties, and, in particular, whether it would be excluded from the mandatory disclosure.

190. The Delegation of Brazil noted that the initial intervention of the Delegation of Indonesia summarized the position of many developing countries. It stressed that disclosure requirements were essential for the protection of GRs, as well as the importance of the idea of mutual supportiveness between the international agreements relating to the protection of GRs and the IP system. The Delegation had supported efforts towards that policy objective not only in the IGC but also in the WTO. Regarding the trigger, it was of the view that access and utilization of GRs should be the trigger of the obligation to disclose. It believed that using the country of origin would be a better tool to avoid misappropriation of GRs by IPRs. It asked the Delegation of the EU, to explain how the disclosure of the source would prevent misappropriation of GRs and allow for the enforcement of the sovereign rights of countries on their GRs.

191. The Delegation of the USA disagreed with the suggestion that a disclosure requirement would introduce legal certainty, just because it would supposedly introduce minimum and maximum standards internationally. The strongest legal certainty was no disclosure requirement. The Delegation could note that interpretation differed of what those international standards would mean and there would still be uncertainty. It believed that the premise that an international legal standard was necessary for legal certainty was false. It had heard that a disclosure of source requirement was necessary as a transparency tool, but it questioned that foundation. Many patent applications related to thousands, if not millions of GRs, and those GRs often came from many regions around the world. The Delegation failed to see how a disclosure requirement was a transparency tool. It recalled that the work of the IGC was supposed to be evidence based, and asked for examples of cases where a disclosure

requirement had been made in a proponent's IP office, and to demonstrate how that had been used by others. It remained deeply concerned that new patent disclosure requirements would actually add new uncertainties in the patent system, particularly where the sanctions for noncompliance included invalidation of a patent. That would create a cloud of uncertainty over the patent rights by opening a new avenue for litigation. Such uncertainties would undermine the role of the patent system in promoting innovation and technological development and could have negative effects on the economic development incentives that patents provided. Those uncertainties would likely also undermine any potential benefit sharing. Binding mandatory norms on GRs disclosure and patent law would also limit each Member State's policy space, while "a one size fits all" approach had been frequently criticized by Member States. It was mindful that many Member States had spoken eloquently on the need for flexibilities in the implementation of IP norms. The same reasoning not to adopt "a one size fits all" approach for GRs issues should apply as well. The Delegation asked what was the public policy basis for asking, on the one hand, a patent applicant to show PIC and MAT and, on the other hand, not asking ministries of health to enforce PIC and MAT when approving a drug. What was the public policy basis to require disclosure requirements for TK and not other knowledge? It wished to hear the reply not just from the Delegation of the EU but also from the Delegations of India, South Africa, Nigeria, Brazil, Indonesia, Norway and others. It was precisely because those answers were important that the Delegation of the USA had proposed a study on disclosure requirements. National experiences had evolved since prior studies were conducted, and a study would reduce the need to ask and answer questions during the session. The Delegation flagged the importance of discussing the definition of "misappropriation", which was a priority under the mandate.

192. The Chair indicated that he would not place the burden on the Delegation of the EU to respond to all the questions. He believed that the Delegation of the EU, on behalf of the EU and its Member States, had made a good intervention, articulating its position and its views on what a disclosure requirement from its perspective might look like. All delegations should be doing that, because that was how the Committee was going to get consensus and build bridges around the issues.

193. The Delegation of Italy noted that the way discussions had been conducted by asking questions to the Delegation of the EU had put it in a difficult position as a Member State of the EU. By its intervention, it did not wish to answer on behalf of the Delegation of the EU. The Delegation stressed that GRs were plants, animals and minerals. There was nothing in common between those objects and IP as such and even less so with copyright, trademark or industrial designs. The work of the Committee should therefore be limited to patents. Regarding geographical indications, it noted that varieties of grapes such as Cabernet Sauvignon were used around the world to make wine. However, each country had different geographical indications, which showed that the issue was not GRs but the characteristics related to the local production of those wines. The issue of disclosure of origin should be studied much more in depth, because there were different approaches. It wondered what should be declared in the case of a patent application for a pharmaceutical product based on GRs which were taken from a gene bank. Would that be the gene bank? Or would it be necessary to find out the country of origin of those GRs? Once one found one country of origin, would it be necessary to undertake a research project to find out whether those GRs were also present in other countries and include those in the disclosure? It noted that there were plants which had become common usage throughout the world. Would it be necessary to track their origin centuries before? All those problems needed further reflection and not just simple answers.

194. The Delegation of Colombia stressed that disclosure requirements were key to the protection of GRs and that their purpose was to improve transparency through the request of information regarding the country of origin, the source, PIC and benefit-sharing. It stressed that

most applicants had that kind of information and, if not, mechanisms would need to be established to deal with such situation, as nobody could be bound to the impossible. The Delegation asked those delegations who had stated that disclosure requirements undermined the legal certainty of the system to explain why. It believed that the opposite was true, namely that disclosure requirements strengthened the legal certainty of the system.

195. The Chair closed the floor on the questions to the Delegation of the EU. He did not expect the Delegation of the EU to respond to such a significant number of questions at that stage.

196. The Delegation of Indonesia considered that this exchange of questions had been a very good exercise, in trying to narrow gaps among countries.

197. The Delegation of the EU, speaking on behalf of the EU and its Member States, took note of the questions that delegations asked regarding the disclosure regime in the EU.

198. [Note from the Secretariat: The Chair reopened the plenary after a meeting with the Regional Coordinators.] The Chair reported that the appropriateness of suspending the plenary and holding informal meetings had been discussed with regional coordinators. Informal meetings could facilitate more open exchanges among participants. But they should be organized in such a way that inclusiveness and transparency were guaranteed. The Chair said that he would consider the possibility of holding informal meetings as an option. The Chair reported also on a brief discussion he had on the role of the facilitators. He recalled that the plenary had not been engaged so far in any drafting exercise. However, the facilitators were expected to listen to, and review the dialogue that was taking place in plenary. That said, the Chair invited the facilitators to present the outcomes of their understanding of the dialogue that took place on the policy objectives and the subject matter, including any suggestions that they would have, as well as the rationale for those. He emphasized that those suggestions would just be those of the facilitators. He would allow the plenary some time to consider those suggestions. All possible decisions regarding those suggestions would be taken by the plenary.

199. Ms. Bagley, speaking on behalf of both the facilitators, said that the facilitators had prepared potential language that reflected what they heard regarding policy objectives and subject matter of the agreement, with the goal of offering possibilities for streamlining document WIPO/GRTKF/IC/29/4. They did not intend to try to include every option presented by all Member States, but rather to review the discussions and synthesize potential language in light of these discussions. She explained that the facilitators had taken a minimalist approach and had kept with the development of a text that would need to be acceptable to many diverse parties. The facilitators had identified three primary policy objectives: increasing transparency in the patent or IP system; facilitating complementarity; and minimizing the grant of erroneous patents. Ms. Bagley put forward the suggested language as follows:

“Policy Objectives. To enhance the efficacy and transparency of the international [IP] [patent] system, facilitate [complementarity] [mutual supportiveness] with relevant international agreements and minimize the granting of invalid [IP] [patent] rights.”

The facilitators were of the view that this language confined and reflected articulated statements from delegations in support of enhancing efficacy, transparency, and complementarity in the patent or IP system, and preventing the grant of erroneous or invalid patents. The word “invalid” had been suggested as preferable to “erroneous”. The facilitators thought therefore that it could be a worthwhile improvement to incorporate. They had retained in brackets the terms in which there was still a lack of consensus so that they could hopefully be resolved. They noted that the current text in document WIPO/GRTKF/IC/29/4 included mechanisms to accomplish the policy objectives. They concluded that the policy objectives should be just

those, and not include particular mechanisms, as those mechanisms would be addressed elsewhere in the text. As far as Article 1 regarding the subject matter was concerned, the facilitators noted that there had been a non-negligible amount of support for a simple and elegant text. The language suggested by the facilitators sounded as follows:

“Subject Matter of Instrument. This instrument applies to genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources].”

The facilitators recalled that the framework for such language had been put forward by the Delegation of Ghana and had received support from a number of delegations. The facilitators simply added bracketed text regarding areas still to be discussed. The facilitators hoped that these options which had adopted a minimalist approach had sufficiently encapsulated key features of the discussions and would help the Committee in moving forward.

200. The Chair thanked the facilitators and announced that the plenary would come back later on to the suggestions they had made. He reopened the floor on the two core issues that had been addressed by the plenary so far, namely subject matter and content of disclosure.

201. The representative of ICC referred back to the intervention he had made on the content of disclosure. He was afraid that he had given the impression unintentionally of unqualified endorsement of the position of the Delegation of the EU, on behalf of the EU and its Member States, which was not right. He clarified that ICC was opposed to any form of disclosure in this area, for a number of reasons. The first reason was that it would be counterproductive to the broad intention of the CBD and not useful. There were several other reasons as put forward in a written statement. [Note from the Secretariat: in addition to this statement, the representative of the ICC submitted a text that is available on the Internet (at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2011/Patent-disclosure-requirements-relating-to-genetic-resources--will-they-work-/>).]

202. The Delegation of Pakistan expressed its disagreement with the proposals regarding the content of disclosure made by the Delegations of the EU, on behalf of the EU and its Member States, and Italy respectively, and the representative of ICC. Disclosure requirement should not be limited to patents, but extend to other IPRs, including plant varieties-related rights. It was of the view that the risk of misappropriation of GRs was at the same level under the plant variety protection system as that under the patent regime. A number of new plant varieties were developed from land resources and wild species. The Delegation of Pakistan supported the principle of mandatory disclosure as proposed by the Delegations of South Africa and Nigeria, as well as other delegations.

203. The Delegation of Ghana wished to address the issue of disclosure requirement, building up on a statement made earlier. It noted that the principle that was reflected in Article 3 of document WIPO/GRTKF/IC/29/4, specifically the need to disclose source or origin, was one that WIPO had already recognized and adopted in its early years. It reminded that WIPO had been set up in 1967. In its view, WIPO had already adopted an instrument that reflected the need to disclose source of folklore and recognized the principle that the PIC of the relevant rights-holders needed to be sought. This instrument was the 1982 Model Provisions. The Delegation recalled that Section 5 of the 1982 Model Provisions would require that “in all printed publications and in connection with any communications to the public of any identifiable expression of folklore, its source shall be indicated in an appropriate manner by mentioning the community and/or geographic place from where the expression utilized has been derived”. According to the Delegation, Section 5 stated very clearly the need to disclose. More so the 1982 Model Provisions emphasized the requirement regarding prior approval. Section 3 provided that where protected expressions of folklore were to be used both with gainful intent

and outside their traditional or customary context, prior approval must be obtained from the competent authority designated as the main repository of rights to folklore. The 1982 Model Provisions recognized sanctions: it allowed for criminal penalties to be imposed for failing to obtain the required written consent prior to the use of the protected folklore, for failing to acknowledge the source of folklore, for misrepresenting the origin of expressions of folklore, and for distorting the works of folklore in a manner considered prejudicial to the owner, dignity or cultural interest of the community from which it originated. In addition, a violation of the 1982 Model provisions could lead to any profits made to be seized. These remedies could be imposed along with damages and other civil remedies. The Delegation of Ghana wished to draw the attention of the plenary to this instrument that had been important in terms of building norms at WIPO. It proved that WIPO has had a long standing tradition and history on the issue of protection. It noted that many Member States from Africa had complied with the 1982 Model Provisions. Ghana in particular adopted a law that reproduced nearly verbatim many of these provisions, proving that it had a long tradition and history in this regard. This country had recognized the principle of disclosure and a need to obtain PIC. Article 3 of document WIPO/GRTKF/IC/29/4 reflected the same well-anchored two basic notions: disclose and seek the PIC of the relevant right holders. The Delegation wondered why it should be such a controversial matter. It also observed that the 1982 Model Provisions captured in a very succinct and concise manner all the issues that were dealt with by document WIPO/GRTKF/IC/29/4, and with far greater clarity. It noted that the 1982 Model Provisions did not dwell on reasons for such disclosure, while the Committee has spent inordinate amount of time going over the reasons why disclosure was needed. According to the Delegation, the Committee should perhaps building on this very good example which simply imposed an obligation to disclose without necessarily tying it to novelty and all the criteria that had been developed under patent law. The reason for so doing had been to keep it simple. The Committee should consider that the objective in seeking to protect GRs was not to say that the relevant matter to be protected must be susceptible to protection under IP laws. This would induce an irrelevant consideration. The forthcoming instrument should simply state, as the WIPO early 1982 had done: disclose origin or source and require PIC, in an unwarranted way.

204. The Delegation of Argentina stated that it was absolutely critical for its country to protect GRs. It believed that a method was needed that would allow Member States to prevent misuse and misappropriation of GRs, and to benefit from their use. The Delegation supported a disclosure requirement of the origin and source of GRs, their derivatives and associated TK in order to complement the CBD requirements. Such a requirement would allow Member States to comply with national and international requirements regarding the access to GRs and sharing of the benefits arising from their utilization.

205. The Delegation of Switzerland addressed the issue of the content of disclosure. It was of the view that it was the source that should be disclosed, with the understanding that the "source" was to be understood in a broad sense. In such sense, "source" would cover all possible options from where a GR and TK associated with GRs could come from. With this broad understanding, the concept of "source" included the following: (a) the party providing GRs, that was the country of origin of such resources or a party that had acquired the GRs in accordance with the CBD; (b) the Multilateral System established by the ITPGRFA; (c) IPLCs; and (d) other sources, such as *ex situ* collections. The Delegation noted that the concept of source was also used in Article 17 of the Nagoya Protocol in the context of monitoring the utilization of GRs. Other concepts that had been proposed, such as the concept of the country of origin, were in its view too narrow. For example, rubber trees historically had originated in the Amazon region, and had been later taken to Southeast Asia. According to the definition of the CBD, the country of origin was the country which possessed the GRs in *in situ* conditions. So, in the case of rubber, it was likely that there were a multitude of countries of origin. It wondered whether the country of origin meant the historical country of origin instead. If so, the question would be what exactly this historical country of origin would be. However, these countries of

origin might not be the place from where the rubber plant in question had come actually from. Disclosing thus one or several of these countries of origin would not really increase transparency of ABS, which was the objective of the disclosure requirement. Additionally, this would create a solution which did not provide for legal certainty. Moreover, requiring the disclosure of the country of origin was not mutually supportive with the existing international instruments on ABS: (a) in the context of ABS, the Nagoya Protocol spoke of the “Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with” the CBD; (b) the ITPGRFA was not based on the concept of country of origin, but the GRs were provided instead under the already mentioned Multilateral System; (c) the disclosure requirement should also be applied to TK associated with GRs, the question of which would be what would be the country of origin of this TK. The Delegation reiterated that one potential source was the “Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with” the CBD. Accordingly, with the broad understanding of “source,” the notion of the country of origin was also covered. Finally, if the source was unknown to the patent applicant or inventor, he or she should have the possibility to make a declaration to that effect. The Delegation concluded that for the reasons outlined above, it supported that the “source” was the object of disclosure.

206. The Chair opened the floor to questions to be addressed to the Delegation of Switzerland.

207. The representative of CAPAJ observed that some countries recognized lands that pertained to indigenous peoples within a country, from where GRs might originate. But there were also countries that did not have that sort of legal regime. He wondered whether the source would not be a disadvantage of indigenous peoples.

208. The representative of Tulalip Tribes asked about the status of the TK that was contained in disclosure requirement. He asked whether a disclosure would indicate that PIC had been obtained, and whether the content of the disclosure would be the knowledge that had been codified in the description. He also wondered whether the content of disclosure would be protected or would be made to the public.

209. The Delegation of Australia asked the Delegation of Switzerland whether the disclosure regime of its country encompassed the country of origin, and if so, how.

210. The Delegation of Namibia asked whether, if a user bought a GR as a commodity, used it for R&D, while that GR was covered by various regulations in the country that sold that commodity and then declared on its IP application in Switzerland that the source had been the local corner shop or a laboratory supply company, that would have satisfied Switzerland’s objective and the reason why there was any disclosure requirement in the first place.

211. The representative of South Centre asked the Delegation of Switzerland whether it could provide an example where the source was unknown to the patent applicant or the inventor and where they were unable to comply with the broad definition of source it had referred to.

212. The Delegation of Switzerland stated that it wished to respond later on.

213. The Chair reopened the floor for statements regarding content of disclosure.

214. The Delegation of Egypt referred to the statement regarding the subject matter made by the Delegation of the EU, on behalf of the EU and its Member States, that claimed to limit the scope of any agreement to patents. It noted that plants were the GRs that were the most affected by biopiracy. The Delegation noted that under the patent regime, Article 27(3)(b) of the TRIPS Agreement imposed to Members to provide for the protection of vegetal varieties by

means of patents, or an efficient *sui generis* system or by a combination of these two means. The Delegation requested therefore that the scope of any system of protection extend beyond patents and cover IPRs in general. Regarding the content of disclosure, the Delegation said that it should be reflected that the applicant must disclose the GRs and/or TK that he had used and document in detail that he had received the PIC of the competent authority in the country of origin or source. The Delegation emphasized an extremely important issue that was that the country of origin might not be the country of source. The applicant should therefore quote or name the country of origin or the country of source and make a declaration that he had actually complied with the legal requirements in the country of origin or in the country of source.

215. The Delegation of Japan reiterated that it did not see the need for adopting a mandatory requirement. It did not believe that introducing a mandatory disclosure requirement would be the effective way to address issues concerning GRs. It was also of the view that introducing a mandatory disclosure system in its country would introduce instability in the utilization of GRs and harm the existing patent system. It was concerned that a mandatory disclosure requirement discouraged the private sector from using research databases for patent applications or put at risk the validity of granted patents. It could hinder the industrial sector's desire to spur creativity and innovation, as well as harm the incentive granted by the patent regime.

216. The Chair noted that the Delegation of Japan had clearly articulated some legitimate concerns from industry and the impact on innovation and inventiveness. He noticed that the Delegation of Japan envisaged databases as one mechanism. He asked the Delegation whether it could offer comments regarding the concerns of the owners of GRs, as they had indicated that they were concerned about knowing where their used genetic material had ended up.

217. The Delegation of Japan took note of the question and said that it would respond at a later stage.

218. The representative of Tupaj Amaru emphasized that the Committee's terms of reference or mandate were not to protect the pharmaceutical industry, but rather to protect GRs and TK.

219. The Chair wished to avoid misinterpretation of what he had stated earlier on. He was not favoring one policy interest over the other. He had simply making the point that there was more than one policy interest to negotiate upon, as well as more than one group of stakeholders. He urged the Committee to consider all views in reflecting on what outcome it wished to achieve.

220. The Delegation of Latvia, speaking on behalf of the CEBS, supported the principle that a disclosure requirement should be part of patent applications. Disclosure requirements should apply to the patent system, namely to patent applications for inventions directly based on GRs, and not to IPRs in general. The content of disclosure should be the country of source or origin. If the country was unknown, this should be indicated. Cases where the source was different from the country where the GRs were available in-situ or where the inventor had accessed the GRs should also be disclosed. It referred to a botanical garden as an example.

221. The Delegation of Nigeria thanked the Delegation of Switzerland for its statement. It wanted to draw attention to Article 3.1(a) in document WIPO/GRTKF/IC/29/4 which showed that the Committee had already recognized that disclosure of source and disclosure of origin were not in conflict. It put forward the example of a rosy periwinkle whose origin could be the Philippines or Madagascar. Actually, that could reflect the fact that there were two varieties of the same plant. It argued that there were cases where it was very clear that the origin was not in doubt. Actually, more often than not, the users of the GRS would be able to know the origin. At the same time, it recognized that if that information would not be available, the disclosure

system could rely on source. The source itself could be problematic, because some *ex situ* deposits of GRs were taken away from their historic origins. Echoing what the Delegation of Switzerland said, the Delegation recognized the historical, accidental and even natural migration of GRs from their original source, but the idea of disclosing sources and origins were not in conflict.

222. The Chair noted that the Delegation of Nigeria had made a very important point and invited the Committee to reflect on this issue. He added that this was obviously an issue for industry as to how to ensure legal certainty.

223. The Delegation of Australia wished to address the issue of the content of disclosure, building up on the intervention made by the representative of Tulalip Tribes. It considered that the applicant should not be required to disclose the actual GRs or particularly the actual TK that they had been inspired by to develop their invention, unless they had been required to enable the working of the invention. As pointed out by the representative of Tulalip Tribes, publishing the TK itself could make that TK move outside the circle of protection that existed under the customary law of indigenous peoples. The content of disclosure should be the source or a declaration that the source was not known. In this regard, the Delegation was particularly interested in hearing the response of the Delegation of Switzerland to the question on the source encompassing or not the notion of country of origin. The Delegation of Switzerland said that parties to the CBD might require as part of their national disclosure requirements a statement on whether or not permission to access had been required, but it should not be an obligation for an IP office to assess the validity of that statement. It considered that the most efficient course of action was for the patent office to publish that information and enable interested parties to follow their own interests under either a confidential arrangement or an environmental regulation that might have been breached. The Delegation was interested in hearing from delegations which had experience working in patent offices, if they thought that a patent office was qualified to assess an ABS contract or any similar arrangement. It hoped that at the conclusion of the present session the Committee would reach a common agreement that patent offices were not the place to be checking ABS contracts. They could just provide the information for interested parties to follow up. In this regard, the Delegation noted that the core issues did not refer to the issue of what a patent office did with the content of disclosure, and it was willing to touch upon this as well. It observed that disclosure requirements were currently being made voluntarily as part of the definitions or examples of preferred embodiments. Disclosure requirements stated that the biological material had been gathered from the wild or obtained from a commercial supplier, as that was current practice. It allowed patent applicants to declare the legitimacy of their activities, insulating them from allegations of biopiracy.

224. The Delegation of Namibia was of the view that the subject matter should be any GRs or associated TK that was involved in making the claimed invention. The content of the disclosure should be where the applicant accessed the GRs or associated TK. It supposed that this was compatible with the formulation of the Delegation of Switzerland regarding the source, provided that the source included the country of origin where it was the case. It added that this formulation would also respond to the points raised by the Delegation of Japan and earlier by the Delegation of the United States of America. The Delegation of Namibia recognized that innovation was undoubtedly a great good and IP as a spur and reward for innovation had proved to be a very effective system, but innovation was not an absolute good without any limits. The motivation for requiring disclosure provision was not to stop industry from making innovation, but to ensure that industry went to legitimate sources to get the GRs and associated TK. The Delegation observed that it was not standard scientific practice to just travel around and pluck material out of nowhere and work on them. Researchers had very strict protocols for recording origins of whatever they were working on. It was common practice to ensure the legal provenance of the subject matter of their research when the researchers were developing an innovation. The intention of the Delegation was very clearly to get it through to the users that

they could not show up at an IP office and claim an IPR over something that they had no right to research in the first place. It mentioned the discovery of penicillin, based on the observation that bacterial growth on dishes was being inhibited by mold containing penicillin. If asked where the penicillin mold had come from, the researcher could have said that he did not know or it came of thin air. Any litigation in court would have ended up in clearing up the researcher. But such cases were really very rare. The Delegation said that in the vast majority of cases, inventors and industry had choices as to where they would get material from. It could be conceivable that a researcher could work with material accessed from an *ex-situ* collection, and if such material led to a dead end and had no chance of resulting in an IP application, leave it at this point. But would the researcher perceive that it was worthy of an IP application, then it should go to the country of origin or to the country that had acquired the resource in accordance with the CBD, or to the traditional community holding the indigenous knowledge associated with this material, and conclude MAT before submitting an IP application to an IP Office. The Delegation was of the view that the disclosure obligation should be broad to deal with GRs and associated TK in whatever way they were involved in the IP application. It should be done in such a way as to create an incentive to source GRs and associated TK through PIC, and to conclude MAT before commencing research, or at the very least before filing an IP application.

225. The Delegation of Canada noted that different Member States had chosen the country of origin as the source for their disclosure model, while most countries accept source. Origin seemed to be a particularly challenging element for some jurisdictions. The Delegation had heard about precedents and other legal instruments referring to origin, but the context of the present discussion seemed to be different. The representative of the ICC and some other stakeholders had talked about challenges that could arise in determining origin. It was not even sure that the representative of ICC was providing an exhaustive list of all the issues that could arise. But it seemed obvious that for some participants, origin might not be easily determined. Sometimes origin would not be meaningful or sufficiently linked to the subject of the patent application, because the relevant material would potentially exist in various countries or be something that had been modified, or for other reasons. The Delegation was therefore interested in hearing more from other Member States that had disclosure systems in place not necessarily only on whether their law referred to source and/or origin but also on practical experiences that could be reported from their patent offices, where perhaps some issues had arisen in determining origin or where a particular origin had been cited and had caused problems for various reasons, including that other countries or communities had claimed ownership of the material in question. The Delegation pointed out that the Committee had been talking mostly about origin and source of GRs, but not of TK. It was interested in hearing also whether the elements of source and origin applied equally and in the same manner to questions of provenance of TK associated with GRs and whether there were unique challenges in determining origin of TK that did not exist with GRs.

226. The representative of IPO explained that IPO was a trade association for owners of all forms of IP, and was the only association in the United States of America that served all industries and all fields of technology. She felt that an earlier suggestion that industry should keep an open mind was worth a response. She wished to highlight that industry had participated in the IGC since its inception in order to share its experiences and perspectives. Industry had also participated in the CBD, FAO and others forums. It had every intention of complying with the CBD and national laws and regulations. Many of the member companies of IPO had made the difficult choice of not engaging with certain countries where such laws were not clear. IPO continued to have concerns on how patent disclosure would achieve the stated objectives while ensuring effective incentives for innovation. She very much looked forward to all of the Committee's participants keeping an open mind in trying to find sustainable solutions that were workable in practice, as innovation was in the interests of everyone.

227. The Chair took note of the comment made by the representative of IPO. His invitation to keep an open mind to opportunities in order to build up bridges had been made in reference to an intervention that had not supported disclosure, setting the discussion within a very black and white perspective. This would not necessarily reflect all groups representing industry. In this context, he had recalled that there were different legitimate interests at stake, those of the IPLCs, those of industry and those of civil society. He appreciated the comment made by the representative of IPO about engaging with Member States.

228. The Delegation of South Africa wondered which role the 1982 Model Provisions as referred to by the Delegation of Ghana would play in the norm setting work of WIPO. With regard to disclosure and its content, it furthermore emphasized that the 2005 Patents Amendment Law of South Africa provided for the three elements: origin, source and TK. In terms of the manner in which the 2005 Patents Amendment Law operated, it explained that there was a separate form called P-26 on which all this information was applied. The Delegation said that this could probably answer a question that the Delegation of Australia had raised. Content of disclosure should not be limited to GRs, because the protection that the Delegation of South Africa sought was IP protection. To that extent and consistently, associated TK was included. To exclude TK from disclosure would defeat the purpose of the IGC's mandate. Such exclusion could have made sense in the context of the CBD was to ensure conservation of GRs. Since the IGC was about IP, the source of knowledge regarding the utility of GRs should also be disclosed.

229. The Delegation of the United States of America wished to address a couple of questions raised and pose some questions to the Delegation of Switzerland. The Delegation of Colombia had asked how disclosure requirement undermined the patent. This was because patent validity would no longer be a function of novelty, inventive step and industrial applicability. As the Delegation of Namibia had explained, a disclosure requirement involved an external entity deciding whether an inventor had the right to conduct research. Other delegations included within the disclosure requirement a requirement about whether PIC and MAT had been obtained before filing a patent application. The plenary had heard examples of where the wrong ministry had granted permission. The Delegation had gathered many experiences of significant delays in obtaining PIC and MAT, noting that the United States of America had a one year grace period while other countries had none. The need for PIC and MAT before filing a patent application confronted patent applicants with a risk, and all these situations increased legal uncertainty. The Delegation of Australia had raised the question of whether a patent office was competent to assess ABS contracts. The Delegation of the United States of America believed that patent offices were not competent to assess the validity of an ABS contract. Patent examiners were not contract lawyers and were not trained to handle such matters. Regarding questions for the Delegation of Switzerland, the first question was whether a disclosure requirement applied to human GRs or other GRs taken from humans. If it did, the Delegation wondered whether the human being with whom the GRs had been obtained must be named in the disclosure. The second question was whether a disclosure was required for each type of GRs if the claims included several GRs which might be in the form of a genus of GRs, and how the office considered the situation where a genus of GRs was involved. It also wondered whether the applicant was required to only disclose a representative GR within the class of the genus. The third question was whether the patent office also required disclosure of prior art that was material to the patentability of the invention. If not, what was the basis for having a disclosure requirement on the source of GRs and/or associated TK, but not on prior art that was material to patentability? Did disclosure improve examination? The Delegation furthermore referred to the question raised by the Delegation of South Africa and the point made by the Delegation of Ghana regarding the 1982 Model Provision. It understood that that had been a model law on the protection of folklore and hoped that it could be considered when the IGC would address TCEs. It observed that the 1982 Model Provisions predated the DA recommendations and the launch of the IGC process.

230. The Chair reminded the Committee that lengthy discussions had taken place in previous meetings on the competence of IP offices as far as the verification of the contents of disclosure was concerned. Article 3.2 of document WIPO/GRTKF/IC/29/4 reflected a common view on that. The Chair asked the facilitators whether they wished to ask questions to participants.

231. Ms. Bagley, speaking on behalf of both the facilitators, noted that the legislation of Switzerland included the invention being “directly based on” GRs. She wished to have a clearer understanding of what “directly based on” encompassed or meant.

232. The Delegation of Switzerland responded that the notion of “directly based on” was supposed to describe the relation between the invention, and the GRs or the TK. An invention which was “directly based on” would mean an invention that would not exist without the GR or the TK.

233. Ms. Bagley, speaking on behalf of both the facilitators, thanked the Delegation of Switzerland for its response. Based on the explanation given by the Delegation of Switzerland, she asked all the delegations whether “includes utilization of” and “is consciously derived from the” would be encompassed or not within “is directly based on” in Article 3.1 of document WIPO/GRTKF/IC/29/4.

234. The Delegation of Switzerland responded that it would depend on how those other concepts were understood. It noted that the Nagoya Protocol in its Article 2(c) stated that ““Utilization of genetic resources” means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the [CBD].” The Delegation was not sure whether “all forms of utilization” would be equivalent to “directly based on”.

235. Ms. Bagley, speaking on behalf of both the facilitators, thanked the Delegation of Switzerland for its response and invited delegations to reflect or explain what would be the difference between the three concepts she had mentioned in Article 3.2 of document WIPO/GRTKF/IC/29/4.

236. The Chair invited participants to engage with the facilitators on this matter in the margins of the plenary. He opened the floor on the second sub-issue regarding disclosure, which was the nature of the obligation to disclose.

237. The Delegation of South Africa referred to Article 3.2 of document WIPO/GRTKF/IC/29/4 and stated that it appeared to be sending two contradictory messages. In the first part of the sentence, the article said that IP offices were not obligated to do anything. But in the second sentence, it looked like they could assist the applicants to meet the disclosure requirement. The Delegation found that these two statements were contradictory, and would rather keep the second sentence.

238. The Chair reminded that Article 3.2 was trying to meet two different goals. It was trying to grant support to applicants in order to ensure as far as possible that they were able to meet their obligations. It was also trying to recognize that IP officers should not be imposed the obligation to verify the content of disclosure. He noted the comments made by the Delegation of South Africa, and invited the facilitators to take those into account. The Chair asked whether the Delegation of South Africa would wish that the disclosure requirement be mandatory or voluntary.

239. The Delegation of South Africa reminded that the law in South Africa made it mandatory. It reiterated its view that the threshold could not be lower than what the law in South Africa was requesting.

240. The Delegation of Australia observed that applicants were making voluntary disclosures and were getting lost in the applications. The present situation was causing problems. A mandatory requirement with a clear field would therefore be most useful. Regarding the interpretation of Article 3.2 and the comment made by the Delegation of South Africa, the Delegation explained that the article was dealing with two different matters. The latter part of the article placed an obligation on the IP office to give guidance on applicants on how to fill in the forms. At the same time, the article did not require from the office that it confirmed to the applicant that what the applicant had told the office had been in fact true. The Delegation added that this could be determined in subsequent actions, if required, or by parties following their respective interests in the GRs or TK. Perhaps the two sentences in Article 3.2 needed to be clarified in expression, but they were not contradictory in substance.

241. The Delegation of Nigeria proposed that disclosure be mandatory and be the standard. This was consistent with the principle that transparency was at the core of the IGC negotiations.

242. The Delegation of Pakistan aligned itself with the statements made by the Delegations of Nigeria and South Africa. Disclosure should be mandatory.

243. The Delegation of China believed that the disclosure requirement should be mandatory. In addition, on the relationship between the first part and the second part of Article 3.2, it believed that the IP office or patent office, with the assistance of other departments, should verify the disclosure form and verify whether the content of the disclosure was true.

244. The Delegation of Egypt was of the view that disclosure must be mandatory and be subject to penalties, namely by suspending the examination of the application.

245. The Delegation of Brazil aligned itself with the Delegations of South Africa, Nigeria, Pakistan, China and Egypt, as far as the mandatory character of the disclosure requirement was concerned. It referred to the statement made by the Delegation of Australia on Article 3.2. It proposed to change the wording of Article 3.2 in order to make it clear that in fact what was really wanted in this process was to create in the IP offices check points that allowed for the enforcement of the protection of GRs. The aim was not to place additional obligations on the IP offices. In fact, the idea was to make the work that had already been conducted in the IP offices mutually supportive to the protection of GRs. The only one new element to be added would be that the IP offices would have to inform IP applicants of the disclosure requirement system.

246. The Delegation of the EU, speaking on behalf of the EU and its Member States, believed, in relation to Article 3.2, that mandatory disclosure requirements should constitute a formal requirement and that the role of the patent offices would be limited to checking whether the formal requirements had been fulfilled and, in particular, whether the applicant who declared that the invention was directly based on GRs and possibly associated TK had subsequently disclosed information. There would be no assessment of the content of the submitted information. In relation to the last sentence of Article 3.2, the Delegation emphasized that this part seemed to be overly descriptive as different countries could have different procedures. Sometimes only negative decisions were communicated to the applicant. Consequently, to communicate a particular positive decision on one aspect of the application would be alien to the normal processing of patents and would put an additional burden on patent offices.

247. The Delegation of India supported the delegations which had stated that the disclosure requirement should be mandatory. It aligned itself with the points made by the Delegation of Brazil regarding Article 3.2. This article could be appropriately reframed in order to state that the patent office merely looked at whether or not the disclosure had been made of the source/origin of the genetic material. The substantive examination would be done by the national authority which was competent for implementing the Biodiversity Acts.

248. The Delegation of the USA reminded that the USA did not have a disclosure requirement system and did not support such requirements. It observed that some applicants from the USA, however, volunteered to disclose the source of GRs. A number of applicants from the USA had also filed patent applications in the EU under the relevant EU Directive, which, as it understood, suggested applicants to disclose, while it did not make it mandatory. Such non-mandatory systems seemed to strike an appropriate balance, because they would still preserve the incentive for innovation. Therefore, it preferred the option of making it voluntary.

249. The representative of ICC added that it was his understanding of the policy of ICC that it was directed solely against mandatory applications, but that it did not have objection to voluntary applications. Speaking from the point of view of someone who had filed patent applications regarding biological resources, it was indeed very prudent to put such origin in the application. That said such requirement was in most circumstances not very useful to promote the objectives of the CBD. If the filing was about wheat generically, the GR could come from everywhere. He added that voluntary disclosure was good practice, at least where there would be no argument about what the applicant needed and could disclose.

250. The representative of Tulalip Tribes wished to record his support of mandatory disclosure. He expressed his interest in the suggestion made by the Delegation of Australia, supported by the Delegation of Brazil. Some of the problems could be dealt with by a declaration where the applicant would state that he had valid or legal access to the GRs and associated TK. As to the competence of the IP offices, the patent office itself probably would not be competent to judge the validity of the statement of the declaration. But, while there were not a lot of ABS legislations in place presently, he believed that down the line as countries would have their ABS legislation in place, the lines of communication between the two different offices would become more solid. Cross-communication and cross-checking of the declarations would take place as a matter of course. Problems of competence were a temporary problem but not an unsurmountable barrier. More discussion was needed on the principle of having a declaration without the requirement for the office to do the verification.

251. The Delegation of Japan reiterated its support for non-mandatory disclosure. It could not support mandatory disclosure. It also agreed with what the Delegation of United States of America had explained.

252. The representative of CropLife International spoke on behalf of CropLife International and ISF. He represented the green biotech sector and companies that developed agricultural innovations. He emphasized that secured and sustainable access to GRs was of key importance to the agricultural sector. Innovative agricultural products provided not only socio-economic benefits to farmers, but also solutions to global challenges like climate change. Collaboration with local partners was crucial in this respect. For example, the sector that CropLife International and ISF represented was working with the African Agricultural Technology Foundation (AATF) for the development of water-efficient maize for Africa. Other collaborations included the Brazilian Agricultural Research Corporation (EMBRAPA) and the International Rice Institute in Asia (IRRI), amongst many others. The development of one new agricultural product required access to a large number of GRs from a wide variety of sources around the globe. This reality had been endorsed by the multilateral approach already taken by the ITPGRFA. The agricultural sector was using GRs in full compliance with existing ABS

obligations, including existing international obligations, like the ITPGRFA. Avoiding misappropriation was a key objective of legal frameworks on ABS, which had been developed pursuant to the adoption of the Nagoya Protocol. While discussions at the IGC had started long before the Nagoya Protocol, they seemed to fail to take into account the existence of this growing legal framework that already addressed problems of misappropriation of GRs and associated TK. In the Nagoya Protocol, a potential role for patent offices had been contemplated, but rejected after due consideration as not effective as an instrument for compliance with ABS obligations. The agricultural sector had endorsed discussions at the IGC that would focus on avoiding the grant of erroneous patents. Effective IP systems did not, and should not, grant patents on an invention which did not comply with internationally recognized patentability criteria. The agricultural sector fully endorsed tools that further enhanced the effectiveness of patent systems. Incorporating compliance with ABS in an IP system would not, however, enhance its effectiveness. Rather, it would undermine incentives provided by the IP system and therefore negatively impact on agricultural innovation which was quintessential in addressing global challenges such as climate change and food security.

253. The representative of Tupaj Amaru supported the proposals put forward by the Delegations of Nigeria, Pakistan, Brazil and India along the lines that the disclosure requirement must be mandatory and must constitute a norm within the forthcoming instrument or instruments. He could not support the proposals put forward by the Delegations of the United States of America and Japan. The Committee was supposed to be working on a compulsory international instrument whose norms should be compulsory and which should include sanctions.

254. The Delegation of Namibia supported mandatory disclosure provision of an administrative nature that would allow provider countries to use the Internet and information technology capacities of the IP system to trace what happened to GRs, associated TK and derivatives once they had left their jurisdiction. After spending 15 years trying to encourage access, collaboration, innovation and benefit sharing, it believed that the largest disincentive to innovation and legal uncertainty was the lack of trust that providers had in the system to protect their interests. The result of that was that it could take years to get an access permit in some jurisdictions. No civil servant could have taken the risk of making a decision to grant access, because if the access had been granted to someone who turned out to be a biopirate, it might have been the end of his or her career. In some jurisdictions it could have led to more serious consequences for the individual involved. Therefore, if there was a real interest in legal certainty, a much better plan was to have a disclosure system where everyone could have legal certainty being of course a contractual matter applying to both providers and users. It felt that industry would find it a lot easier to comply with a mandatory disclosure provision than providers would find it to provide access, should they have doubts in the system. The Delegation wished also to correct a factual error regarding the Nagoya Protocol. The Nagoya Protocol did not reject the use of patent office as a checkpoint, but left the use of those offices as a checkpoint up to national discretion instead of making them mandatory for all members. The Nagoya Protocol did so very clearly on the understanding that the IGC would be the correct forum to bring any mandatory disclosure arrangement. The CBD could not make IP law. A number of Parties to the Nagoya Protocol had introduced checkpoints in their IP offices. Many more parties would do so in the future.

255. The representative of CAPAJ stated that the indigenous people had been developing innovations permanently and historically, and in particular innovation in the field of farming and livestock. In a process which had lasted hundreds of years, new GRs had been produced by indigenous peoples, were animals or plants varieties. Article 3 of document WIPO/GRTKF/IC/29/4 should not just aim at encouraging those who were carrying out innovations in laboratories. It should mainly constitute an incentive for those, as the indigenous peoples, who had been farming in a harmonious relationship with Mother Earth. He put forward

the example of the guanaco and the alpaca wool. The forthcoming norm should guarantee safety and security to those who were producing GRs in the field.

256. The Chair opened the floor on the next core issue, namely exceptions and limitations.

257. The representative of Tulalip Tribes focused particularly on Article 4.1(d) which he believed should be deleted. First of all, such limitation would depend on the negotiations on the status of TK. In a patent application where TK was used, TK should be disclosed, whether it was "in the public domain" or not. The Committee had not agreed upon a definition of TK in the public domain. So, in the absence of any information regarding the TK that would be used, it would not be possible to challenge the patent. This limitation should at least require the definition of, and a discussion on what TK "in the public domain" was.

258. The Chair reminded that the Committee had held many substantive discussions on this matter, but did not reach any agreement yet. An attempt was made to develop a tiered approach to start un-picking that particular aspect around the control of TK and its use. As the representative of Tulalip Tribes had said, the Committee should continue discussions on that matter in further meetings.

259. The Delegation of Australia expressed support for the statement made by the representative of Tulalip Tribes.

260. The Delegation of Namibia was of the view that there should be a very limited exception and limitation provision. It said that none of the particular examples listed in Article 4.1 should be validated as exceptions. Mandatory disclosure requirement would serve to build confidence in the IP system and reassure providers that misappropriation would be detected by the IP system. The only limitation and exception would be the one that allowed Member States or patent offices to excuse an applicant from disclosure, should that be in the overriding public interest to do so, and by providing reasons publicly as to why the exception had been allowed. Such exception would leave policy space and accommodate the sovereignty of Member States for very significant cases, where disclosure would have otherwise prevented issuing of patent rights that were in the overriding public interest. For all other cases, there should be a disclosure of origin. The effect of disclosure would depend on the regime governing the particular subject matter of IPRs and thus, in the particular case of GRs, on the outcome of the discussions around GRs originating from areas beyond the national jurisdiction. Disclosure of human GRs would have no effect on the CBD system, because the CBD decided not to include human GRs. But such disclosure might very well have implications in terms of national laws that restricted or controlled research on human GRs, for example stem cell research. The Delegation reminded that a very intense debate about human genetic engineering was going on. That would be a useful tool to have a disclosure requirement on those types of GRs. The Delegation was of the view that derivatives were part of GRs and associated TK utilization. The Delegation would never entertain an exception on derivatives. Commodities should not be the subject of IP applications, should there be no PIC to utilize domestic GRs and, therefore, to do research and development on them. If there was such use, they were no longer commodities and they were GRs, and should therefore be disclosed. The Delegation agreed with the point made by the representative of Tulalip Tribes and supported by the Delegation of Australia about TK in the public domain. Regarding the temporal scope, the Delegation reminded the well-known position of the African Group that the date of access was completely irrelevant, while the date of utilization was the one that was important. This position was reflected in the African Union Guidelines on the Nagoya Protocol which had been endorsed by the Heads of State in Africa. It would be applied hopefully soon throughout the continent. Any user who had speculated that once the resources taken out of Africa, he could use them any way he liked, would find out that he would no longer have access to resources in Africa any way in the future. The Delegation recognized that if the invention was made before the entry into force of the CBD, the user would probably be able to get away with biopiracy. But if the resource had been

sitting in the user's botanical garden or type collection where it had been collected for taxonomic reasons, the subsequent use of it should be subjected to the disclosure regime, no matter when the resource had been accessed or acquired in the first place. Otherwise, it would be as if someone would get away with human slavery after having taken teenagers out of the country they were born in.

261. The Chair asked the Delegation of Namibia to clarify its position on commodities.

262. The Delegation of Namibia responded that there should be no exception for commodities. If commodities were utilized as GRs, derivatives or TK associated with GRs, as a basis for an IP claim, the source of those commodities should be declared in the system. The consequences of that would be that unless the user had PIC for doing research on an commodity, disclosure of so-called commodities in IP claims would allow the provider countries or other parties with an interest in the matter to identify potential misuse of commodities as GRs. The Delegation recognized that commodities were not GRs. They were for eating, making clothes and other utilitarian purposes. But if commodities were used for research and development, they would become GRs and would fall under the scope of ABS legislation.

263. The representative of CAPAJ pointed out that it was preferable to give no room for exceptions and limitations, as there was no clear answer on who would be qualifying and decide upon the applicability of the exceptions in particular cases. Patent offices, because of their administrative nature, would not be qualified. The compulsory character of the disclosure requirement should in all cases prevail.

264. The Delegation of South Africa reminded that the relevant acts in its country included commodities within the scope of its mandatory disclosure requirement. It put forward the example of the rooibos tea industry which had to comply with the disclosure of the commodities and TK involved in the development of their products, and finalize ABS agreements accordingly. It expressed support for the statement made by the Delegation of Namibia regarding the only exception that might be justified, namely in case of overriding public interest.

265. The Delegation of Egypt pointed out that Article 4.1(b) regarding derivatives would open the door quite widely for biopiracy. It reminded that derivatives were natural part of GRs according to the definition provided by document WIPO/GRTKF/IC/29/4. The same was true of Article 4.1(c) regarding commodities, since there could be GRs or TK behind the use of commodities. Regarding Article 4.1(d), the Delegation recalled that the protection of a particular TK that was publicly available would only elapse after a certain period of time, as agreed upon internationally. Therefore, the exception as envisaged under Article 4.1(d) could not have any effect without knowing the date at which the particular TK would fall into the public domain. The Delegation said that Article 4.1(f) and Article 4.2 were in contradiction between each other. Article 4.1(f) set up a date, while Article 4.2 put forward other dates. It reminded that its country had a national legislation on disclosure that would have in any event preceded any forthcoming instrument.

266. The Delegation of the United States of America reminded the Committee that its country did not have a disclosure requirement and that it did not support such requirement. Nevertheless, it was still thinking through the exceptions and limitations as drafted. It asked that all of these exceptions and limitations remain in document WIPO/GRTKF/IC/29/4 at this stage, as potential safeguards.

267. The Delegation of India aligned itself with the statements made by the Delegations of Namibia and South Africa that the only exception that should be kept should be the one that meet an overriding public interest. Following up on the statements made by the Delegation of Namibia on commodities, it referred to the Biodiversity Act of India which provided that products

which were normally traded as commodities were kept out of it, which meant in practice commodities that were not used as GRs for research purposes.

268. The Delegation of Nigeria aligned itself with the statements made by the Delegations of South Africa, Namibia and India regarding exceptions and limitations. The exceptions and limitations that were listed under Article 4 ought not to apply, while there should be a window in case of an overriding public interest at the discretion of the national governments.

269. The Delegation of the EU, speaking on behalf of the EU and its Member States, wished to keep all exceptions in Article 4 in document WIPO/GRTKF/IC/29/4, especially as there were diverging views on the scope and modalities of the disclosure requirement. The Delegation noted that derivatives were included in Article 4 and that this issue was a very problematic one.

270. The Delegation of Argentina said that the authorities in its country were still analyzing the issue of exceptions and limitations. The Delegation was not clear with the wording, particularly as far as the commodities were concerned. It felt also that TK in the public domain should be defined more clearly. For the time being, it wished that the text remained as it was.

271. The Chair reminded that the issue of TK in the public domain would be one of the key issues for the IGC to discuss during sessions focusing on TK.

272. The Delegation of China addressed three aspects regarding the issue of exceptions and limitations. Firstly, it wished to express its reservations as far as TK was concerned in Article 4. It agreed that there was a need first to clearly define the scope of TK protection. To narrow too much the scope of protection of TK in Article 4 before the Committee defined the regime of protection for TK, what the present wording of Article 4 might imply would impact its full protection negatively. The Delegation noted that some instances of TK had a long history that had involved wide dissemination, and some of them had even been documented. It acknowledged therefore that the first access to that kind of TK could have taken place through the public domain. However, TK kept within local communities and TK holders constituted part of their livelihood as well as a foundation for further innovation. The Delegation reminded that TK owners also provided momentum for the constant development of TK. It believed therefore that TK should not lose its eligibility for protection, just because it had been documented and published. Protection should be decided on a case-by-case basis, providing for a different scope of protection in accordance with the different cases of TK. In this way, a balance would be stricken between TK protection and TK utilization. A flexible treatment of TK would help to realize the objectives of the IGC's work. Secondly, the Delegation of China addressed the issue of human GRs. The Delegation was aware that the CBD did not apply to the protection of human GRs. But it nevertheless believed that this should not prevent the IGC from holding a discussion of this issue. It was of the view that the access and utilization of human GRs needed to be subjected to norms. This aspect should therefore be submitted to the Committee's consideration. The exclusion of human GRs from the forthcoming instrument needed to be discussed with upmost precaution. Thirdly, the Delegation noted that the items listed under Article 4 did not have the same statute. Some exceptions could be due to the fact there was no need to protect the items involved. Some other exceptions derived from conventions that had settled them. Those should not be reopened for discussion at the IGC. Some other items should simply not be included at all. The Delegation proposed therefore that the Committee take into account the different contexts and rationales behind each limitation and exercise caution over all the exceptions and limitations as proposed.

273. The Chair asked the Delegation of China whether the relevant legislation on disclosure in China provided for exceptions and limitations.

274. The Delegation of China said that the third modification of the patent law included GRs and disclosure of the origin or source of GRs. As it was a new requirement for applicants, TK was not included in the law. But adjustments might be brought into the disclosure regime in the future, based on the experience that China would gather in implementing the present regime.

275. The representative of ICC reiterated his position that there should be no disclosure requirement at all in the first place. He noted that some delegations had put forward the public interest as a basis for reducing its scope. He observed that, as far as the ICC was concerned, there was certainly a general public interest at stake, namely freedom. He noted that the majority of the limitations as drafted, perhaps all of them, were meant to increase the freedom to do research. The right to do research, which was presently criminalized in many circumstances as indicated by the Delegation of Namibia, was crucial and should not be limited. Would the Committee decide there should be a disclosure requirement, exceptions of this sort should certainly not be abandoned.

276. The Delegation of the Plurinational State of Bolivia supported the proposal made by the Delegation of China that each of the exceptions and limitations as listed in Article 4 should be considered individually, since each of them had different characteristics. For example, the Delegation would not consider derivatives as an exception, as most of the developing countries requested that they should be included. The Delegation considered as well that TK which was publicly available would not *per se* pertain to the public domain. TK remained part of a community and consequently owned by a community, even it would become publicly available. The exclusion of human pathogens needed also to be reviewed carefully, particularly in the light of the international regulations issued by WHO on pathogens. The Delegation reminded that there were requirements for disclosing the origin of a pathogen, if it was to be used in the elaboration of a drug. There were other TK aspects which should also be considered in the same light.

277. The Delegation of Namibia responded to the point made by the representative of ICC. It wished to correct the potential and mistaken impression created that the Delegation considered any form of research to have been criminalized, beyond the fact that certain kinds of research had indeed been criminalized. The freedom to research was undoubtedly a great public good and a great contribution to the progress of humanity in getting rid of many of its worst problems. Freedom to research was essential for the future which was getting more and more compressed by climate change, population growth, food security issues, etc, but there had always been limitations. The Delegation reminded that research on humans was not allowed without permits. The idea that freedom to research was absolute was mistaken. Limitations that were put on research had a public interest rationale. As far as research into GRs and associated TK was concerned, the question was not outlawing research. It was about ensuring that research complied with national ABS legislation and contributed their fair share to biological diversity and traditional lifestyles embodying TK. It was about ensuring that researchers respected the sovereign rights of nations. The Delegation emphasized that its country was very much in favor of facilitating research, increasing access to resources and subsidizing research, as public subsidy to academic research was actually today a very much bigger driver of innovation than private sector investment in research, at least to its understanding. The Delegation added that typically the private sector would take publicly funded research and then do what the private sector did best, which was to manage IPRs, marketing, branding, distribution, manufacturing, making money and paying dividends to shareholders, which was a proper role for the private sector to play. The private sector did invest in late stage research in many industries, where very promising leads had clear prospects to commercialization. The Delegation reiterated that its country was not against research and did not believe that research should be outlawed. But it was of the view that research should be legally controlled in the public interest.

278. The representative of SPC believed that the new disclosure requirements should not be seen as limiting the rights to do more research, in the sense that disclosure was already part of the patent law system. A new disclosure requirement would only enhance the spirit behind the patent law system. Furthermore, such requirement would bring in transparency. Such requirement fell in line with the spirit behind the negotiations and the interests of the GRs and TK owners.

279. The Chair closed the discussion on exceptions and limitations. He invited participants to consider the language suggested by the facilitators earlier on policy objectives and subject matter. He invited the facilitators to review the discussion that had been held on the other core issues so far, in order to distill that, make some commentary on it and consider whether they could come forward with some suggestions that might enable the Committee to get consensus on key issues, or at least narrow the gaps within the core issues.

280. The Delegation of the Plurinational State of Bolivia observed that some parts of document WIPO/GRTKF/IC/29/4 had not been dealt with yet, and in particular Article 3.5. It asked the Chair when those would be dealt with.

281. The Chair reminded that the agreement as far the working method was concerned, was to frame the discussion within the list of core issues with the view to reaching a common understanding. As far as Article 3.5 was concerned, he understood that this was an important issue for the Delegation of the Plurinational State of Bolivia. He would open the floor for the Delegation of the Plurinational State of Bolivia to address this item at a later stage. The Chair suspended the plenary.

282. [Note from the Secretariat: The next discussion took place on the following day, February 17, 2016]: The Chair reopened the plenary and stated that after a year's break, there was a need for delegations to "warm up" and start discussing in more detail the core issues. A good exchange of views had taken place and, importantly, the dialogue had shifted away from simply restating well known positions and had started to narrow gaps in some areas. However, there were a number of outstanding issues that the Committee had yet to reach a common position on, such as the determination of the subject matter and the question of derivatives. The facilitators had attempted to capture the essence of Member States' views in concise text which would hopefully focus discussions. On objectives, the gap had been narrowed, as reflected in the facilitator's text, but there was still a need for a common understanding. In relation to disclosure, there was support of many Member States for some form of mandatory disclosure. However, a number of countries remained to be convinced of the merits of such an approach and this was also reflected in the comments from the industry observers. From the perspective of the countries supporting disclosure, there was general consensus that the obligation to disclose should be mandatory. In addition, the gap had also been narrowed in relation to the content of disclosure and to how an IP office would deal with that disclosure. A healthy discussion had taken place on the definition of "source" in the list of terms of document WIPO/GRTKF/IC/29/4 and the facilitators would have to reflect on that. An additional issue that remained outstanding with respect to Article 3 of document WIPO/GRTKF/IC/29/4 was the relationship with ABS requirements, but the Chair noted that that issue would be dealt with later on as one of the core issue that was reflected in his list. As requested by the Delegation of the Plurinational State of Bolivia, the intent of Article 3.5 would need to be considered. In relation to exceptions and limitations, the Committee had not been able to narrow the gap, though it had discussed a new concept in relation to public interest. This remained an outstanding issue. The facilitators would reflect the previous day's work in a revised text which they would present to Member States for full consideration. The Chair noted that the definition of misappropriation was an issue that had been reflected in the mandate and that had not yet been discussed. Sufficient time would be provided for that discussion. He further noted that there were currently two definitions reflected in document WIPO/GRTKF/IC/29/4 and asked that delegations review

these options before a discussion on misappropriation would take place. In moving forward, the Chair proposed that the Committee should continue discussing core issues in plenary. The next core issue was the important issue of sanctions and remedies. The Committee had already had many discussions on this issue over the past years. It was a key area where policy interests intersected, particularly in relation to legal certainty, impact on industry investment decisions and potential economic returns for the owners and users of GRs. He asked the Committee to carefully consider the policy consequences of their positions and stressed that it would be important to hear from countries what their approach was in this area and what the national experience was. He recalled that the mandate of the Committee was to focus on core issues and on trying to come to a common understanding.

283. [Note from the Secretariat: The Vice-Chair, Mr. Jukka Liedes, was chairing the session at this point]. The Vice-Chair thanked the Committee for its confidence in him and for electing him as Vice-Chair. He was committed to assist the IGC and the Chair to get good results during the session. In previous days, the Chair had set a standard for the working of the Committee and delegations' interventions had been short and concise. In addition, the Committee had been able to tackle several substantive issues during one day, having a meaningful debate on each item. The next item that needed to be discussed was the consequence of non-compliance. The Vice-Chair opened the floor for discussion.

284. The Delegation of Brazil understood that the Committee's work during the week was based on two pillars, the establishment of the mandatory disclosure requirement on GRs, and the existence of effective sanctions that allowed that obligation to be fulfilled. In this respect, as regards sanctions and remedies, it believed that the national law of every country had to have appropriate sanctions linked to the implementation of mandatory disclosure requirement, whether those were pre-grant, post-grant or sanctions outside of the system. The Delegation supported any national legislation that went in the direction of appropriate sanctions and that had a proportionate approach to specific breaches of national law.

285. The Delegation of the EU, speaking on behalf of the EU and its Member States, stressed that if a patent applicant failed or refused to declare the required information, and despite having been given the opportunity to remedy that omission continued to do so, the application should not be further processed. If the information provided was incorrect or incomplete, effective proportionate and dissuasive sanctions had to be emphasized outside of the field of patent law. For reasons of legal certainty, the submission of incorrect or incomplete information should not have any effect on the validity of the granted patent or on its enforceability against patent infringers. The Delegation believed that revocation of patents could not be a sanction. Moreover, revocation of a patent was an extremely strong penalty and one which not only undermined legal certainty, but ran counter to policy objectives, namely to enhance transparency in the patent system within the WIPO framework and to protect innovation in order to facilitate the possibility of ABS.

286. The Delegation of Australia was interested in hearing views from other delegations regarding sanctions, and specifically whether they found that the publication of judicial rulings regarding a failure to disclose had been an adequate sanction. The Delegation found from its national experience that publicity regarding the activities of patentees, patent owners and commercial operators that were not following best practice could be a powerful force. There were instances in media reports of cosmetic companies not being able to engage or not willing to engage in good faith with concerned parties in Australia, and as a result that had affected their reputation in the Australian market and brought the attention of other regulators to the issue. The Delegation considered that as a post-grant sanction, the publication and naming of patentees that failed to exercise best practice was quite a dissuasive sanction. It supported the statement of the Delegation of the EU, on behalf of the EU and its Member States, that revocation of a patent would undermine the opportunity to share benefits. It would have the

perverse outcome of putting innovations based on GRs and TK into the public domain and allowing anyone to use them without payment. The Delegation wanted to avoid the knowledge of indigenous peoples becoming available for others to use without their control, particularly when they could actually have an interest in working with the patentee and collaborating with them for mutual benefit.

287. The representative of Tupaj Amaru hoped that the Vice-Chair would be open to the views of indigenous peoples. The representative stressed that sanctions had to be discussed in the context of a legally binding instrument and not a mere declaration. He endorsed the statement made by the Delegation of Brazil but could not support the proposals made by the Delegation of the EU, on behalf of the EU and its Member States. The representative believed that countries had to establish appropriate and effective legal and administrative measures to address non-compliance with Article 3.1.

288. The Delegation of Nigeria asked for clarifications on pre-grant and post-grant sanctions. On pre-grant sanctions, it was not clear, although it seemed to be presumed, whether the suggested measures would be initiated by patent offices or relevant IP rights offices. On post-grant sanctions, it was also not clear who would have responsibility for initiating them. Given the fact that misappropriation or so called "biopiracy" always happened in the context of unequal power relations, the Delegation wondered whether it was up to big corporations to litigate against indigenous and local communities or it was more appropriate for states to take the responsibility to prevent misappropriation and be proactive in terms of post-grant sanctions. The Delegation disagreed with the Delegation of the EU, on behalf of the EU and its Member States, on the issue of revocation. It insisted that revocation was still an option in appropriate cases, while it accepted that there could be instances where disclosures had been made in error and it was left to the national system to sort this out. Further, the Delegation also disagreed with the suggestion of the Delegation of the EU, speaking on behalf of the EU and its Member States, that revocation would undermine ABS, and was rather of the opinion that ABS would be enhanced.

289. The Delegation of Switzerland believed that a distinction should be made between pre-grant and post-grant sanctions. Pre-grant sanctions concerned the processing of the patent application. If the patent application did not contain the required disclosure, the processing of the patent application was stopped. If a defect was not corrected within the deadline set by the patent office, the application was rejected. Post-grant sanctions applied once the patent had been granted. If an intentional wrongful disclosure of source had been found, criminal sanctions such as fines would apply. Moreover, a judge should be able to order the publication of the ruling. In this regard, the Delegation shared the views expressed by the Delegation of Australia. However, as mentioned by other delegations, the Delegation believed that revocation of granted patents should not be available. Revocation would destroy the very basis for benefit-sharing, the facilitation of which was the objective of the disclosure requirement by increasing transparency. In addition, revocation would also contradict legal certainty.

290. The Delegation of India wished to make a number of comments. Firstly, it asked for clarification on the comment made by the Delegation of Australia about the consequences of revocation and, in particular, the argument that revocation would not result in benefit-sharing when there was wrongful disclosure of the source of the biological material. It noted that if a patent holder wanted to deceive the providers of GRs by wrongfully mentioning the source and his intention was mala fide, it was questionable whether such a person would agree to benefit-sharing or could be expected to share benefits in any case. Additionally, the Delegation contested the argument that revocation would put TK in the public domain. Secondly, the Delegation referred to the problem that provider countries faced in respect of the very wide scale misappropriation of GRs and associated TK. Unless there were strong deterrents there would not be an adequate solution to the problem. In this respect, it recalled that India had a

provision for revocation of patents. The Delegation supported the statements made by the Delegations of Nigeria and Brazil. As indicated by the Delegation of Nigeria, there were vastly unequal players in the business. There were large companies who were involved in extracting resources from extremely poor providers of resources, local communities, and unless there were strong deterrents against these large companies, a proper solution could not be found. Revocation was not the only option available. It was the ultimate penalty that was part of a vast array of options available. There were other lesser penalties that could be thought of first. Finally, referring to the statements made by the Delegations of Australia and the EU, on behalf of the EU and its Member States, on the fact that patent revocation would affect innovation and R&D, the Delegation requested them to consider from the perspective of the local communities and the small providers, who had kept all the resources in the place for millions of years for future generations to actually access to the resources.

291. The Delegation of South Africa stressed that minimum standards needed to be established when dealing with sanctions and remedies. Article 6.1 was a minimum standard that highlighted the role to be played by national legislation in the execution of sanctions and remedies. The Delegation urged the Committee to accept the known fact that there would be people who would not follow the prescribed rules, and that it was therefore important to find a common approach on sanctions and remedies, given the existence of different interests, whether those were the prevention of the erroneous granting of patents or misappropriation. A minimum standard would need to be found and the chapeau attempted to do that in Article 6.1. Articles 6.1(a) and (b) covered pre-grant and post-grant sanctions. On pre-grant sanctions, the Delegation agreed with the Delegation of Switzerland that when the required criteria were not fulfilled, the application did not proceed. In the case where a patent had already been granted, it agreed with the Delegation of Australia on the use of the publication of judicial rulings regarding a failure to disclose. The Delegation suggested that there could be a list of repeat offenders on the WIPO website. However, it indicated that a determination of the specific nature of sanctions, including the revocation of a patent should fall in the jurisdiction of the national legislation. There had to be an agreement on minimum standards, while the rest would be determined at the national level and in national courts. Therefore, at that stage the question that the Delegation of Australia had raised fell out as it would be a matter for each sovereign country to determine how the minimum standards were met. The Delegation pointed out that its country provided for revocation and also had a dispute resolution mechanism which could be used even before a decision had to be taken on the revocation of a patent. The Delegation indicated that Article 6.2 was an oxymoron as it was not possible to say that people had committed an offense and then not punish them. Article 6.2 did not create a balance. Finally, it supported the statement made by the Delegations of India and Nigeria, that there had to be a balance between the users and holders of the knowledge and it pointed that the national legislation and national judicial systems should fill that gap.

292. The representative of Tulalip Tribes supported the statements made by the Delegations of South Africa, Nigeria, India and Brazil. The Delegation of India, in particular, had expressed most of his thoughts. He did not agree with the view that revocation had to be taken off the table. Revocation should only be used in the rarest of cases. With a well-functioning disclosure mechanism, revocation would be extremely rare, because the application would have to indicate where the GRs came from and whether the TK had been validly acquired. Other remedies were available in case of innocent trespass. However, a system where revocation was not possible was the equivalent of a license to steal. In such a system, a corporation that would never be faced with the potential revocation of its patent could make the calculation that the compensation price was only a minor price to pay. He agreed with the Delegation of Australia that reputation was going to be a big issue and would stop a lot of the potential mischief on the applications. Any company that really cared about its investors was not going to put them under that liability and risk. Nonetheless, when some corporation had developed something by using willful misrepresentation and had laid on its application, in those cases of willful mischief,

revocation had to be one of the sanctions available. On the issue of the TK, the representative believed that there were other parts of the Committee's negotiations that would protect TK, should a patent be revoked.

293. The Delegation of Barbados highlighted, as indicated by the Delegation of South Africa, the need to distinguish between pre-grant remedies, that would be available through the IP offices, and post-grant remedies, available through the courts. The issue of revocation had to be left on the table, and would depend on the nature and the extent of the evidence that was tendered before the courts. Post-grant remedies would be enshrined in national legislations.

294. The Delegation of Egypt pointed out that when the text in front of the Committee would become a legally binding instrument, it would be an important instrument for national legislators, who could then simply provide a list of possible sanctions. The Delegation reasserted the fact that disclosure was one of the prerequisites and an essential condition of a patent application. If the applicant had not disclosed the source, the patent application would not be complete and would not have met the prerequisites and the application would be considered void. The patent would therefore not be granted. As far as post-grant sanctions were concerned, if the conditions of disclosure and the general legal principles had not been respected, there would have to be revocation. Such a provision had been included in many national legislations, including Egypt. The Delegation noted that Article 6.2 was almost a reward for non-disclosure, because it enabled an applicant not to disclose yet to remain unpunished.

295. The Delegation of the USA noted that discussions of sanctions and remedies had not been identified in the mandate as the focus of the Committee's work. Its comments on that topic would be brief, so that the Committee could focus on the topics that had been identified in the mandate. It noted that there had been no agreement the previous day that a disclosure requirement should be mandatory. The Delegation did not support a disclosure requirement, but if there was one it urged that it be voluntary. It did not support paragraph 6.1, which mandated a disclosure requirement. It did not believe that a disclosure requirement was a reasonable formality and it believed that preventing the processing of a patent application or invalidating a patent raised concerns with consistency with international agreements. However, it recognized the importance of applicants being given an opportunity to be informed of, and to correct mistakes. It suggested that the text be revised to include the following language: "Member States should put in place appropriate, effective and proportionate legal and administrative measures to address non-compliance with Article 3.1. Subject to national legislation, such measures may consist of: (1) providing an opportunity to meet the disclosure requirement before the grant of a patent in response to a communication from the intellectual property office indicating that disclosure appears appropriate; (2) allowing a patentee to request correction of the patent to add a required disclosure; (3) allowing third parties to dispute the validity of a patent by submitting prior art with regard to inventions that include genetic resources and associated traditional knowledge". The Delegation did not support a mandatory disclosure requirement and believed that to use the patent system to enforce other laws was inappropriate. It recognized that countries could impose reasonable formalities upon the grant of patent rights, but it was not reasonable to require proof of compliance with a law outside of the IP system, such as the payment of business taxes, compliance with a bioprospecting permit requirement or infringement of an earlier patent or copyright. Any failure to comply with those other laws could not affect the validity or enforcement of a patent. The Delegation believed that if an IP office delayed the processing of a patent application, the duration of the patent term had to be extended. It requested the addition of the following language: "Failure to examine a patent application in a timely manner should result in an adjustment of the term of the patent to compensate the patentee for delays". The Delegation supported the submission of the Delegation of the EU, on behalf of the EU and its Member States, that sanctions could not include invalidity or revocation, as such sanctions would, among other things, be contrary to its policy objectives of promoting legal certainty and supporting innovation. Regarding the

question raised by the Delegation of India, it indicated that without a patent, a company would have no property interest to obtain investments necessary to develop new products and would stop the research and development process; and with no product generating revenue, there would be no benefits and thus no benefits to share.

296. The Delegation of Namibia supported the statement made by the Delegation of Brazil that sanctions and remedies would be for national governments to determine at a national level. It also aligned itself with the Delegation of South Africa with respect to the distinction between pre-grant and post-grant sanctions and the importance of keeping those in mind. It believed that the establishment of an effective mandatory disclosure provision would result in very little need for post-grant sanctions and remedies. It favored an administrative penalty in the pre-grants stages of the procedure to the effect that the application would not be further processed, as pointed out by the Delegation of Switzerland and others. The Delegation was not keen on the idea of revocation and believed that sanctions and remedies had to be determined at the national level. It did, however, recognize that there could be cases under national law where revocation of the IP right would be the only way of serving justice and it believed that that had to be left open to national discretion and should be for very extreme cases only. If that was the case, it wondered whether there could be some way to avoid the entrance into the public domain of the subject matter of the patent, which was its biggest objection to revoking a patent. If the subject matter of the patent were to enter the public domain, it would lose a great deal of its value, if not all value. A much more reasonable alternative to revocation was to have a mechanism where the patent rights could be assigned to the provider of GRs or TK, so that the person who had fraudulently declared would lose control over that patent, but the validity of the patent itself would be preserved and the right to that invention would go to the people who had been wronged by the wrongful declaration. As indicated by the Delegation of South Africa, some of the more extreme remedies and sanctions could be avoided by having in place a functioning and reasonable dispute resolution mechanism.

297. Ms. Bagley, speaking on behalf of both the facilitators, asked the Delegation of Brazil to clarify whether its position on sanctions and remedies was that sanctions and remedies had to be left to national law.

298. The Delegation of Brazil explained that the main objective was to have sanctions that would be effective in implementing the mandatory disclosure requirement. The division between pre-grant and post-grant sanctions was acceptable to the Delegation. It believed that extreme sanctions had to be allowed, as indicated by the Delegations of Nigeria, South Africa, India, Namibia, as well as by a number of observers. It was important to allow for policy space in national legislation and for the possibility to have extreme sanctions in cases of extreme failures to comply with ABS systems. Regarding the question raised by the Delegation of Australia on the publication of judicial rulings when there was a failure to disclose, the Delegation noted that in its country judicial rulings were made public as a general rule. It asked for clarification as to whether the idea was to have a list of offenders that would be publicly available or just to publish individual judicial rulings. It considered the issue of compensation to be the most important part of a ruling. A ruling that said that there was no compliance to the system or to the mandatory disclosure requirement would not reach the goal of fair benefit-sharing. The Delegation sought clarification regarding the proposal of text made by the Delegation of the United States of America. It understood that that proposal related to Article 7 rather than to Article 6. It sought clarification in that respect and stated that it could not go along with that proposal.

299. The Delegation of Australia noted that there seemed to be agreement amongst the proponents of disclosure on Article 6.1(a). It welcomed the drafting suggestions put forward by the Delegation of the United States of America, which appeared to embody the principles of national justice and democracy. It was interested to hear about the national experience of the

United States of America with stakeholders, including indigenous peoples, on those matters. The Delegation thanked the Delegation of India for its questions and observations. It recognized the ancient custodians and developers of GRs and TK. Regarding the question of TK being moved to the public domain, it apologized for the lack of clarity of its comment and for using the term “public domain” which was not well understood for the subject matter at hand. What it had meant was that the claimed invention would no longer be the subject of a monopoly. Regarding the observation about *mala fide* applicants, the discussion had distinguished between the bad faith applicant from the confused applicant dealing with a law it was not familiar with or the applicant with poor filing practices. Hefty sanctions had to be proportionate to the wrong. Under Australian law, revocation of a patent was not off the table in appropriate circumstances. It provided for revocation of a patent when it had been obtained by fraud, false suggestion or misrepresentation. In accordance with Article 32 of the TRIPS Agreement, an opportunity for judicial review of that decision was available. In accordance also with the Australia-USA free trade agreement, each party had to provide that a patent could only be revoked on grounds that would have justified a refusal to grant the patent or on the basis of fraud, misrepresentation or inequitable conduct. Australia needed to look at internally what was meant by its law when it said that a patent was obtained by fraud. It was keen for a formalities disclosure requirement and not a substantive requirement of patentability. The Delegation asked the Delegation of India if it could clarify how its law on revocation worked. That discussion could happen bilaterally. The Delegation extended an invitation to other delegations that had revocation as a sanction linked to a failure to disclose to join in that discussion for the benefit of sharing information with each other.

300. The Delegation of Norway believed that where an applicant failed to fulfill a disclosure requirement, even after having been encouraged to do so, this could lead to the application not being further processed or considered withdrawn with the result that no patent was granted. However, where a patent had already been granted, a failure to disclose should not affect the validity of a patent or leave a granted patent unenforceable. One of the aims behind a disclosure requirement was to make sure that information on use of GRs and associated TK was made known and could be used to ensure that the requirements of PIC and ABS regimes were respected. If failure to disclose were to lead to invalidity of patents, the result would be the exclusion of any benefit-sharing, as without a valid patent there would be no benefits to share. That would not be in the interest of any of the parties or society at large. If information on the use of GRs and TK showed that a granted patent should not have been granted in the first place, for example, because it was not novel or did not include an inventive step, that could lead to revocation. In those cases, invalidity was a result of the lack of fulfillment of the patentability requirements and not a result of failure to disclose, and, therefore, had to be excluded from the sanctions connected to the disclosure requirement. Possible post-grant sanctions should be limited to civil and criminal penalties, such as fines or other sanctions for fraudulent behavior or for giving the wrongful information. The Delegation could also support the option of naming and shaming by making public those actors that had failed to disclose. It believed that the mentioned sanctions would strike a fair balance between all interests of the parties and would ensure proper incentives for applicants to respect the disclosure requirement and ensure transparency, without making ABS regimes ineffective.

301. The Delegation of Ghana aligned itself with the submissions made by the Delegations of Nigeria and India, on revocation. While the penalty could be harsh, it had to be applied sparingly. Maintaining it would be an effective deterrent. It was a basic principle in law that remedies had, to the extent possible, to put the parties in the same position they were before the illegal conduct or harm had occurred, and that was precisely what revocation would do. Contrary to the suggestion made by other delegations, including the Delegation of Australia, revocation would facilitate and in fact render very effective the concerns that had been expressed regarding ABS. It would put the parties, including the right holders in the position they had been before the illegal conduct had occurred and would allow the rightful owners, if

they so wished, to enter into an arrangement for the mutual sharing of benefits. In that sense, it would not be contrary, but would simply be supportive, of the concerns expressed for ABS. The Delegation disagreed with the suggestion made that the issue of sanctions ought not to be taken up by the Committee, because it would fall outside of the scope of the IGC's mandate. It recalled the decision of the GA on the IGC which stated that "The Committee will, during the next budgetary biennium 2016/2017, continue to expedite its work, with a focus on narrowing existing gaps, with open and full engagement, including text-based negotiations, with the objective of reaching an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs)". It did not see how that mandate would not include a discussion on document WIPO/GRTKF/IC/29/4 regarding sanctions.

302. The representative of HEP stressed that appropriate sanctions had to be available and applied. She pointed out that, in the case of patents being revoked, it would be very difficult to identify who the knowledge holders were. She wondered if a special tribunal or instance would be established to handle such revocations. She emphasized the importance of transparency and urged the Committee to act within the short timeframe that was at its disposal. She believed that document WIPO/GRTKF/IC/29/4 had to be simplified and had to include minimum standards, so that people would know what sort of remedies were available.

303. The Delegation of Brazil indicated that many delegations seemed to understand that without a patent there would be no benefit-sharing. Its own understanding was that benefit-sharing went beyond the patent, as commercialization could also include benefit-sharing. It was not correct to say that the possibility of having revocation would undermine benefit-sharing. It reiterated its question regarding the publications of judicial rulings. It wondered whether the idea was to allow the publication of judicial rulings, which were already public anyway in many countries, or to make available a naming and shaming list of offenders.

304. The Delegation of Ethiopia supported the statements made by the Delegations of South Africa, India, Namibia and Ghana. It was important that sanctions be available in cases of failure to disclose. IP offices had to be given the authority to delay the processing of IP applications or to consider such applications withdrawn when the required information had not been provided in a timely manner. The Delegation supported the idea of transferring the IP right of a person who had not complied with the disclosure requirement to the rightful owners before resorting to revocation. It was also willing to explore the idea of a dispute resolution mechanism that would prevent the rights from entering into the public domain. The Delegation concurred with the Delegation of South Africa, that the draft articles had to provide for minimum standards, which would provide enough room for states to bring a wide range of measures at the national level. Ethiopian laws provided a range of measures and sanctions, ranging from cancellation to revocation and other measures. Revocation was required in instances of misappropriation of GRs and TK associated with GRs.

305. The Delegation of Canada mentioned that its country did not have a mandatory disclosure requirement. It shared the concerns that had been expressed by the Delegations of the EU, speaking on behalf of the EU and its Member States, Switzerland, the USA and Norway, that revocation of a patent would create uncertainty and potentially have a negative impact on innovation. As the Delegation of Australia, it wished to hear the experience of other countries that had revocation as a sanction. It had been stated that revocation was extraordinary and rarely used. The Delegation wished to know whether other measures had been considered and used prior to revocation, and if revocation were to be used, what the circumstances of such use would be, when it would be applied, how often it would be used, and what impacts it would have in terms of innovation, research and development, and benefit-sharing.

306. The representative of CECIDE urged delegations to put aside their political differences, so as to make progress by the closure of the session. He endorsed the statements made by the Delegations of Brazil, India, Nigeria, South Africa and Namibia. Article 6.1(a) provided a general provision that was still insufficient to avoid repeated massive misappropriation. Revocation was the only way of guaranteeing the security and effectiveness of local communities and indigenous populations who were victims. Revocation also contributed to ensuring that justice was done to the victims. However, revocation had to be proportional to the damage caused.

307. The Delegation of Japan supported the statements made by the Delegations of the EU, speaking on behalf of the EU and its Member States, the United States of America and Canada. It noted that under Article 6.1, sanctions and remedies were provided on the premise of a mandatory disclosure requirement and it reiterated that such a requirement should not be introduced. The provision on sanctions could represent a burden for patent applicants and discourage R&D activities.

308. The representative of CAPAJ shared the experience of the system of pharmacopeia and herbal remedies practiced by IPLCs, making special reference to a community in the Andes. He stressed that that system was not governed as a business: The healers cured people on a non-profit basis. He highlighted the differences between that approach and the approach of the pharmaceutical industry. The issue at hand could not be dealt with by reaching an agreement on benefit-sharing and allowing misappropriation to go on. Those who were acting in bad faith had to be sanctioned.

309. Ms. Bagley, speaking on behalf of both the facilitators, referred to an earlier intervention of the Delegation of Namibia, that a reasonable alternative to revocation would be for patent rights to be assigned to the owner or provider of the TK or GRs, so that the patent would still remain valid and there would still be the possibility of benefits. She asked the Delegation of Namibia to clarify whether there was a provision to that effect in the law of Namibia and whether it could provide any example of situations where that had happened.

310. The Delegation of Namibia clarified that there was no provision to that effect in Namibian law and it was not aware of any situation where that had happened. It noted, however, that in IP law, it was one of the remedies available in case of patent infringement. It therefore seemed to be a reasonable provision to be introduced as an option. The Delegation supported the idea of publishing the judicial rulings and the idea of naming and shaming and pointed out that, in the African Union Guidelines for the Coordinated Implementation of the Nagoya Protocol in Africa, it was envisaged to start a regional database collecting that kind of information. The database would be made available to ABS and IP authorities in Africa, so as to avoid repeat offenders moving from one African country to the next and never getting caught. An additional measure that could be considered in situations where the identity of the provider of the TK and GRs was evident from the application and where the applicant refused to make a declaration of the original source, was for the IP office to inform the ABS authority in the country of origin, so that there could be follow up and authorities in the providing country could be informed that an attempt of biopiracy had been detected.

311. Ms. Bagley, speaking on behalf of both the facilitators, referred to an earlier intervention of the Delegation of Brazil, that in the case of revocation, there would still be a possibility of benefit-sharing if there was commercialization. She recalled that the Delegation of the United States of America had argued that the person obtaining a patent would no longer have an incentive to invest in commercialization or continue commercialization if they no longer had the exclusivity that the patent provided because the patent had been revoked. She asked the Delegation of Brazil to further clarify how benefit-sharing would occur if following revocation the patent holder no longer had an incentive.

312. The Delegation of Brazil explained that it had made a technical point and was not challenging discussions that were of a more philosophical nature, as to how the right holder or the applicant would feel. It reiterated that it was not accurate to say that without a patent there would be no benefit-sharing because benefit-sharing could take place in commercialization.

313. The representative of Tupaj Amaru believed that the proposal made by the Delegation of the United States of America would nullify Article 6.1, with the result that the instrument would not provide for appropriate sanctions and remedies, and pharmaceutical companies would be able to act with total impunity. The Committee had to work towards developing a legally binding instrument.

314. The Delegation of China supported the statements made by the Delegations of Brazil, India, Nigeria and South Africa. The purpose of Article 6 was not to apply sanctions or to create invalidation; it was to regulate the access to and use of GRs. Serious consequences such as revocation would actually only apply to a small number of cases. If access to and use of GRs was made in conformity with the requirements of international instruments and domestic laws, the granting of patents would not cause any problem. The Delegation believed that the provision of sanctions would not affect the certainty of the patent system.

315. The Delegation of the USA clarified that its proposed amendments related to Article 6, rather than to Article 7, in response to the question raised by the Delegation of Brazil. On the issue raised by the Delegation of Brazil of the possibility of benefit-sharing going beyond patent rights through commercialization, the Delegation stressed that if a patent was invalidated, development and commercialization might not proceed. For example, if a medicine was being sold, patent invalidation might cause a patent owner to withdraw from the market, and open the door to generic competition. In such a situation, it wondered how benefit-sharing would be obtained from those other producers. The Delegation thanked the Delegation of Brazil for pointing out that revocation was an extreme measure. Regarding a point that had been raised by the Delegation of Ghana, it noted that according to paragraph (b) of the IGC's mandate, the primary focus of the Committee's work was to reach a common understanding on core issues. By stating that the Committee had to focus on the core issues identified in the mandate, the Delegation had not excluded work on other issues, such as sanctions and remedies. With respect to the question raised by the Delegation of Australia, it indicated that consultations with indigenous peoples and other stakeholders were ongoing.

316. The Vice-Chair stated that the next core issue to be discussed was the trigger, that is, the relationship or link between the subject matter of disclosure and the claimed invention in order to trigger the application of a patent disclosure requirement, and he opened the floor for comments.

317. The Delegation of Australia supported formulations on trigger that created a very direct link between the claimed invention and the GRs and/or TK, whose provenance had to be disclosed. It provided two specific examples where it would have expected disclosure of provenance to be made. In both cases, disclosures had in fact been made within the patent documents, and the applicant had been able to provide the relevant information, but the disclosures had been lost within the patent documents and were not easily accessible. In the first case (patent US7259004), the patent was no longer maintained, and that had resulted in a failure for a pharmaceutical company to take the research from a University and turn it into a new antibiotic. In the second case (US8691300), there had been significant public relations damage in Australia, and intertribal conflict, because of a failure for the disclosure to be easily accessed. The Delegation invited interested delegations to consult and consider those documents during the week, hoping that they would help the IGC to reach agreement on a formulation.

318. The Delegation of the EU, speaking on behalf of the EU and its Member States, proposed that disclosure of the information be organized by including questions to be answered in the standard patent application form. The applicant could either give a negative or a positive response to the question whether the invention was directly based on GRs and, pending further discussions, TK associated with GRs. If the answer was negative, the applicant did not need to fulfill any other administrative requirement on that issue. A positive answer triggered the requirement to disclose the country of origin or source as foreseen. In the exceptional case that both the country of origin and the source were unknown to the applicant, that would have to be declared accordingly. On the connection between the material and the patented invention, the applicant should have used the GRs in the claimed invention. The applicant should have the possibility to disclose the material used in the invention in an adequate way, without having the obligation to make further research on the origin of the resource, and taking into account the interests of the applicant, the patent office and other stakeholders. A good balance could be found by requiring that the invention be directly based on the specific GRs and make immediate use of the GRs, in other words, depended on the specific properties of that resource. The inventor also had to have had physical access to the GRs by either having the GRs in their possession or by at least having had contact sufficient enough to identify the properties of the GRs relevant for the invention. The Delegation requested that a definition for the term “directly based on” be included in the list of terms.

319. The representative of ICC reiterated that he was opposed to any mandatory disclosure. One of the reasons for that was lack of clarity and the question of the nexus was an example of that lack of clarity. He noted that an invention based on tomatoes could be generic or specific. A specific invention only related to and was only obtainable from a specific variety of tomatoes, with which the inventor had done experiments. If it was general, on the other hand, the gene component that the invention related to was available in all tomatoes. He wondered whether the necessary nexus was only established in connection with the specific variety on which the inventor had done research, or on all varieties of tomatoes where it was in fact obtainable from.

320. The Delegation of Brazil stated that any patent that included utilization of GRs would have the obligation to disclose that GRs had been accessed according to their national law and their international obligations and that benefit-sharing obligations had been complied with. The term “utilization” had already been explained in the list of terms. That definition was a lot clearer than the proposal to use the expression “directly based on”. Even if there was a definition for the expression “directly based on”, the Delegation believed that it would create uncertainty for the patent applicant and add a subjective aspect to the trigger of the obligation. “Utilization” provided a very clear trigger and a clear threshold.

321. The Delegation of Nigeria supported the statement made by the Delegation of Brazil. A trigger would occur where there was an attempt to seek IP rights in the context of the use or utilization of GRs. Adding subjective words such as “directly based on” or “consciously derived from” would create uncertainty and lack of clarity.

322. The Delegation of the Plurinational State of Bolivia supported the statement made by the Delegation of Brazil. What was important in looking at the trigger was the GR itself. Words or concepts such as “directly based on” or “consciously derived from” were subjective and lacked clarity. In addition, their meaning could be construed in different ways. With reference to the statement made by the representative of ICC, the Delegation considered that it would be important to reflect on the issue of GRs that were patented that had specific origins in certain regions.

323. The Delegation of Namibia supported the idea that the trigger should be the “utilization of genetic resources” as defined in the Nagoya Protocol, in other words, to conduct research and

development on the genetic and/or biochemical composition of genetic resources. The Nagoya Protocol did not define “utilization of traditional knowledge”. The Delegation thought it could be worthwhile to have further discussion on the definition of that term in the TK section of the Committee’s work. It was also inclined to think that the country of origin or the country that had acquired the resources in accordance with the CBD would be the right place to get PIC for the utilization of the GRs. The Delegation noted that a lot of resources were very widely available nowadays and there could be some grey areas around that, but those would be sorted out quite easily through case law once the international legally binding instrument was enforced. With reference to the statement made by the Delegation of the EU, on behalf of the EU and its Member States, and its preference for the expressions “directly based on” and “physical access to the resource”, Namibia reiterated its earlier question regarding whether it deliberately sought to exclude cases where the access was not physical but based on information. If the answer to that question was yes, it would be a very important point to take up for further clarification, because the future utilization of GRs was very clearly one that had a major informational component. That issue had also been raised very widely in WHO, ITPGRFA and in the discussions of the Nagoya Protocol on Article 10. Given the proposed policy objectives of transparency and mutual supportiveness, it stressed that the issue of genetic information could not be ignored.

324. The representative of IPO stated that before a patent disclosure requirement could be triggered, there had to have been access. She provided a real life example of some of the difficulties that IPO members had faced with that aspect, which involved her own company, Eli Lilly and Company, an active member of IPO. The company’s patent group had received a request for a collaboration agreement with scientists from Cameroon involving a natural product that had a potential anti diabetes application. The company had reason to believe that there were national laws regulating ABS, but it could not find sufficient information to determine what it needed to do. The researcher in Cameroon was not aware of any local requirements, but, at the company’s request, agreed to investigate further. In an effort to obtain some guarantee that any contract it would enter into would be compliant with national law, the representative personally contacted the Cameroon national focal point and sent a letter in follow up to the initial contact. The research scientist in Cameroon sent the company a letter in appreciation for the good faith informing it that the Prime Minister’s office was forming an inter-ministerial committee of experts to resolve the requirements under the law. However, the company never received a response from the Government of Cameroon. It closed its files on that research collaboration a year after it had first tried to initiate it. If instead countries relied only on a system of patent disclosure, the company would not even have attempted to enter into that research collaboration. It would simply have stayed away rather than risking years of research efforts to such uncertainty. It was crucial for governments to facilitate collaborations rather than put systems in place such as patent disclosure requirements, which only served to discourage researchers.

325. The Delegation of Latvia, speaking on behalf of the CEBS, stated that there had to be a strong link between the invention and the GRs. The invention had to be directly based on the GRs and the inventor had to have had physical access to the GRs. The Delegation supported the proposal of the Delegation of the EU, on behalf of the EU and its Member States, on the inclusion of the expression “directly based on” in the list of terms.

326. The Delegation of the USA thanked the representative from IPO for her illuminating intervention on some of the challenges of disclosure requirements. It also thanked the Delegation of Australia for pointing out some patents that the Committee should take a look at. Additional patents for consideration included patents US3009235, US4814470, US5336785, and US7195628. They related to the Velcro and Taxol patents. With respect to trigger, the Delegation wished to know at what point the use of a GR was considered so widespread and well-known that disclosure was required. It supported the suggestion by the Delegation of

Namibia that more discussion was needed on the meaning of “utilization”. The information issue that had been raised also needed to be discussed. With respect to the information issue, it noted that there were approximately 11,000 patents related to the use of HeLa cells that had been obtained from a woman in its country back in the 1950s.

327. The Vice-Chair indicated that the next core issue to be discussed was the relationship with national and domestic ABS systems, and he opened the floor for discussion.

328. [Note from the Secretariat: The Chair was chairing the session again at that point.] The Delegation of Namibia recalled that discussions had taken place within the Nagoya Protocol on whether IP offices should become mandatory checkpoints. In the end those discussions were suspended and that option had not been included in the Nagoya Protocol, because the IGC had then moved on to text-based negotiations and the CBD realized it was not the right place to make IP law. Against that background, the Delegation was in favor of IP offices being made checkpoints for the ABS system. It believed that it would be a huge step forward and would really go a long way towards meeting the policy objective of transparency and of mutual supportiveness, if all IP offices could take on that obligation. Failing that, it suspected that many countries, predominantly developing countries but also some of the more progressive and fair minded developed countries, would, in fact, require at least through a mandatory disclosure provision that IP offices function as a checkpoint. Failing even that, it believed that the very minimum that should come out from the Committee’s negotiations was an administrative arrangement within the header section of IP applications where there was a disclosure of origin or source, so as to enable providers to use the information technology infrastructure underlying the international IP system to search for misappropriations or legitimate use of resources and TK that they had provided to users. The system was there and to change the database slightly would not be a burden and would constitute a huge benefit to the countries that were predominantly providers of GRs and TK. Its preference was for all IP offices to act as checkpoints, and for the international system to act as a checkpoint. It believed that many countries would make it a domestic option and, at the very least, that the information system had to be adapted to facilitate tracking and tracing by provider countries.

329. The Delegation of Norway did not oppose a notification procedure. It was in the process of considering whether its own IP office could be a checkpoint under the Nagoya Protocol and thereby notify the disclosed information it received to the related Clearing House Mechanism. It was, however, unsure of whether the IGC had the authority to regulate the activities of Clearing House Mechanisms established in other fora and it was uncertain of whether it was allowed to insert the second sentence of Article 3.3, thereby making or forcing the Clearing House Mechanisms to receive the information that they were not obliged to receive under their individual fora.

330. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported Article 3.3. It believed that a simple notification procedure should be introduced by the patent offices that received a declaration. That notification had to be as simple as possible and not lead to an unnecessary administrative burden for patent offices. The exchange of information had to be managed in a cost effective way and without unnecessary additional charges imposed on patent applicants. The Delegation did not support the inclusion of requirements relating to ABS, as that was being dealt with in separate systems and should not be duplicated at negotiations in WIPO. To include PIC and MAT in a patent disclosure requirement would change patent application procedures in a substantive manner resulting in different patentability criteria, which it did not support. The Delegation further indicated that the patent offices did not have the competence to assess those issues to the merits, and neither did they have the expertise for that. Therefore, it did not support the inclusion of requirements relating to ABS.

331. The Delegation of Brazil supported the statement made by the Delegation of Namibia that Article 3.3 was necessary and that IP offices should work as necessary checkpoints for the implementation of the international obligations of ABS. The Delegation also agreed with the first part of the intervention by the Delegation of the EU, speaking on behalf of the EU and its Member States, that the notification procedure had to be simple and cost effective. The Delegation asked for clarification from the Delegation of the EU, on behalf of the EU and its Member States, on whether it considered the idea of having IP offices as checkpoints to be a problem, since Article 3.3 did not go as far as mentioning many elements that had been mentioned in its intervention.

332. The Delegation of India supported the interventions made by the Delegations of Namibia and Brazil. It also supported the statement made by the Delegation of the EU, speaking on behalf of the EU and its Member States, regarding the need for a simple notification procedure. It was important to recognize the role of the patent/IP offices as mandatory checkpoints. Unless relevant information on disclosure was shared with the national competent authority implementing ABS legislation in different countries, that information would be of no use. It was important to recognize the role that patent offices would play in advancing the objective of preventing the misappropriation of GRs and associated TK.

333. The Delegation of Japan noted that the Nagoya Protocol gave flexibility to its contracting parties on the kind of measures they could take to ensure compliance. In that context, only certain countries had notified patent offices as checkpoints pursuant to Article 17 of the Nagoya Protocol. Japan was not a party to the Nagoya Protocol. The Delegation could not see the relationship between the patent system and ABS regimes.

334. The Chair noted the comment of the Delegation of Japan with respect to the Nagoya Protocol. Many Member States were in the process of considering their policy approach regarding the Nagoya Protocol or had already reached a decision on that point. He invited those Member States to share their national experiences if they so wished.

335. The Delegation of the USA did not support requirements for using IP offices to enforce other laws outside of the IP system. It requested information as to the purpose of such a declaration. Did such a declaration exist in practice, and if it did, how would it be used? The Delegation requested that Article 3.3 be bracketed. It believed that the notification procedure envisaged by that paragraph would be extremely burdensome, if not unworkable. It suggested the following wording as an alternative "Patent applications should be published by patent offices and the information associated therewith should be publicly accessible".

336. The Delegation of South Africa explained the simple procedure that was used in South Africa. In addition to a formal patent application, applicants also had to fill a simple form called P-26, and include information regarding the origin of the GRS and the TK that had been used. That information was shared with the Department of Environmental Affairs, which had the authority to provide access to the GRs. That information at both levels was confidential. The Delegation did not understand why it should be published and put in the public domain. The input provided by the Delegation of the United States of America would lead to the exposure of confidential material, which would put it in the public domain. Publications had to be precluded until the patent was granted.

337. The Delegation of Nigeria responded to the suggestion made by the Delegation of the United States of America regarding the over burdening of the patent system. The Delegation believed that the patent system was a malleable system. Historically, it had always adjusted to technological changes and to the realities of the time. Even with the advent of modern biotechnology, there had been a shifting and a recalibration of the patent system to respond to contemporary realities. It stressed that there was an opportunity and positive reasons for

change, hence a simple notification procedure should be introduced. It noted that attempts to reconcile the CBD and the IP system were ongoing.

338. The Delegation of Australia asked whether the Delegation of the United States of America was able to provide national experience or evidence regarding the unworkable or onerous burden that was reflected in Article 3.3.

339. The representative of South Center believed that there was consensus on the fact that the objective of Article 3.3 was to facilitate access to the content of the disclosure that was being provided to the IP offices, so that it could be accessible to others beyond the IP offices and to the public in particular.

340. The Chair closed the discussion on the relationship with national and domestic ABS systems. The Chair proposed to modify the list of core issues to include a core issue that was clearly articulated in the mandate, namely the definition of misappropriation. The Chair suspended the plenary.

341. The Chair reopened the plenary by indicating that the discussion of core issues would continue. He hoped that such discussion would be completed by the end of the day in order for the facilitators to take note of all of views expressed and present some proposals for members to consider. The first core issue to be discussed was the definition of misappropriation and there were two bracketed definitions within the list of terms in document WIPO/GRTKF/IC/29/4. The Chair asked whether any Member States had a preference or some way in which the definition could be narrowed in order to consider having one definition only.

342. The Delegation of the USA supported Option 2 and highlighted that it could not support Option 1 as that option was inconsistent with the dictionary definition of the word "misappropriation". The dictionary definition was as follows: "to take something such as money, dishonestly for your own use to appropriate something wrongly as by theft or embezzlement." It expressed its concern that the definition of misappropriation in Option 1 would discourage use of the patent system and would not encourage compliance with national legislation. In addition, such a provision would be difficult to implement. Patent examiners were not in a position to make a determination of whether that condition was met. If the examiner could not make the determination and the issue needed to be reviewed in litigation, an important cost would be the legal uncertainty created by that situation, which would devalue those patent applications. The value of a patent portfolio was important to all patent owners, in particular to small businesses. In order to protect their interests, it believed that approaches that did not impose unreasonable burdens upon the patent system should be explored first. Option 2 of the definition of the term "misappropriation" had been improved recently and it was important that the definition be kept circumscribed. Misappropriation was loosely used in the IGC. The Delegation felt it was necessary to have the term precisely defined, so as to make clear that misappropriation was a matter of violation of law. The sharing of national experiences was critical. It had heard several examples of the erroneous grant of patents, but very few specific examples of GRs that were taken in violation of national law. There were examples, however, where people had traveled somewhere to capture a rare insect such as a butterfly or rare animal in violation of national law. Usually, the objective of those crimes was not to promote knowledge and obtain a patent, but to make traditional medicine, jewelry or to have a trophy for the wall. It agreed that fighting biopiracy was important, but it could not be expected that biopirates would be deterred by requirements in the patent system. It noted that proprietary genetic material was commercially used by others without the consent of the owner of IP rights to the material. According to Option 1, the use of GRs protected by plant variety protection without the authorization of the plant breeder would be misappropriation. It believed that that definition was overly broad and that Option 2 should be considered instead. Option 2 was appropriately narrow in scope,

defining misappropriation of GRs consistently with misappropriation of other things or knowledge.

343. The Chair noted that there was a legal definition as well as a broader definition of “misappropriation” and asked the Delegation to share the source of the cited definition.

344. The Delegation of the United States of America responded that the source of the citation was the “Merriam Webster Dictionary”, which was available online at MerriamWebster.com.

345. The Delegation of Namibia recalled that “misappropriation” was actually introduced into the discussion as a euphemism for biopiracy. It noted that the dictionary definition of biopiracy was closer to the concept that was being discussed at the IGC. The key characteristic that defined misappropriation was the utilization of GRs, their derivatives and associated TK without PIC of those authorized to offer such consent, in accordance with national legislation where there was national legislation and in accordance with the rules of natural justice in cases where there was no national legislation. It favored Option 1 as a definition. It was very clear from Article 2 of the CBD that the idea that states had sovereign rights to their natural resources was not in fact something that was instituted or created by the CBD. That article confirmed that in accordance with the principles of the UN Charter, states had sovereign rights to their natural resources. Article 15 of the CBD implied that states had the right to grant PIC for access to GRs. The Nagoya Protocol went further and focused on the concept of “utilization” as it was contained in the third objective of the CBD. In its view, the key was utilization of GRs. The key was not physical access. The key was not where GRs were obtained from. The key was whether users had PIC for their utilization. For example, as regards *ex situ* collections that were collected for taxonomic purposes, such as botanical gardens or zoos, during the colonial period, there was never PIC from the rights-holders for their utilization as GRs. To take them and use them as GRs would be misappropriation. Collection holders that had legitimately collected seeds with permits for breeding purposes would be misappropriating those seeds if they were to use them for biotechnology purposes. Microorganisms collected for biotechnology purposes constituted a form of misappropriation. Ethnobotanical knowledge collected by researchers as a way of documenting the wisdom of IPLCs would be misappropriated, if it was mined by pharmaceutical companies for drug leads. In all those cases, the key was whether users had permission to use a GR the way they were using it. If they did not have such permission, that was misappropriation. The Delegation argued that it could never support the second part of Option 2. since there were so many different ways of stealing the resources and knowledge from people, that even if they were in themselves lawful, they did not constitute permission for utilization.

346. The Delegation of Ethiopia agreed with the Delegation of Namibia, misappropriation being linked to biopiracy or as a consequence of biopiracy, which was obtaining access to GRs without appropriate authority or unauthorized use of GRs, TK associated with GRs or their derivatives or unequal sharing of benefits from the use of GRs or TK associated with GRs. It believed that misappropriation included unauthorized and uncompensated collection for commercial means. Misappropriation involved the use of GRs, TK associated with GRs and their derivatives without the PIC of the owners and without benefit-sharing. The PIC of the owners, IPLCs and whoever owned the GRs or the TK associated with GRs, was very important when misappropriation was defined.

347. The representative of ICC noted that the Delegation of Namibia had mentioned a very good metaphor regarding cattle rustling and had said that in that situation when he was recovering his stolen cattle, he did not think it was a good idea to kill them. Such metaphor should be further extended in order to assess how it might apply by analogy to GRs. The ownership of GRs, as explained by the Delegation of Namibia, was based on the CBD and it was based on the principle of sovereignty. Sovereignty, he believed, gave rights over the

protected area of a country, so that in principle a country had the right of sovereignty and could control what was done within its territories. Elsewhere, other countries had that right and in international waters it had to be done by international agreement. It was perfectly in order for countries to make rules about what happened on their territories. It would be more difficult to make rules on what happened to resources which left their territories and went elsewhere. If it was cattle, cattle had ear tags. But GRs did not generally have ear tags. So the question of what happened to GRs outside national territories seemed to point to a different question. As a minimum, the country had a perfect right to make arrangements about GRs within its own territories, however, it was more difficult to argue that such requirements would apply to those outside, that left its territories and circulated more widely. If he had found cattle on his neighbor's territory, there would be a presumption that they were the neighbor's ones rather than his, even without ear tags. But if he had found them on his own territory, why should there be any presumption that he was not entitled to use them?

348. The Delegation of Japan supported the statement made by the Delegation of the United States of America and preferred Option 2. Option 1 would be difficult for the patent examiners to implement, because it was difficult to check. Option 1 could damage the use of the patent system and legal certainty. It understood that the biopiracy problem should be solved, but it was not linked to the patent system.

349. The Delegation of South Africa said that the representative of ICC probably had never heard of genomic sovereignty. Genomic sequencing technologies, including biomarkers, would make it easy in the near future to prove, for instance, that a particular Rooibos could only belong to South Africa rather than any other country of origin. It argued that the days when someone could claim that he or she had taken cattle without knowing that it belonged to someone else were coming to an end through these technologies. Regarding sovereignty, it was important to separate the legal concept from other concepts. It argued that discussions in the IGC should be guided by legal concepts, rather than by a general understanding of "misappropriation" that was based on commercial dictionaries. For legal certainty, legal sources should be given for defining misappropriation. Secondly, it stated that the patent system should not be discussed as a standalone system. Misappropriation had to be considered within the broader framework of the IP system. If misappropriation was to be considered only within the patent system, its Delegation would have proposed to discuss it in relation to a PLT or PCT amendment rather than in the IGC. Instead it preferred to take a *sui generis* approach to this discussion. It said that delegations should not begin to discuss the issue in a particular smaller arena. It was also important to keep the focus on a legal definition of misappropriation such as the one contained in Option 1.

350. The Delegation of the USA pointed out that Option 1 was inconsistent with a dictionary definition of misappropriation. Such definition would be more consistent with a definition of unauthorized use. With respect to the question of the Delegation of South Africa on what legal basis in the USA Option 2 might be closest to or might track, that would be the Uniform Trade Secret Act.

351. The Delegation of Brazil supported Option 1 and the statements made by the Delegations of Namibia and South Africa. It understood that misappropriation happened when someone did not take into account the international rules of ABS related to GRs. It could not support Option 2. Option 2 was contradictory, since the second part of Option 2 was an exception or limitation to the definition that was presented in its first part. It was neither inclined to support the content of the Option 2, nor the way in which it was written. It did not understand why such kind of precisions, such as the activities that should not be understood as misappropriation, should be included in the list of terms.

352. The Delegation of Australia had a question regarding the expression “failure to take reasonable protective measures” in the last line of Option 2. It wondered if the Delegation of the United States of America could share its national experience regarding that term and whether it had been codified.

353. The Chair reiterated that a number of countries had their own domestic systems and invited them to elaborate on whether or not they had dealt with this issue of definition of misappropriation.

354. The Delegation of Ghana preferred Option 1 and noted that the Delegation of the USA had offered a dictionary definition of misappropriation, but unfortunately it fell a bit short. Conspicuous by its absence was the lack of any reference whatsoever to the prevailing legal definitions in the United States of America. There was an earlier suggestion that a comparable definition was found under U.S. trade secrets law. That also fell a bit short. The Delegation provided the current rules or provisions in the USA, by referring to 36 CFR 2.30 of the United States Code of Federal Regulations (CFR), which provided the definition of “misappropriation of property and services” as follows: “(1) Obtaining or exercising unlawful possession over the property of another with the purpose to deprive the owner of the property. (2) Obtaining property or services offered for sale or compensation without making payment or offering to pay. (3) Obtaining property or services offered for sale or compensation by means of deception or a statement of past, present or future fact that is instrumental in causing the wrongful transfer of property or services, or using stolen, forged, expired revoked or fraudulently obtained credit cards or paying with negotiable paper on which payment is refused. (4) Concealing unpurchased merchandise on or about the person without the knowledge or consent of the seller or paying less than purchase price by deception. (5) Acquiring or possessing the property of another, with knowledge or reason to believe that the property is stolen.” The second point was what Option 1 was about. It also noted that part two of the relevant section provided that “The regulations contained in this section apply, regardless of land ownership, on all lands and waters within a park area that are under the legislative jurisdiction of the United States.” It believed that that was the section to focus on since it was pertinent to current discussions and suggested to take positions with reference to the American law when it came to the definition of misappropriation.

355. The Delegation of India supported the Delegations of Namibia, South Africa and Brazil on supporting Option 1, because that was where their interests would be safeguarded as provider countries. It understood that users would have no respect for the interests of the communities that were providing those resources. In fact, users’ interests were well served by freeriding, by letting those resources available, and by finding ways of appropriating them without paying the due to the communities, which had been keeping those resources for everyone’s benefit. It could not understand the point made by the Delegation of the USA when it said that biopiracy could not be deterred from the patent system. That was a very strong statement which had to be considered carefully. The implications should be considered by all delegations, because biopiracy was in fact taking away resources which belonged to the communities. Biopirates were then converting those resources into their own property through the IP system. It was very important for the IP system to actually tackle that problem. Delegations needed to understand the implications mentioned by the representative of ICC. His point was that countries were free to charge anyone who was indulging in fraudulent financial activities in his or her own country, but if that person actually took away the money and did all kinds of money laundering in foreign jurisdictions, no one should do anything and turn a blind eye. It argued that if that was the implication of what the representative of ICC had said, delegations should understand the process more carefully and further consider what kind of remedies were needed to tackle such kind of problems.

356. The Delegation of South Africa noted that the U.S. Uniform Trade Secrets Act required a very high level of protection for trade secrets. In this particular Act, misappropriation was described as (1) the acquisition of a trade secret of another by a person who knew or had reason to know that the trade secret was acquired by improper means, or as (2) disclosure or use of trade secret of another without expressed or implied consent by that person. While the focus of the first part of the definition (under No. 1) was on "improper means", the second part of the definition (under No. 2) was compatible with the concept of PIC. It then said that even this definition could be compatible with the concepts that were captured in Option 1 of the consolidated text.

357. The Delegation of the Plurinational State of Bolivia supported the delegations which had proposed Option 1. It added that in international organizations whenever a draft international instrument was negotiated, delegations sought definitions which were useful and would assist them in resolving a problem. Definitions had to be designed to solve problems and not necessarily as dictionary definitions. It believed that delegations should agree on a definition that was useful to them.

358. The Delegation of Nigeria aligned with the Delegations of the Plurinational State of Bolivia, India, Ethiopia, Namibia, South Africa, Brazil and Ghana supporting Option 1. In addition to reinforcing the idea that delegations were building on in order to check biopiracy, consistently they had been talking about overlapping of language and regimes. Delegations had been encouraged to make sure that all of those instruments, including the CBD and the Nagoya Protocol were reconcilable. It was amazed that delegations had been reinforcing the need for simplicity and when it looked at Option 2 that did not lend itself to anything that was simple. It was an attempt to define exclusion. It did not see why delegations could not have treated all exclusions under exclusions and exceptions. The Delegation insisted that the simplest definition of misappropriation appeared to have been captured under Option 1, giving regard to the historical nature of IGC deliberations and the objective delegations had captured earlier, which was to prevent misappropriation and encourage transparency in the process of acquisition of GR related IP rights.

359. The Delegation of Argentina preferred Option 1 and shared the views expressed by the Delegations of Brazil, India, Namibia and Nigeria. It believed that utilization and PIC were essential to that definition. It also believed it was important to maintain the reference to "in accordance with national legislation".

360. The Delegation of China supported the Delegations of India, Ghana, the Plurinational State of Bolivia, Nigeria and others. It agreed with the definition as it appeared in Option 1. It believed that such definition was much clearer and was positive in nature, whereas Option 2 contained two parts. One part was a positive definition and the second part was of negative nature, consequently, Option 2 was not a good definition. There were exclusions contained in Option 2 and it could not agree with including them in the definition. That was why it could not agree with Option 2.

361. The Chair asked whether China had a definition of misappropriation in its domestic legislation.

362. The Delegation of China explained that the Chinese patent law required disclosure of the source of GRs and the origin of GRs. It also noted that if the acquisition and utilization of those GRs was contrary to the provisions of the law, it did not grant a patent. As to when the law had been violated, that was not covered under patent law but under other provisions of its legal acts.

363. The representative of Tupaj Amaru considered it incomprehensible that the definition was to be sought in dictionaries. Such definitions undermined the authority of the Committee, whose

mandate was to draft a binding international instrument. The definition of GRs was in the CBD. Participants should base their laws on existing rules and not on dictionary definitions. He preferred Option 1, which was supported by many countries of the South. Regarding misappropriation, he preferred the phrase “illicit appropriation” or “unlawful appropriation” with an additional new reference to the PIC of IPLCs.

364. The Delegation of Indonesia believed that Option 1 was the most appropriate. It shared the view that misappropriation was another word for biopiracy and noted that delegations were trying to develop definitions that could not be found in a general dictionary. It thought that Option 1 was adequate enough to reflect legal certainty of misappropriation if it was reflected in national legislation of the providing country or the country of origin. It also shared its national experience in the effort to ratify the Nagoya Protocol by explaining that there were elucidations in the text of the law for the ratification, namely there was a reference to misappropriation and the utilization of GRs, which in the IGC context could be adapted to GRs.

365. The Delegation of the EU, on behalf of the EU and its Member States, believed the function of the term misappropriation in the operative parts of the text was not yet clear and it was not convinced that that term should be included in document WIPO/GRTKF/IC/29/4. The policy objective of the instrument should be focused on enhancing transparency of the patent system to facilitate the possibility of ABS, which was being dealt with in other systems, and preventing the erroneous granting of patents. That should determine the operative parts of the text. The concept of misappropriation, therefore, fell outside of the scope of the discussions in the IGC.

366. The representative of ICC thanked the Delegation of India for taking up his point, while rejecting its money laundering analogy for the reason that the vast majority of GRs, whether in patents or elsewhere, were not illegally acquired under any definition. There was no more reason to make a declaration about the legality of acquired GRs than to make a declaration about the source of the money he could have used to pay the patent office fees.

367. The Delegation of the USA stated that it did not seek to enshrine U.S. law in the instrument. It had cited the Uniform Trade Secret Act, because it was asked whether it had similar provisions in U.S. law. It appreciated the references given to U.S. law and believed that Option 2 tracked its laws more closely. Option 1 did not reflect deception, theft or false pretenses. All that Option 1 reflected was the failure to get a permit from the right person. A very honest researcher could run afoul of Option 1. Regarding the question from the Delegation of Australia, it believed that failure to take reasonable protective measures derived from Article 39 of the TRIPS Agreement. In the United States of America, a number of active cases of trade secret misappropriation had actually occurred. It insisted that the objective was to define the term misappropriation in a manner applicable to all WIPO Member States. It stressed that a person who might have gotten permission from the wrong person or office had not misappropriated anything. It suggested that Option 1 be relabeled as unauthorized use.

368. [Note from the Secretariat: The Vice-Chair, Mr. Liedes, was chairing the session at this point.] The Delegation of Namibia responded to the issue of sovereignty, territoriality and jurisdiction that was raised by the representative of ICC. GRs did not just leave its territories. They were taken away from its territories. Especially in Africa and in the rest of the colonized world, they were very often taken away very violently and with extreme measures attached to that dispossession. For example, the Dutch had put to death people who had smuggled GRs or spices out of what was today Indonesia. Horrible injustices were driven by the slave trade that was put in place to grow cotton and sugar, which were misappropriated GRs. Therefore, if it was simply raised as a matter of sovereignty, territoriality and jurisdiction, it would be a denial of history, a failure to recognize that the colonial world was gone. The Delegation argued that one lived in a globalized village where all would be better off to get along. That was exactly why

WIPO existed. That was the reason why an international legal regime on ABS, such as the Nagoya Protocol, was needed. Regarding the statement made by the Delegation of the EU, on behalf of the EU and its Member States, it was an important nugget of wisdom, namely that “misappropriation” was not being used in an operational way in the text. The policy objective might be to prevent misappropriation, but it was currently stated as increasing transparency and enforcing operation of the ABS system, which was a very much more positive way to look at it. Because it had never regarded the prime purpose of ABS as preventing biopiracy. It had always thought the ABS system was to increase access, increase utilization and increase fair and equitable benefit-sharing. It was keen to stop biopiracy, because that undermined the implementation of ABS. It preferred to go along with the positive approach, forward looking approach, one that looked to partnerships, cooperation, benefit creation, and fair and equitable benefit-sharing. Therefore, the Delegation was very attracted by the idea that, unless misappropriation did end up being used operationally in the text, there would be no need to define it.

369. The Delegation of South Africa pointed out that it had consistently preached the virtues of an approach that was a minimum standards approach, which would take the common denominator of all the stakeholders involved. In that particular case, in the definition of misappropriation, discussions were bending backwards, delving into the legal philosophy of the United States of America in order to accommodate its fears. It was difficult to understand that the same delegation, which had insisted on providing national examples, was saying that it did not intend to use the U.S. philosophical background as part of the international instrument. It recalled that delegations needed to be open, to share what was at stake, and that was a fundamental pillar of everything that the Committee had been doing. It thought that the responses that had been given were not a demonstration of accountability. There was a need to move beyond playing games. It appealed to other delegations, which it was engaging with, to come up with a similar kind of openness and willingness to move forward. The same argument applied to the Delegation of the EU, speaking on behalf of the EU and its Member States. It stressed the need to consider a juridical response on the juridical concepts, which were the building blocks of what delegations were doing in the IGC. There was no doubt that there was a majority understanding of what misappropriation was and a failure to engage at that high level of conceptualization by the other proponents of the argument. Deliberations should move on based on the common denominator to which many Members States had subscribed to.

370. The representative of IPO was concerned with the ambiguities of Option 1. As a former scientist and current patent attorney in a pharmaceutical company, she provided a practical example to demonstrate the reason of her concern: She referred to the rosy periwinkle, which involved a direct allegation of misappropriation involving research that had been conducted in the 1950s, at least 40 years before the CBD or the IGC. In any Internet search on misappropriation, the rosy periwinkle and TK from Madagascar were always mentioned. In reality, the rosy periwinkle was spread around the world. The first writing she could find to try to find the origin of the plant was from Pliny the Elder, from the Roman Empire over 2,000 years ago. It had been subsequently described in English writings from the 14th century. In the early 20th century, it had been believed to be useful for the treatment of diabetes. Her company, Eli Lilly and Company, had collaborated with university researchers in Canada. They had obtained samples from a biological supply company and then directly from the United States of America. The Canadian researchers had received their sample from Jamaica. The ultimate discovery was that it was useful for the treatment of cancer, not diabetes. She wished to know who was owed benefit-sharing. Was it the Romans? Was it the English? Was it the Jamaicans or the Americans? Whose TK was it when the discovery was made in Canada and the U.S? She stressed that there had been no prior discussion of any traditional use of rosy periwinkle for cancer.

371. The Delegation of Italy pointed out that misappropriation had already been settled by the CBD and Article 12 of the Nagoya Protocol. Even if those two treaties contained no definition of misappropriation or unlawful use, the substance of the rule provided for a discipline which gave Member States the obligation to provide rules to combat that type of activity. It fully shared the opinion of the Delegation of the EU, on behalf of the EU and its Member States, which had said that that issue had already been settled elsewhere. There was a definition of misappropriation but it did not find any articles using that definition. The definition had no correspondence in the normative part of the text and was completely useless.

372. The representative of the Assembly of Armenians of Western Armenia said that the issue of misappropriation of GRs was an essential question. She argued that the least that could be done was to have, within the framework of protection against misappropriation of GRs, recognition of indigenous peoples and territories as referred to in UN Resolution 1514.

373. The Delegation of Turkey said that the session should not be used to discuss irrelevant topics.

374. The Vice-Chair said he took note of this intervention and opened the floor on the discussion on no disclosure and defensive measures.

375. The Delegation of the USA supported the removal of brackets within and on Article 7.1. If one of ordinary skill in the art would need to access GRs in a specific location, the patent applicant should be required to provide such information. If an invention could be made without obtaining specific GRs, the source was irrelevant and should not be required. With regard to Article 8, it could support the removal of the brackets. Regarding Article 9.2, databases of appropriate information were critical to well-functioning patent examination systems. Without appropriate publicly accessible databases, patent applicants could file patent applications for information that was in the public domain and examiners could fail to make any appropriate rejections. It strongly supported the establishment of database search systems with information associated with GRs. There were already a significant number of such databases in the United States of America. There were a wide variety of such databases ranging from specialized databases with sequence listings to more general databases providing information about medical uses of genetic material. At present, none had the capacity to store a GR itself. It suggested that the words "information associated with" be inserted before the phrase GRs in Article 9.2. With respect to Article 9.3, it suggested that the phrase "and the public" be added after the phrase "an examiner". It requested additional information as to the safeguards that were referred in that article.

376. The Delegation of Vanuatu asked the Delegation of the United States of America whether or not the databases in the USA encoded information regarding patents on GR-related inventions where such GRs were obtained from other countries.

377. The Delegation of South Africa recalled that the Committee was not addressing just the patent system and that disclosure was not attempting to change the substantive elements of patent law, such as novelty, inventive step or industrial applicability. The focus of disclosure had been discussed in Article 3.1. It did not see the relevance of Article 7.1, as it had no applicable relevance and it eliminated the entire discussion. There was a huge tradition in South Africa of horse racing. They put blinkers on the racers, so that they could only see a particular perspective. In that particular case, if delegations were building a minimum standard, they needed to broaden the perspectives from the limited blinkers they were looking through.

378. The Delegation of Nigeria aligned with the observations made by the Delegation of South Africa. It did not see any rationale for keeping Article 7, because such provision would complicate matters and undermine what had been achieved in the previous articles. Even if the

Committee was to keep it, the Delegation suggested stopping at the word “invention” and deleting the second sentence.

379. The Delegation of Brazil aligned with the position expressed by the Delegations of South Africa and Nigeria. Regarding the defensive measures, it believed that they could only be effective if there was a mandatory disclosure requirement system with sanctions. Defensive measures would be complementary with those two essential pillars. In that regard, as had been mentioned by the Delegation of the United States regarding brackets in those articles, the existence of the brackets in that part of the text depended largely on the agreement on the other parts of the text. The Delegation saw those measures in a holistic way as a complement to the mandatory disclosure requirements with sanctions.

380. The Delegation of Ghana aligned itself with the statements made by the Delegations of South Africa and Nigeria, but on slightly different grounds. The first sentence in paragraph 7.1 assumed incorrectly that disclosure would be sought simply for the purpose of carrying out the invention. That might not be the case. Indeed, it would not most often be the case. It was clear that a disclosure requirement was premised on minimizing or preventing misappropriation, not to carry out an invention. To that extent, the first sentence in Article 7.1 could not be relevant. The second sentence introduced issues regarding novelty, inventive step or industrial applicability. Those ideas introduced conditions for disclosure. They would require that when making a request or requiring disclosure, the applicant should meet any of the specifically enumerated items. The combined effect of that last sentence was basically to state triggers for the disclosure requirement. Delegations had debated at length on the triggers that were going to be useful for disclosure and perhaps those issues could have been raised in the context of that discussion. That was clearly not relevant to Article 7 and should be deleted.

381. The Delegation of Japan supported Article 7.1. With regard to the references to IP or patents, it supported only the reference to patents, which might be associated with GRs. There was no point in expanding the subject matter to all IP rights.

382. The representative of HEP said that her program supported disclosure, which was very important for the users and TK holders. She believed that Article 7.1 should be retained and that its language was appropriate, although it could perhaps be simplified.

383. The Delegation of China aligned with the views expressed by the Delegations of South Africa, Ghana, and Nigeria. It did not agree with the content of Article 7, because it believed that a disclosure requirement should be a requirement in general and should not be fully linked to the inventions. Only if it was framed as a general requirement, it could play a full role for the purposes of PIC and ABS.

384. The Delegation of Switzerland noted, regarding Article 8, that due diligence measures concerning ABS were options that the Parties to the Nagoya Protocol could establish to implement the users' compliance provisions of the Nagoya Protocol. Switzerland had implemented such compliance measures within its national laws and it did not see the need for their consideration at the IGC. It questioned the need for Article 8. The Delegation did not understand the meaning of the reference to protected GRs.

385. With regard to Article 7.1, the Delegation of Namibia noted that there was consensus that it was not the intention of the instrument to change the usual criteria for patentability. Since all the provisions in such article were already part of the patentability criteria, it did not see the need for the article. It understood that it was a negotiating tactic to insert such article as a way of signaling that its proponents fundamentally disagreed with the idea of a mandatory disclosure provision, but assuming that reason would prevail and delegations could overcome those

objections, it believed that it was fair to assume that once they had done that there was no longer need for such paragraph.

386. With regard to Article 8.1, the Delegation of South Africa said that due diligence was part of the work of the CBD and its Nagoya Protocol. It noted that Article 3.1 referred to the same content. There was also an issue with the link between Articles 8.1(a) and (b). There was no logical sequence which said what those two provisions had to do with due diligence. Considering that they were already covered by Article 3.1 and probably they also appeared in Article 9.2, delegations should have discussed them under Article 9.2. The Delegation stressed that there was no need to keep Article 8.1, since the entire article was redundant.

387. The Delegation of the Russian Federation said that defensive measures were borne upon the prevention of granting erroneous patents which was the core part of the document. It believed that due diligence and the various provisions could be linked to Article 9, since it referred specifically to the quality of the data obtained and contributed to preventing the erroneous granting of patents.

388. The Delegation of the USA responded to the question regarding which databases might be included in the WIPO portal. It proposed to create a list of databases and work with others to define what would be included. For example, the WIPO portal might include the Alaska TK and native foods database and perhaps the Korean and Indian traditional knowledge databases. It was not considering a database of patents, as those already existed and there were mechanisms to search databases of patents for multiple countries already through their national patent offices.

389. The Delegation of Nigeria believed that Articles 8.1(a) and (b) could be deleted, because there was some degree of repetition with Article 9. Probably the most efficient way to engage the content of Article 8 was to look at it from Article 9. It did not think that the whole idea of defensive measures would merit a title on its own. It suggested reconsidering whether there was any real need for Article 9 and even defensive measures.

390. Regarding Article 9, the Delegation of China believed that databases could play a role in preventing the erroneous granting of patents and many countries were having consensus over that. If a comparison was to be made between databases and an obligation to disclose the source of GRs, there would be a big difference in terms of costs. When implementing those measures, Member States should take those costs into consideration. It believed that disclosure requirements could be complemented with the database search system. However, the former should not be replaced by the establishment of a database. It also agreed with the Delegation of Nigeria that there was a duplication with Article 8.

391. The Delegation of South Africa supported the comments made by the Delegation of China concerning the limitations of databases. Databases were a means. They were part of the measures and they were not a norm. Ongoing efforts should be about norm-setting. In the IGC's work, there was agreement on the value of databases as a means to ascertain, before a patent was granted, that it should not be granted because prior art information was available. So if databases were a tool, they should be considered not at the level of regulations but at the implementation level. Delegations needed to focus on norm-setting. If the cost of a database and the time that it could require were to be considered, most of indigenous communities might not afford such complex databases, neither some of the countries. To shift the burden of databases on Member States was a challenge. Therefore, the issue of databases had to be voluntary and probably there had to be capacity building at the level of implementation to assist Member States to set up such databases. The WIPO portal website was an excellent idea, but it had to be voluntary. Member States should volunteer their information into that database. They should ascertain that the information that they provided was part of prior art, there was

nothing secret and therefore they could do that. Many countries were ready to do that, such as India, which had the TKDL. The Delegation stressed that non-normative issues, such as those related to databases, were only a means and they did not deserve space in the document under consideration.

392. The Delegation of Japan considered that the key issue was to avoid erroneously granted patents. The Delegation, jointly with the Delegations of Canada, the Republic of Korea and the United States of America, had proposed document WIPO/GRTKF/IC/29/6. Almost all Delegations recognized the importance of that issue. It hoped that WIPO would focus on that issue as an IP specialized organization, because databases were one element of defensive measures. It supported Article 9.2.

393. The Delegation of Namibia aligned itself with the Delegation of Switzerland and considered that there was no need for an additional due diligence provision in that instrument. It appreciated that Switzerland and also the EU had a broad due diligence-based system for compliance with the obligations under the Nagoya Protocol. As far as ABS obligations were concerned, it believed that that probably could be enough. Regarding the mandatory disclosure requirement, the usual business understanding of due diligence, in terms of the fiduciary duty as a manager of a public company or as a director of a private company, would trigger the normal due diligence business considerations about investing in biopiracy, as opposed to getting PIC and MAT. There would be no need to bring due diligence additionally into the IP system. Regarding databases and the prevention of erroneous patents, all Member States had an interest in preventing erroneous patents and it had no problem with such system being established. It believed it would greatly assist patent examiners in avoiding mistakes. But because not everything would be able to be captured in a database and because of the cost involved in the database, it would take quite a long time before being anywhere near comprehensive. The Delegation emphasized that it did not believe databases could ever be a substitute for a mandatory disclosure provision, though it had no objection with establishing databases. It welcomed the assistance of those who could afford to pay the cost of putting them in place for the benefit of everyone. It saw databases as part of a balanced package. The same thing would apply to the WIPO portal site, which was simply a meta-function for accessing those databases.

394. The Vice-Chair then extended the discussion to the general issue of databases, and opened the floor for comments.

395. The Delegation of USA commented that it saw that process as part of a negotiation. It was interested in others' views on how databases could be most effective in the IGC. It believed that the content of the database could include information about GRs and associated TK. The type of protection would be defensive. It would be a tool for patent examiners to help prevent the erroneous grant of patents. Regarding who would have an authorization to access the databases, certainly patent examiners would, and perhaps it would be available to the public as well. Its vision was not to include secret or sensitive TK within the database. Regarding the intervention of the Delegation of South Africa, it noted that Article 9.2 did not require the establishment of databases. If each WIPO Member States created a database, however, it was unlikely that an examiner would be able to check them if there was no connection between the databases to enable the efficient searching of all of those databases. The instrument should include both paragraphs in Article 9.2 and Article 9.3.

396. The Delegation of Indonesia believed that a database was important but it was not the primary aim of the discussion in WIPO. It was important to tackle misappropriation and also biopiracy. A mandatory disclosure requirement was needed. The database could be useful and Indonesia was indeed developing a database system. From its national experience, it was quite difficult to include full information into the database system, because in Indonesia there were

non-codified laws or customary laws and local wisdom, which needed further consideration. The Delegation saw the merits of having a database system, but it agreed with the Delegation of South Africa that the norm-setting issue to be discussed at the IGC was not the database system.

397. Regarding due diligence, the Delegation of Brazil added its voice to the proposal made by the Delegation of Switzerland not to have that part of the text in the instrument. It also supported the statements of the Delegations of South Africa and Indonesia on databases. It understood that they could only be seen as complementary measures and they should be in any case voluntary.

398. The Delegation of Nigeria argued that Article 8 could be deleted. It aligned itself with the interventions of the Delegations of Indonesia, Namibia, China and South Africa, that the focus should be on mandatory disclosure requirements, while databases would be only complementary. It noted that where databases had worked, as in India, it was essentially because the state took the initiative. In most African countries where there were certain clear divisions among indigenous and local communities, building a database and defining what was TK in the public domain could be a very complicated issue, because the way the public domain was constructed in patent jurisprudence was not exactly the same way it was constructed in TK contexts. It suggested that if work on databases was to be included, the right place would be Article 9.2. It proposed to delete the provisions that followed the sentence "in consultation with relevant stakeholders and taking into account their national circumstances and other considerations." It also argued that every national agency would determine what kind of database a particular country was capable of developing and evolving through time. While there was an opportunity to incrementally or to modestly incorporate the database, as said by the Delegation of South Africa, it was hardly a normative issue, even though it was emerging as one of the encouraging practices in that area.

399. [Note from the Secretariat: The Chair was chairing the session at that point.] The Delegation of Ghana aligned itself with the statements made by the Delegations of Namibia, Indonesia and Brazil to the effect that the proposal regarding databases should be considered as complementary, but not as an alternative to the disclosure requirement. The proponents of the use of databases acknowledged that there were some constraints which would include excessive costs, a great deal of uncertainty and the like. It proposed a fresh approach to the use of databases, which would be simpler and would not involve excessive costs. The proposal would be for patent offices or other relevant national agencies to compile a list of applicants who have indicated in their applications for IP rights that they had used GRs. The patent offices would compile in a database information about such applicants and make the information available on the Internet. Therefore, such information could be easily accessed and there would be no doubt that when such databases were compiled, they would be a direct, very simple and cost effective method of ensuring the implementation of the disclosure requirement. It reiterated that the proposed approach did not entail a cost associated with the databases, as proposed in the current Article 9.

400. The representative of Tulalip Tribes considered the issue of databases. First, he referred to the policy objectives that were also related to databases. In the policy objectives, there was some strong language that referred to "ensuring that patent offices have access to appropriate information." It was very clear that there was a group of countries that believed that if disclosure of origin obligations were not to be considered at all, databases should be the primary mechanism to meet the policy objectives. Therefore, the draft text of the policy objectives suggested that access to appropriate information shall be ensured almost in a coercive way. He thanked the proponents of the Joint Recommendation and recognized that many of the comments that he had made in the past had been taken into account. However, he did not believe that that was enough. He aligned with the Member States that had supported the idea

that databases could only be corollary and additional to patent disclosure, rather than the primary mechanism by which TK was to be protected. It also asked the Delegation of the United States of America whether it had consulted with the indigenous peoples in making this proposal. In international law, if a new mechanism was established that allowed a certain set of actions to be taken, these could have domestic implications. If that Delegation was negotiating in good faith and it thought that the United States of America might sign the treaty which might result from the IGC's work, there was the need to envision that if that treaty were applied in his nation state, would it be acceptable or would it fail to protect the rights of indigenous peoples? He believed that the way in which the proposed databases were going to be established could have significant implications for the rights of indigenous peoples. While there was a study on the potential cost and benefits of disclosure of origin, there was no study of the potential harms and benefits of databases. Several questions still had to be asked such as: what was the status of the knowledge in the databases? What did the public domain mean in terms of TK versus the copyright sort of definition of the public domain? There was also the issue of the capacity to create a secure system. In the United States of America, there was a significant difficulty in that if the Government had compiled a database or paid for it, it could not then protect it from public access. This was due to a recent Supreme Court decision that could make such access obligatory in the case of a Freedom of Information Act's request by any third party. An additional question concerned those who would bear the costs of establishing databases, not only in terms of economic costs, but also in terms of social costs. For instance, if novel TK was to be included into these databases, there could be a lot of conflict. Additionally, in many cases, customary laws would not allow TK holders to put their knowledge into such technological structures. Regardless of the outcomes of the IGC negotiations, there would be a significant amount of TK that would not be included into a database. Therefore, he argued that there was the need to envisage a mechanism that would protect IPLCs' rights beyond databases and that the latter should not be the focus of the IGC deliberations. He argued that indigenous peoples needed holistic mechanisms for the protection of their rights. The focus at the IGC was defensive measures within the IP system. Delegations had to be careful not to do harm and to make sure that whatever measures were to be taken at the IGC, they would not cause harm in other dimensions of indigenous life. For example, if previously undisclosed TK was to be disclosed to the public, indigenous peoples might be able to show prior art and defeat a patent. However, this TK disclosure could also create problems from the non-monopolistic exploitation and over-harvesting of GRs. He reminded that TK was not abstract knowledge. It was knowledge that was related to indigenous people's livelihoods, their dignity, their identity and their very ways of life.

401. The Delegation of India supported the statements of delegations that had mentioned that databases were not a substitute for mandatory disclosure. That was its experience in India because the TKDL was a work in progress, which was being strengthened through the mandatory disclosure that India had in its Patent Act. India had shared access to the TKDL with some major patent offices on conditions of confidentiality, but yet it found that a lot of erroneous patents were being granted. Once granted, those patents had to be challenged, and this represented an enormous burden. The number of challenges that India had pursued by using the TKDL really did not match the quantum of misappropriation that was actually taking place. India was implementing its Patent Act with due diligence, and mandatory disclosure was absolutely imperative to prevent misappropriation and the erroneous grant of patents. The issue of the inclusion of this information on the WIPO portal was very contentious because most of the information that was contained in the TKDL was widely held knowledge. It was not knowledge in public domain. It argued that once delegations would have discussed this issue in the session on TK on how to address concerns about widely held knowledge, delegations would then be able to see that this portal could not make much sense and it would not be very useful.

402. The Delegation of Canada believed that databases could play an important role in the prevention of the erroneous grant of patents with regard to GRs and TK associated with GRs,

which would contribute to providing protection to GRs and associated TK. It saw them as an important element of any instrument that delegations were developing. It believed that databases could be maintained by Member States and populated in cooperation with stakeholders, including indigenous and local communities. Such databases would be optional in the sense that a community would not have to contribute information to a database.

403. The representative of HEP recalled that her organization's work was focused on environmental protection and health for all at an affordable cost. From that perspective, she believed that databases were a very important tool. She indicated that it would not be easy to reach the knowledge holders and invite them to transmit their knowledge. Some databases already existed and some traditional medical knowledge had been recorded, but this had often been done under vague conditions. For example, the representative had met people, in fairs in Africa, who would simply give all their knowledge on cards and flyers to unknown people. More progress in technology was needed and she believed that there had to be an obligation regarding the establishment of databases under Article 9. Databases would complement the rules which were already stipulated in the disclosure provisions and the conditions of such disclosure. Proper transparency was also needed to encourage people to share their knowledge in databases.

404. The representative of ICC believed that databases were a very good idea for preventing the erroneous grant of patents. He agreed that they should be optional in the same way as he thought that disclosure should be optional. A delegation had previously said that there was a consensus about not wanting to change patent law. He remarked that if delegations were considering databases, and not changing patent law, it was a general rule that only public knowledge invalidated patents. There would be no point in having a database accessible to examiners, which included knowledge other than public knowledge. If there was private knowledge in it, he wondered what the patent examiner could say to a patent applicant. That would be a serious change to existing patent practices. It could also be that patent applicants might reinvent what was already known secretly to a TK holder. However, if that was an independent invention that should be allowable.

405. The Delegation of Indonesia argued that there was merit in discussing databases. It wanted to learn more regarding the database system not only based on the question posed by the representative of Tulalip Delegation and the experience of the Delegation of India, but also from the delegations that had proposed the joint recommendation such as the Delegations of Canada, Japan, the Republic of Korea and the USA regarding their experiences or their plans to develop such a database system. It reiterated that Indonesia was developing its own database system.

406. The Delegation of Pakistan aligned itself with the statements made by the Delegations of Indonesia, Brazil, Ghana and India. Database systems at a national level or linkage with a WIPO portal would be a resource but not primary evidence for appropriate safeguards against misuse of GRs. It therefore suggested that focus should be on the issues of misappropriation and mandatory disclosure to reach a solid conclusion.

407. The Delegation of Vanuatu indicated, in the context of Article 9.2(c), that Vanuatu was working on building its own database with the Council of Chiefs, who would own the database, and sought clarifications from those who had already drafted policies on databases to provide their wisdom on the types of questions they were referring to on databases. It explained that while a database was being established in Vanuatu, its IP Officers would not have direct access to it.

408. The Delegation of the USA, in response to the question from the representative of Tulalip Tribes, stated that consultations with all stakeholders were ongoing. In response to the

questions of the representative of Tulalip Tribes and the Delegation of Vanuatu, it envisioned that only prior art should be included in these databases. Furthermore, if the USPTO were to compile such a database, it would welcome the assistance of all stakeholders. It noted, for example, that the U.S. Department of Agriculture had a plants database, which included the known uses of many plants and was a resource used by U.S. patent examiners. As to the assertion that only a disclosure requirement was needed, it questioned that assertion. If an inventor discovered what appeared to be a new use of a plant grown in the United States and sought a patent in India, for example, and if that use was previously known in India, it wondered whether the Indian TKDL would not serve as a valuable resource for patent examiners. It failed to understand the position that databases were not necessary.

409. The Delegation of the Republic of Korea, as one of the proponents, firmly believed that the most effective, practical and feasible form of protection for GRs and associated TK or TK associated with GRs, in the patent system was to prevent the erroneous grant of patents through the establishment and use of database systems. This was based on its national experience of using a database for TK and TK associated with the GRs in patent examination.

410. Ms. Hernández, speaking on behalf of both the facilitators, noted that some delegations had suggested that elements discussed under Article 8 would also come under Article 9. However, she noted that the focus of Article 8.1(b) was about another type of database. It was about databases that contained information on the certificate of origin and such databases would not have to be constituted again because the Nagoya Protocol already provided for them. Patent offices could consult such databases to know whether an access had been lawful. In Article 9, the focus was on databases that would help establish the status of technology.

411. The Delegation of the USA said that the facilitator did make a correct assertion with respect to Article 8.1(b). These databases would contain information that would help confirm that a lawful chain of title for the protected GRs had been provided. It would be a way to verify that authorization was received for the GRs. The databases envisaged in Article 9, would be about prior art.

412. The Chair then concluded discussions of core issues on his list. He explained that he had one additional item relating to Article 3.5 in document WIPO/GRTKF/IC/29/4. Since the Delegation of the Plurinational State of Bolivia was the proponent of that text, he asked the Delegation to explain the rationale for that particular text and then opened up the floor for comments from Member States.

413. The Delegation of the Plurinational State of Bolivia said that had tabled this proposal in 2009, which had subsequently been discussed in the intersessional period and in 2011 and 2012 as well as by the group of experts. Many representatives of indigenous peoples thought that it was a worthwhile proposal to be considered in the IGC, particularly on the issue of biopiracy. Therefore, it was decided to include this provision since the patentability of life forms raised moral and ethical issues for many peoples. GRs found in nature could not be considered to be human inventions since this would reduce the value of life to a simple economic value. This was alien to the philosophies and beliefs of many indigenous peoples in developing countries. GRs could not be considered as a creation of human kind. These issues could not be considered solely in economic terms, but in terms of human values and dignity. From the adoption of Article 27.3(b) of the TRIPS Agreement, a process had started, which had led to the proliferation of policies and laws that considered life forms as being patentable subject matter, including human life itself and its components such as proteins, genes, cells and body parts generally. The Delegation had also addressed the issue of extending the notion of inventiveness so that discoveries regarding a life form or its parts would not be considered as patentable subject matter. In 1999, 918 patents had been filed for basic food stuffs like sorghum, rice and others. In 2000, it had been discovered that more than 500 genes and

human life forms had been patented, including more than 9,000 patents pending for 161 partial or complete human genes. In 2005, a study had revealed that almost 20 percent of human genes had been patented. That was 4,000 of the 24,000 human genes. On the basis of the original proposal of the Delegation of the Plurinational State of Bolivia, the language currently included in Article 3.5 evolved as the concerns expressed by other members. In document WIPO/GRTKF/IC/29/4, it proposed retaining the current Article 3.5. That was a complementary proposal to the requirement to disclose the sources and origins. It was important to prevent biopiracy by avoiding that living organisms were patented as they appeared in nature.

414. The Delegation of Brazil supported the proposal made by the Delegation of the Plurinational State of Bolivia.

415. The Delegation of Namibia recalled the long-standing African opposition to patents on life. From an IP perspective, it believed that granting patents on what were essentially discoveries from nature was against the innovation incentive that IP was trying to create. The Myriad case being the case in point, there were also other interesting examples from case law where very ingenious discoveries were all un-patentable. On that basis, it supported the position of the Delegation of the Plurinational State of Bolivia.

416. The Delegation of the USA stated that the TRIPS Agreement provided that microorganisms were patentable subject matter. It suggested deleting Article 3.5. As an alternative, it proposed placing in the preamble the following language: "Recognizing that GRs in the form found in nature are not inventions and therefore no patent rights should be granted to such GRs."

417. The Delegation of Ecuador supported the statement made by the Delegation of the Plurinational State of Bolivia.

418. The Delegation of the EU, speaking on behalf of the EU and its Member States, did not support Article 3.5 as it extended into the area of substantive patent law. Further, it was unrelated to the formalities of a disclosure requirement and it was in contradiction to the EU Directive on the Legal Protection of Biotechnological Inventions.

419. The representative of HEP stated that in those cases where the divergence in viewpoints was increasing more efforts should be made to bring views together.

420. The Delegation of Italy believed that the solution proposed by the Delegation of EU, speaking on behalf of the EU and its Member States, was supported by arguments which went beyond ideological matters. Article 3.5 was a very general rule regarding patentability. The focus of discussions at the IGC was a very specific area of focus. That was GRs originating in certain countries and that were used in another country in order to seek a patent. Hence, a general rule, which said that in any case what was found in nature should not be patented, would go much further than what should be considered in the text. This was something which was really a national issue. Despite the different views on this, it believed that the IGC was not the appropriate forum to discuss this issue.

421. The representative of CAPAJ asked the Delegation of the EU, speaking on behalf of the EU and its Member States, whether it was for substantive reasons or for procedural reasons that it did not approve the inclusion of the language proposed by the Delegation of the Plurinational State of Bolivia. In particular, he wondered whether the issue was that this was not the appropriate place to include such language, or whether the Delegation was opposed to the principle as such and therefore in favor of the patenting of human genes. He also asked the Delegation of the Plurinational State of Bolivia whether it knew if there were other instruments, agreements or conventions that prohibited that which it wished to include in the text. He also

noted that the Plurinational State of Bolivia was implementing a number of measures guided by the spirit of the indigenous peoples of that country. He wondered whether the proposal was based upon or inspired by these indigenous principles.

422. The Delegation of the Plurinational State of Bolivia said that it had heard divergent views regarding the fact that Article 3.5 should not be included in this text and it could not accept those views. It had given examples of patents that had violated the proposed principles and it had been working on the matter for 20 years. Article 27 of the TRIPS Agreement had dealt with this matter, but it had not sufficiently resolved this issue. Therefore a new instrument was needed to struggle against misappropriation and biopiracy. It also stressed that in the IGC's mandate Member States were asked to protect GRs in an equitable way. It believed that this was the link that would argue for the inclusion of this article in the instrument.

423. The Delegation of Japan believed that the exclusion of GRs that could be the basis of an invention was not appropriate because the granting of patents was a very important step in terms of promoting development. The proposed article 3.5 was not in line with the TRIPS Agreement, as mentioned by the Delegation of the United States of America, and it was not related to disclosure requirements either. The Delegation could not support it.

424. The Delegation of Pakistan supported the statement made by the Delegation of the Plurinational State of Bolivia. It argued that GRs and their derivatives found in nature could be discoveries, but not inventions. Therefore, it supported the proposal that Article 3.5 be retained in the text.

425. The Delegation of Namibia sought guidance on which forums were compatible and not compatible with the IGC deliberations. When delegations brought in considerations from the CBD, they were told that they had nothing to do with the IP system and were not to be discussed in WIPO. Then other Member States would refer to the WTO's TRIPS Agreement. It wondered if the Chair could clarify the applicable rules regarding that matter.

426. The Chair clarified that any Member State could bring forward a position in the meeting. Member States were trying to come to a common understanding on the issues. The Chair then detailed his approach to the following day, based on the working method that had been agreed. The discussion on core issues was closed. The facilitators were then tasked to develop a revised proposal, including text, in relation to the core issues which had been discussed. This would be reflected in document WIPO/GRTKF/IC/29/4. Clearly the only changes that would be made would cover areas that had been discussed. Other text would remain as it was. Revisions would focus on areas where there was a narrowing of views or a consensus during the discussions. Obviously, these would be just proposals and they would have no authority unless supported by a Member State or by the plenary. The aim would be for this new document to be issued as soon as practical.

427. The Delegation of the USA sought confirmation that where there was a divergence of views those divergent views would be captured in the facilitators' text.

428. The Chair clarified that the only changes to the current text that would be made would be where a Member State clearly indicated that it supported them. If there was no consensus, the changes were clearly bracketed as done in the past.

429. The Delegation of South Africa asked what the rules were for establishing consensus.

430. The Chair stated that, as far as he was aware, the usual rules of WIPO would apply and every Member State had to agree. He suspended the plenary.

431. [Note from the Secretariat: The facilitators' text was made available at this point.] The Chair emphasized that the facilitators had worked on their suggestions together with the Vice-Chairs, with the view, from the perspective of the Chair, that all Member States' interests be considered. He invited the participants to consider carefully the suggestions that the facilitators had made in document WIPO/GRTKF/IC/29/4. Those changes were focusing on providing clarity, narrowing gaps and developing realistic and practical approaches to the policy intent reflected in the negotiations. As participants would see, there was still work to be done in order to fully agree on the policy objectives. But the suggested text was about narrowing the gap on the policy objectives and, hopefully, coming to a common understanding. He also reflected that within document WIPO/GRTKF/IC/29/4 there were two different approaches to delivering these policy intents. He asked participants that in considering the suggested changes, they refrain from checking that their particular formulation had been replicated. What was really needed was to reflect whether or not the words that the facilitators had put forward actually reflected one's intent. The aim was to provide clarity, and there was a danger in this exercise, as all participants were aware, to simply reintroduce language that would cloud that clarity. He invited those Member States who had clearly indicated a preference in approach, to focus on it in their interventions, and based on a clearer formulation of the different approaches, try and reach a common understanding. The Chair noted that there was a gray area related to some approaches which could be considered as complementary, such as databases. Obviously, this gray area should be subjected to a two-way discussion. The facilitators had only considered the discussions and textual proposals that had taken place in plenary, based on the transcript. As that had been a very demanding task, the Chair was well aware that facilitators might still have missed or misinterpreted issues, despite their concern for accuracy. He was confident that participants would kindly advise them of the errors made, if any. He then invited the facilitators to introduce the text.

432. Ms. Bagley, speaking on behalf of both the facilitators, reminded the delegations that the facilitators had been asked to listen to the plenary discussions over the past three days and prepare potential language reflecting what they had heard regarding the discussed provisions in document WIPO/GRTKF/IC/29/4, with a goal of offering possibilities for streamlining the current text. Their objective had not been to try to include every possibility presented by all Member States, but rather to review the discussions and synthesize potential language in light of that discussion. The facilitators, with the help of the Vice-Chairs, had drafted those provisions in good faith, with a view to facilitating progress in those negotiations. Therefore, any suggested changes had not been made with any nefarious intent to disadvantage any delegation; rather, the intent of the facilitators had been to synthesize and reflect positions of potential common ground among Member States. While the facilitators fully understood that Member States might wish to make changes to the proposed text, it was their hope that each delegation and observer would view the suggested languages in the spirit of seeking common ground and forward progress. With that introduction, she went through the proposed text, identifying the changes drafted by the facilitators and explaining briefly why those changes had been proposed. Regarding "Policy Objectives", the facilitators had identified three primary policy objectives on Tuesday, namely (1) increasing transparency in the patent/IP system, (2) facilitating complementarity/mutual supportiveness, and (3) minimizing the grant of erroneous or invalid patents. However, at least two regional groups had brought to their attention that an understood additional objective was to prevent the misappropriation of GRs and associated TK. Therefore, the facilitators proposed the policy objectives as follows:

"The policy objectives of this instrument are to:

- (a) Enhance the efficacy and transparency of the [IP] [international patent] system;
- (b) Contribute to the prevention of misappropriation of genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources];

- (c) Facilitate [complementarity] [mutual supportiveness] with relevant international agreements relating to genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] and the IP system; and
- (d) Minimize the granting of erroneous [IP] [patent] rights.”

It had been requested that one of the objectives be framed as preventing misappropriation. However, as had been noted the day before in plenary, the patent system was only one arena in which misappropriation could occur. There were many circumstances of misappropriation where no patent was sought. Therefore, this instrument could only contribute to preventing misappropriation. There had also been concerns about the meaning of “invalid”, so the original term “erroneous” had been reinserted. After receiving clarity from the proponent, Objective (c) had been revised to reflect that complementarity and mutual supportiveness were to be with relevant international agreements relating to GRs and the IP system.

Regarding Article 1, the streamlined Article 1 which had been previously introduced had not been further changed. The text was as follows:

“1.1 This instrument applies to genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources].”

The facilitators had reviewed Article 2 and noted its striking redundancy to the policy objectives. Therefore, they proposed its deletion to streamline the text. However, as this was still a working document, the numbering of the Articles had not been changed.

Regarding Article 3, the facilitators streamlined the chapeau by replacing GRs and associated TK with “the subject matter of this agreement” which was specified in Article 1. The provision now contained a mandatory disclosure requirement, reflected by the phrase “shall require applicants”, which had received wide though not unanimous support across delegations. In Article 3.1(a), the requirement was for disclosure of the providing country that was the country of origin as well as the source, although if the applicant did not know either of those pieces of information, the applicant might make a declaration to that effect. An applicant did not have to disclose what he or she did not know. The definition of “source” had been revised and consolidated in the list of terms to be broadly inclusive of relevant sources to be disclosed. Previously there had been two options for sources. The proposed language was similar to Option 2 but streamlined to combine to Option 1. The proposed definition of “source” was as follows:

“[“Source” should be understood in its broadest sense, including a party that has acquired the genetic resources in accordance with the CBD, the multilateral system established by ITPGRFA, indigenous and local communities, and other sources such ex-situ collections and scientific literature.]”

The phrase “providing country that is the country of origin” had been chosen to reflect the ambiguity that could be created by specifying only country of origin, as the CBD defined country of origin as anywhere the resources were found *in situ*. As had been noted in plenary, this could allow an applicant to declare a country of origin that had not been in fact the country from which he or she had obtained the resource. Article 3.1(b) had also been retained as it did not require Member States to hold up the processing of applications until relevant information was received, nor did it require countries without national PIC or ABS laws to require disclosure of such information consistent with the intent of a minimum standards instrument. Article 3.2 had been modified in accordance with a Member State’s suggestion on reducing the potential burden on a patent or IP office by clarifying that the office needed not verify the veracity or truthfulness of the contents of the disclosure and only required an office to, upon request,

provide guidance on how to comply with disclosure requirement formalities. Article 3.3 had also been modified to take into account both the existence of the Nagoya Protocol and the ITPGRFA Clearing House Mechanisms, and the fact that not all WIPO Member States were parties to those treaties so that such a notification should only be required if it was appropriate for an office to do so. Article 3.5 had been moved to Article 4 as it appeared to be an exception or a limitation unrelated to disclosure. The facilitators proposed Article 3 as follows:

**“[ARTICLE 3]
[DISCLOSURE REQUIREMENT**

3.1 Where the [subject matter] [claimed invention] within a [IP rights] [patent] application [includes utilization of] [is directly based on] the subject matter of this instrument, each Party shall require applicants to:

- (a) Disclose the providing country that is the country of origin and the source of the genetic resources, [their derivatives] and/or [associated traditional knowledge] [traditional knowledge associated with genetic resources].
- (b) [Provide relevant information, as required by the national law of the [IP] [patent] office, regarding compliance with ABS requirements, including PIC].

If the source and/or country of origin is not known, the applicant may make a declaration to that effect.

3.2 The disclosure requirement shall not place an obligation on the [IP] [patent] offices to verify the veracity of the contents of the disclosure. But [IP] [patent] offices shall, upon request, be required to provide guidance to [IP] [patent] applicants on how to comply with disclosure requirement formalities.

3.3 [Patent] [IP] offices should, if appropriate, notify disclosure of origin information to the Clearing House Mechanism of the CBD/NP/ITPGRFA.

3.4 [Each Party shall/should make the information disclosed publicly available at the time of publication.]]”

Regarding Article 4, Ms. Bagley explained that the new Article 4.2 had previously been the second sentence of Option 2 for “misappropriation” in the list of terms. It appeared to be an exception or a limitation. As a Member State had noted, it seemed more appropriate to be included in Article 4. The phrase “lawful means” had been replaced by “means deemed lawful in the country of origin” in order to capture the understanding that information or an item might be protected in its country or origin, but not in a different country. The phrase had also been streamlined by deleting the illustrative list of activities such as reading publications, purchase and independent discovery, which would not be deemed misappropriation for a trade secret, but many of which could be unlawful appropriation for another kind of IP right, such as a patented invention. Article 4.3 was previously Article 3.5. In relation to Article 4.3, an addition had been made to the preamble which stated: “Recognize that genetic resources in the form found in nature are not inventions and therefore no patent rights should be granted to such genetic resources.” The facilitators had also taken the prior Article 4.1 and created a new article entitled “Entry into Force and Transitional Measures”, which seemed a better fit for the provision. The new article was as follows:

“[ENTRY INTO FORCE AND TRANSITIONAL MEASURES

4.1 [Member States shall/should not impose the disclosure requirement in this instrument on [IP] [patent] applications filed before entry into force of this instrument[, subject to national laws that existed prior to this instrument].]]”

The facilitators proposed Article 4 as follows:

“[EXCEPTIONS AND LIMITATIONS

- 4.1 A [IP] [patent] disclosure requirement related to genetic resources [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] shall/should not apply to the following:
- (a) [All [human genetic resources] [genetic resources taken from humans] [including human pathogens];]
 - (b) [Derivatives];
 - (c) [Commodities];
 - (d) [Traditional knowledge in the public domain];
 - (e) [Genetic resources from areas beyond national jurisdictions [and economic zones]]; and
 - (f) [All genetic resources [acquired] [accessed] before [entry into force of the Convention on Biological Diversity] [before December 29th 1993].]
- 4.2 [Use of genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] that has been acquired by means deemed lawful in the country of origin is not misappropriation.]
- 4.3 [Genetic resources and [their derivatives] as found in nature or isolated therefrom shall/should not be considered as [inventions] [IP] and therefore no [IP] [patent] rights shall/should be granted.]]”

Regarding Article 6, to make this a minimum standards agreement, “should” had been deleted from the chapeau, but “shall/should” had also been deleted from further in the chapeau to provide important flexibility to countries on the types of sanctions that could be imposed. That flexibility had also been the reason for changing “and” in the chapeau to “and/or”. Article 6.1(b)(iii) had been introduced by a Member State and was a practice which might be beneficial for invalidating an erroneously granted patent. In Article 6.1(b)(iv), “including revocation” had been deleted, in favor of the narrower, more specific provision on revocation in Article 6.2 that made clear, as several Member States with revocation provisions had noted, that this should be a sanction limited to egregious circumstances. Article 6.3 had been introduced by a Member State, and recognized that offices might choose to delay application processing for reasons related to the disclosure requirement which might be outside of an applicant’s control, such as suspending processing until evidence of PIC in the form of an international certificate of compliance was provided. If a national biodiversity authority was backlogged, such a certificate might be delayed, even though an applicant had provided all necessary paper work to the authority. Yet with a 20 year from filing patent term, such applicants would be disadvantaged. With those explanations, the facilitators proposed Article 6 as follows:

“SANCTIONS AND REMEDIES

- 6.1 [Each [Party] [country] shall put in place appropriate, effective and proportionate legal and/or administrative measures to address non-compliance with paragraph 3.1 [including dispute resolution mechanisms]. Subject to national legislation, sanctions and remedies may include:
- (a) Pre-Grant.
 - (i) Preventing further processing of [IP] [patent] applications until the disclosure requirements are met.
 - (ii) A [IP] [patent] office considering the application withdrawn [in accordance with national law].
 - (iii) Preventing or refusing to grant an [IP right] [patent].
 - (b) [Post-Grant].
 - (i) Publication of judicial rulings regarding failure to disclose.
 - (ii) [Fines or adequate compensation for damages, including payment of royalties.]
 - (iii) Allowing third parties to dispute the validity of a patent by submitting prior art with regard to inventions that include genetic resources and [associated traditional knowledge] [traditional knowledge associated with genetic resources].

- (iv) Other measures may be considered depending on the circumstances of the case, in accordance with national law.]]
- 6.2 [A party may consider revocation of a patent as a sanction for willful, repeated or fraudulent failure to comply with the disclosure requirement.]
- 6.3 [Failure to examine a patent application in a timely manner should result in an adjustment of the term of the granted patent to compensate the patentee for delays.]”

Regarding Article 9.3, Ms. Bagley stated that a Member State had proposed to introduce “and the public” after “examiner”. However, that appeared to create a conflict or ambiguity with a statement in Section II paragraph 8 of document WIPO/GRTKF/IC/29/6, so the facilitators asked the proponent to reconsider and clarify the proposal. There was a slight change to the chapeau of Article 9.2 as follows:

“9.2 Members are encouraged to facilitate the establishment of databases of information associated with genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] for the purposes of search and examination of patent applications, in consultation with relevant stakeholders and taking into account their national circumstances, as well as the following considerations: [...]”

433. [Note from the Secretariat: all speakers thanked the facilitators for their work] The Delegation of India asked the facilitators for clarification of the omission of brackets on the last paragraph of the preamble. The Delegation asked clarification about moving Article 3.5 of document WIPO/GRTKF/IC/29/4 to Article 4.3. It said that the Chair previously mentioned that there would be no deletions on this until there was a consensus on that.

434. The Chair stated that no deletions on the text had been made by the facilitators, and that they had just moved the paragraph to a different location based on their judgment.

435. Ms. Bagley, speaking on behalf of both the facilitators, stated that the brackets were accidentally not included in the place previously mentioned by the Delegation of India and said that that might not be the only place in the document where brackets were accidentally not included. She apologized for those omissions. The facilitators clarified that Article 3.5 had been moved to Article 4.3 which dealt with exceptions and limitations, because that sounded more as a limitation on patent subject matter which seemed more appropriate to the exceptions and limitations. The Article did not seem to relate to the disclosure requirement which was what Article 3 was directed towards. The facilitators therefore did not delete the article from the agreement.

436. The Delegation of South Africa asked why there was no element on the text about the previous substantive discussion the Committee had on misappropriation. Regarding exceptions and limitations, a great deal number of Member States pushed for the exceptions only to apply in areas of public interest, and it had not seen that reflected in the facilitators’ text.

437. Ms. Bagley, speaking on behalf of both the facilitators, stated that no change had been made to the formulations for misappropriation except that the second sentence in Option 2 had been moved to the new Article 4.2. The facilitators had struggled on how to reflect the views of Member States on the issue of public interest, and their text should be bracketed. They did not feel that they were at the place of really convergence where they could make major changes to that exceptions and limitations provision.

438. The Chair said that there was a previous discussion on the public interest, and therefore that was an omission from the facilitators.

439. The Delegation of the EU, speaking on behalf of the EU and its Member States, asked for clarification on the changes of the preamble and the list of terms.

440. Ms. Bagley noted that they had changed the definition of “directly based on” in the proposed list of terms to a language that combined the text introduced by a Member State and additional language that attempted to address concerns mentioned by other Member States regarding limiting disclosure to physically accessed material. The facilitators mentioned that the two options had been combined in to one in relation to “source”.

441. The Delegation of Indonesia found the document well structured, better than the previous document because it had more clarity, systematic, and added some substantial inputs to the text. The Delegation of Indonesia aligned itself with the Delegation of South Africa regarding public interest. The Delegation of Indonesia asked the facilitators about policy objectives, in particular policy objective (d). The Indonesian law recognized the invalidity system, and therefore sought clarification regarding the invalidity. The Delegation suggested the entry into force in Article 4 to be omitted and changed to another part.

442. Ms. Bagley said that given the previous discussions in plenary and the received comments, there was not widespread support for making that change in policy objective (d). Until there had been sufficient discussion of the appropriate wording, they thought it might be best to return to the use of erroneous which had traditionally been used in document WIPO/GRTKF/IC/29/4.

443. The Delegation of Bahamas wished to know whether the list of terms and the issue of “directly based on” had been dealt with.

444. The Delegation of Brazil noted that new text had been introduced as Article 6.3 and it did not recall having discussed it during the week. During the week, there had been consensus on the idea that mandatory disclosure requirements should not place additional burden for IP offices. The Delegation wished to know why a measure regarding the timely manner of examination of patent applications had been placed under “Sanctions and remedies” and what was the relationship with the system.

445. The representative of OAPI also asked about the new Article 6.3.

446. Ms. Bagley pointed out that the new text had been introduced by a Member State during the plenary, there had been an opportunity for discussion and during the discussion there did not appear to have been many objections in relation to that provision, which was why it had been included. She noted that it was bracketed.

447. The Delegation of Nigeria did not understand why, under Article 6.1(b)(iv), the term “revocation” had been excluded. It did not believe that there had been significant agreement from the majority to exclude it from the text. The Delegation requested further explanation as to how new Article 6.3 was included into the text, recognizing that it was bracketed. Regarding Article 4 “Exceptions and limitations”, the Delegation pointed out that (a) to (d) had been bracketed earlier, since exceptions and limitations had to be limited due to public interest or public policy considerations, as the Delegation of South Africa had reiterated.

448. Ms. Bagley highlighted that the new Article 6.3 was not mandatory. It said “should”, not “shall”. In relation to Article 6.1(b)(iv), she pointed out that the reference to “revocation” had been removed from that article, but it had been included in Article 6.2. It was a question of trying to reach minimum standards where could perhaps be wide agreement on. The facilitators had noted, in reviewing the transcripts and listening to the various delegations, that it seemed that almost without fail countries that had a revocation requirement noted that it was for extreme

or egregious circumstances. That being the common understanding among countries that actually had revocation systems, it seemed appropriate to reflect that in Article 6.2. That was the facilitators' thinking behind making that change. The facilitators had sought to address the concern reflected by several other delegations in terms of revocation being available for minor infractions for perhaps inadvertent failures to properly disclose, by deleting "including revocation" from Article 6.1(b)(iv) and just specifying the conditions for revocation in Article 6.2. Their objective had been to take the different interests of the various delegations into consideration hoping to get a common position. Regarding Article 4.1, she was not clear on the point raised by the Delegation of Nigeria and requested clarification. She stated that they had not changed anything, at least not intentionally.

449. The Chair acknowledged that revocation was a sensitive issue. He asked the Delegation of Nigeria whether it would like to restate their concern regarding the brackets in Article 4.1.

450. The Delegation of Nigeria stated that it wished to abandon that observation at that point.

451. The Delegation of Ghana sought clarification regarding Article 7.1 as it believed that some comments made on the previous day had not been captured at all in the current draft. It suggested that those comments could perhaps be reflected by adding some much needed brackets.

452. Ms. Bagley clarified that the entire Article 7 was bracketed and that there was no need for further internal brackets.

453. The Delegation of Japan asked for clarification as to why the word "should" had been deleted in the chapeau of Article 3.1.

454. Ms. Bagley explained that in Article 3 facilitators had streamlined the chapeau and clarified that the provision now contained a mandatory disclosure requirement. There had been widespread but not unanimous support for a mandatory disclosure requirement and for that reason the word "should" had been deleted and the word "shall" had been retained. A desire for flexibility had also been expressed and that was why "and" had been replaced with "and/or" and "shall/should" later in the Chapeau had been deleted and "may" had been retained. She realized this provision was still going to be the subject of considerable discussion in the Committee's negotiations. However, with the goal of moving towards a text that would hopefully lead the Committee to a common ground, and listening to the Member States, the facilitators had proposed the mandatory disclosure requirement.

455. The Delegation of Namibia, firstly, had made a suggestion about including the assignment of rights to providers of GRs and associated TK under remedies and was curious as to why that had not been included as an option. It asked if it was assumed under Article 6.1(b) (iv). Secondly, with respect to Article 6.3, the extension of the time period, the Delegation asked if that was something that regularly happened when delays were caused, for example, by the backlog in examining patents. It also wondered whether in case of backlog, a longer period of protection was offered for other reasons than disclosure requirements.

456. Ms. Bagley indicated that there were several patent offices that offered term adjustments or extensions for delays in processing of patent applications where the delays were not caused by the actions of the applicant but by the patent office or the patent office requirements. So that was not an unusual type of provision, more generally in patent law. The facilitators thought that there was certainly merit in this situation. In relation to the first question on the sanctions and remedies, the facilitators had noted the proposals of the Delegation of Namibia and explained that instead of adding more provisions to the text, Article 6.1(b)(iv) included the proposal under the term "other measures".

457. The Delegation of Niger noted that Article 2 did not appear in the text and asked if this was an omission.

458. Ms. Bagley explained that Article 2 looked very similar to the policy objectives and it did not appear that it was adding anything meaningful. With the objective of trying to streamline the instrument to contain provisions that actually were going to accomplish the objectives of the Member States, the facilitators had chosen to delete Article 2 on the scope of the instrument from the facilitators' text.

459. The Chair invited the IGC to consider the change proposed and reflect on whether policy interests were reflected and covered in other articles. If Member States believed that Article 2 was important, it could be re-inserted.

460. The Delegation of Italy asked for a clarification. Since it could no longer find Article 6.2 in document WIPO/GRTKF/IC/29/4, it asked whether this Article had been moved to another Article or whether there was an omission.

461. Ms. Bagley explained that the facilitators had amended Article 6.2 and the original language, which read as follows: "[Failure to fulfill the disclosure requirement, [in the absence of fraud], shall/should not affect the validity or enforceability of granted [IP] [patent] rights.]" Such language was replaced and this was an issue that delegations had a fair amount of discussion on. Certainly if the formulation that was put forward in Article 6.2 did not adequately capture Member States' concerns, they would welcome their reintroduction or modification of that language.

462. The Delegation of the Bolivarian Republic of Venezuela sought a clarification regarding the reason why Article 3.5 had been moved to Article 4.3.

463. Ms. Bagley explained that the facilitators had decided to move Article 3.5 to Article 4.3 because it did not appear to them that such an Article had anything to do with a disclosure requirement. Article 3 was about disclosure. Article 3.5 read as follows: "[GRs and [their derivatives] as found in nature or isolated therefrom shall/should not be considered as [inventions] [IP] and therefore no [IP] [patent] rights shall/should be granted.]" This would be an exception or a limitation on the ability of a patent office to grant a patent or an IP right on certain subject matter, which had nothing to do with disclosure and therefore the more appropriate place appeared to be Article 4 on "exceptions and limitations."

464. The representative of Tulalip Tribes, as regards Article 9.2 on "database search systems", said that his recollection was that there was widespread support for databases to be of a voluntary nature and he did not see that reflected in the document under consideration.

465. The Delegation of Chile said that it would have to review the language since it did not recall the discussion of Article 6.3 and it would be reviewing it at a later time.

466. The Delegation of the USA said that since they were working from document WIPO/GRTKF/IC/29/4, as stated by the Chair and as the IGC was a member driven process, it expected that its suggested text would be reflected in the consolidated document and asked when such document would be made available. According to the agreed working methodology, only new facilitators' text, which received the plenary's agreement, would be entered into document WIPO/GRTKF/IC/29/4. At that time, no text had received the plenary's agreement and it believed that all of the changes suggested by Member States should be reflected in the text.

467. The representative of Tupaj Amaru stated that he had proposed amendments on the objectives and in Articles 1, 2, 4 and 6. Unfortunately, these were not reflected in the facilitators' text. He observed that Member States did not make any proposals for the elimination or changing the position of certain paragraphs.

468. The Delegation of Greece, speaking on behalf of Group B, said that Group B had not had time to discuss this document and sought a clarification regarding the relation between document WIPO/GRTKF/IC/29/4 and the document that was under consideration, which included the facilitators' text. It also asked why Article 3.5 of document WIPO/GRTKF/IC/29/4 had been transferred to Article 4.

469. Ms. Bagley said that Article 3.5 had been moved to Article 4 because it had nothing to do with disclosure and Article 3 was dealing with disclosure. It appeared to be an exception or a limitation because it was drafted to limit the subject matter that an IP or Patent Office could grant and that seemed to be much more of an exception or a limitation than a provision relating to disclosure and therefore in their judgment they thought it better belonged in Article 4.

470. The Delegation of Brazil asked what the reason was for placing Article 6.3 under "sanctions and remedies" and how it would operate in the instrument. As it was mentioned by the facilitator, it saw grounds to move the previous Article 3.5 to another part of the text, but it could not understand how Article 6.3 would operate in the whole of the text and specifically how it could be said that Article 6.3 had any relations with sanctions and remedies.

471. Ms. Bagley said that the Delegation of Brazil had raised a valid point since the placement of the Article could not be ideal. She explained that the way facilitators were thinking of it in terms of remedies was due to the fact that it actually was a remedy for the patent applicant in the sense that the term would not elapse, namely they would get adjustment to their patent terms. In terms of where was the best place to put it, the proposed one seemed to be the best place to put it. She did not deny that there could be a better placement of the article.

472. The Delegation of Egypt asked whether discussions would continue on the facilitators' text and leave aside document WIPO/GRTKF/IC/29/4 or whether the two documents would be discussed together. It asked whether this new document intended to replace document WIPO/GRTKF/IC/29/4. The Delegation wanted to know how the document had been arranged as there were two Articles 4.

473. The representative of IFPMA asked a question regarding Article 6.2. In document WIPO/GRTKF/IC/29/4 there were two options around revocation while in the facilitators' text there was only one. He wondered what was the rationale behind that and if possible whether it was possible to reconsider two options which were useful to continue the work.

474. Ms. Bagley said it was absolutely possible to consider the re-introduction of that text if the current language of Article 6.2 did not adequately reflect the interests of Member States.

475. The Delegation of Vanuatu found the two Articles 4 confusing.

476. Ms. Bagley acknowledge this was confusing but they did not want to engage in re-numbering any article, as it was a working document. She asked the Member States for their patience, as they would continue to work through the document to determine the final format and numbering.

477. The Chair hoped the Member States would note that the text had been presented in good faith to capture the consolidated views of Member States. He asked Member States to consider the facilitators' text and reiterated nothing was agreed until everything was agreed. The primary

purpose was to reach a common understanding on the core issues and to narrow the gaps and hopefully reach consensus on key elements. The Chair suspended the plenary.

478. [Note from the Secretariat: The Chair reopened the session after a break.] The Chair hoped that delegations had had a productive period reviewing the facilitators' text. He emphasized again that the facilitators' text was only a work in progress. It was simply a facilitators' revision of document WIPO/GRTKF/IC/29/4 based on the discussion of core issues. The authoritative text still remained document WIPO/GRTKF/IC/29/4 without the facilitators' revisions. As Ms. Bagley had stated, it had been a good faith attempt to capture the interests of all Member States whilst attempting to narrow existing gaps and provide greater clarity in relation to core issues. The facilitators had made judgments on which Member States' interventions had best reflected the narrowing or clarity, and in some cases had deleted or introduced new languages. The Chair then introduced the ground rules for live drafting. The facilitators' text that did not receive any Member State support would not be retained. The aim of the live drafting was to have a further revision of document WIPO/GRTKF/IC/29/4 which would be noted (not adopted) and transmitted to IGC 30. The text would be up on the screen and changes would be introduced, as before, as follows: (1) Any Member State could make any change (i.e. insertion, deletion and modification); (2) Observers' drafting proposals could remain in the text only if supported by a Member State; (3) Proposed additions and insertions were underlined; (4) Proposed deletions or questioned passages were put between square brackets; (5) It was possible to have stand-alone options, which might be introduced by "Option" or "Alt"; (6) Drafting options were separated by "slashes"; and (7) Name of proponents were not included in the text. At the end, the additions or insertions would not be underlined. Brackets would remain in the text. The Chair suggested focusing on the modifications made by the facilitators. He invited the facilitators to reintroduce each modification.

479. The Delegation of Brazil wished to confirm that the agreement of the whole plenary was needed for the addition of the facilitators' text. It also wished to clarify whether the facilitators' text could comprise new proposals or whether their mandate had been to streamline the discussions.

480. The Chair stated that if consensus was required on every single item, the discussion might need to be ceased immediately and could be focused on document WIPO/GRTKF/IC/29/4 only. The facilitators' text was only a working document which captured the discussions in the plenary. The text was bracketed from the beginning to the end. If a Member State supported an element, it could remain. To attempt to have consensus on every item of the facilitators' text would not be possible and not be productive. The aim of the facilitators had been to narrow the significant divergences on the core issues and to seek clarity. If the IGC could get consensus on every element of the text, the IGC would complete its task. However, the discussions on the core issues in the past days had clearly indicated that was not the case. There was still some way for convergence.

481. The Delegation of Indonesia, speaking on behalf of the LMCs, noted that the facilitators' text was an effort to try to capture the gist of the discussions. It commended the facilitators for having accommodated the different views of various Member States. In general, the facilitators' text could be considered as an important contribution to the common effort to make progress. However, it also noted that there were some new issues that had not been thoroughly deliberated and had been incorporated into the text. The Delegation was ready to listen to the explanation by the facilitators and was ready to engage constructively with the discussion.

482. The Delegation of the Bolivarian Republic of Venezuela wondered how to take up the negotiations. The Chair said that the negotiation was based on document WIPO/GRTKF/IC/29/4 without the changes of the facilitators. However, there was the

facilitators' text on the table which included new elements. In terms of procedure, the Delegation wished to know which text should be communicated to the capital.

483. The Chair explained that the authoritative text was document WIPO/GRTKF/IC/29/4. The aim of the facilitators' text was to help the discussions. If the facilitators' text was not acceptable after the discussion, document WIPO/GRTKF/IC/29/4 would be the text to be submitted to capitals.

484. The Delegation of Brazil understood that the facilitators' task was to streamline and clean the text, and to help the negotiations. In the past few days, the work of the facilitators had been very helpful and the facilitators had fulfilled their role. The doubt the Delegation had was how the inclusion of brand new proposals would fit in the mandate given to the facilitators.

485. The Chair clarified that the facilitators had not introduced any additional material that had not been discussed in plenary. However, the facilitators had tried to revise some of the materials because they had thought the language would improve the text.

486. The Delegation of the USA appreciated the helpful explanations from the Chair. The Delegation was ready to move forward based on the facilitators' text. However, it wished to clarify whether delegations would have a chance to introduce text which had been suggested earlier but not captured in the facilitators' text. It also wished to clarify whether the text which was not agreed by all Member States but supported by some Member States might be included and would remain in brackets.

487. The Chair confirmed that the answers to both questions were yes.

488. The Delegation of Nigeria, speaking on behalf of the African Group, shared some of the concerns that had been expressed by the Delegations of Brazil and the Bolivarian Republic of Venezuela on the inclusion of the new Article 6.3. Regarding Article 4, the Delegation recalled that the facilitators had said it was an error not to include an alternative language, which read as "Member States may grant exceptions and limitations to the disclosure requirement on the basis of public interests and other considerations."

489. The Delegation of Bahamas, speaking on behalf of GRULAC, supported the statements made by the Delegations of Brazil, the Bolivarian Republic of Venezuela and Nigeria, speaking on behalf of the African Group. Its concerns were related to the new Article 6.3.

490. The Delegation of Brazil thanked the Chair for his clarification on the working methodology which was that the facilitators should work based on the discussions in the plenary. It believed that all delegations could go along with that understanding.

491. The Delegation of South Africa asked whether the plenary would ascertain the consensus on adopting the facilitators' text into document WIPO/GRTKF/IC/29/4 clause by clause. It wondered what would be the indicator of consensus and which document would be used for IGC 30.

492. The Chair clarified that the discussion would be focused on the articles which had been changed by the facilitators.

493. The Delegation of India, speaking on behalf of the Asia-Pacific Group, supported the Chair's methodology. It went along with the hard work done by the facilitators. It was not easy to keep everyone happy. The Chair had mentioned the three Fs, fairness, friendliness and firmness. The Delegation thought that there should be an implicit fourth "F" which was good faith. The facilitators' text could only go forward, if it was based on good faith. Good faith

meant no new element would be introduced without any discussion. There were some proposals brought in through the statements and they had been part of the transcripts which had been taken but there had not been much discussion on those. The Group believed that delegations should only consider those elements in the facilitators' text which had been discussed extensively. As the Chair had said, any member was free to introduce new elements. The Group did not want to start a negotiation on new elements because that did not follow the procedure which had been clearly laid down by the Chair and supported by the Group. It supported the statements made by the Delegation of Indonesia, on behalf of the LMCs, the Delegation of Nigeria, on behalf of the African Group, the Delegation of Bahamas, on behalf of GRULAC, and the Delegations of Brazil and the Bolivarian Republic of Venezuela.

494. The Chair said that good faith was very important. That was what the facilitators had attempted to do. He recognized that there were sensitivities on some elements of the text which some felt had not been sufficiently discussed by delegations.

495. The Delegation of the Bolivarian Republic of Venezuela wondered how it could justify to capital an element which had not been included in document WIPO/GRTKF/IC/29/4. Its comments were not at all opposing the effort that had been made by the facilitators.

496. The Delegation of China thanked the efforts made by the facilitators. It agreed with the Delegation of the Bolivarian Republic of Venezuela on the fact that it seemed that some of the facilitators' text had not been discussed. It wondered whether the plenary would discuss that text or ignore it. Negotiations had two dimensions: the texts to be discussed and the issues and contents which delegations agreed to discuss together. The Delegation was not sure about what to be discussed.

497. The Chair said that he had indicated the working methodology. The facilitators had distilled the discussion from three days discussion, which reflected the intellectual capital of all delegations. There were sensitivities around some of the work that the facilitators had done. But the facilitators had tried to do their work in good faith. The authoritative document remained document WIPO/GRTKF/IC/29/4. The Chair understood that some delegations felt some key elements had changed and there had not been sufficient discussion. At the moment, the facilitators' text was just a work in progress. The Chair suggested working through the facilitators' text so that delegations could raise their concerns. The Chair invited the facilitators to introduce the first change.

498. Ms. Bagley stated that the first proposed provision was in the list of terms, which was a definition of "directly based on" relating to disclosure requirements in Article 3. It was not currently in the consolidated text. It would not be unless a Member States actually supported it. The proposed definition of "directly based on" was as follows:

““Directly based on” means that the invention must make immediate use of the genetic resource, that is, depend on the specific properties of the resource to which the inventor must have had physical access or access to non-tangible genetic resources or associated traditional knowledge.]”

499. The Delegation of the EU, speaking on behalf of the EU and its Member States, would like to thank the facilitators for their text and hard work. It would also like to draw attention to the fact that the IGC was not in a position to deal with substantive patent law such as the proposed Article 4.3 in the facilitators' text. Its proposal for a mandatory disclosure requirement in patent law would be a formal requirement which would not alter substantive patent law. As new concepts and ideas, it could only provide preliminary comments at the moment. On the definition of "directly based on", the Delegation believed that the definition was going in the right direction. The last part, however, which read "or access to non-tangible genetic resources or

associated traditional knowledge” substantially changed the scope of the proposal it had made. The Delegation therefore asked to include the original language for a definition of “directly based on” as follows: ““Directly based on” means that the invention must make immediate use of the genetic resource, that is, depend on the specific properties of the resource to which the inventor must have had physical access.”

500. The Delegation of the USA could not support the definition contained in the facilitators’ text. It could not support the modified definition proposed by the Delegation of the EU, on behalf of the EU and its Member States, either. It requested that those definitions be retained in brackets. It did not understand what was meant by the phrase “the invention must make immediate use of the genetic resources”. Another question was whether the concept of “directly based on” was limited to claimed inventions or applied to all inventions disclosed in an application included within this definition. Furthermore, a genetic resource was defined as being material. The term material was something referring to tangible, not intangible information. Thus, the term “non-tangible genetic resources” was an oxymoron and the delegation requested to bracket “genetic resources or”.

501. The Delegation of Namibia wished to retain “non-tangible”. The characterization of material as being physical material was not necessarily founded in language. For example, someone would refer to the jokes told by a stand-up comedian as his material. It was certainly not physical. So it could be argued whether genetic material meant it had to be physical material. Certainly it did not have to be in modern biology. The Delegation reserved its right to come back to this issue in further negotiations.

502. The Delegation of Ghana aligned itself with the statement made by the Delegation of Namibia. If, for example, someone had some tangible material that through some process had been vaporized or turned into some other material that could not be touched, that should still be included within the scope of this instrument. Limiting it to only tangible material would be too restrictive.

503. The Delegation of Nigeria supported the statements made by the Delegations of Namibia and Ghana. Non-tangible GRs were not necessarily an oxymoron. In the context of GRs, in the new technological era aggregation of information that could be processed in so many ways could distance the tangible from the non-tangible and still make some industrial sense in relation to applications.

504. The Delegation of the Plurinational State of Bolivia supported the statements made by the Delegations of Ghana, Nigeria and Namibia. It supported the maintenance of the phrase “non-tangible” because it believed that the important thing about GRs was precisely the information around it and not just the physical resource itself

505. The Delegation of South Africa supported the statements made by the Delegations of Namibia, Nigeria, Ghana and the Plurinational State of Bolivia. From the modern technologies, it was essential to retain “non-tangible genetic resources”.

506. The Delegation of Latvia, speaking on behalf of the CEBS, supported the inclusion of the definition of “directly based on” as read out by the Delegation of the EU, speaking on behalf of the EU and its Member States.

507. The Chair invited the facilitators to introduce the next element.

508. Ms. Bagley stated that the next change was Option 2 of the definition of misappropriation where the second sentence had been deleted and moved into Article 4 “Exceptions and Limitations”. The definition of Option 2 currently read as follows:

“[“Misappropriation” is the use of genetic resources, [their derivatives] and/or [associated traditional knowledge] [traditional knowledge associated with genetic resources] of another where the genetic resources or traditional knowledge has been acquired by the user from the holder through improper means or a breach of confidence which results in a violation of national law in a provider country.]”

509. The Delegation of the USA stated that obtaining permission in good faith from the wrong person or administrative office was not misappropriation but fell within the scope of this definition. Legal documents should avoid defining terms inconsistently with the commonly understood meaning of the term. As a result, the Delegation suggested that the term “misappropriation” in Option 1 be replaced by “unauthorized access/use”. It also requested to retain the original second sentence in Option 2.

510. The Delegation of Nigeria indicated that it would be inclined to have misappropriation kept as it was in Option 1. It also supported the facilitators’ revision on Option 2.

511. The Delegation of South Africa wished to bracket “unauthorized access/use”. It referred to the question of methodology and indicated that the aim of the present exercise was to narrow the gaps and create clarity. It wondered whether it was possible for delegations to identify what their position was and focus on defending what they had subscribed to.

512. The Chair supported the comments made by the Delegation of South Africa. Delegations should identify the different positions and keep them as clean as possible. However, delegations also had rights to make their views known. The Chair strongly encouraged delegations to focus on the area where their policy interests were, rather than addressing interests which they had clearly indicated they did not support.

513. The Delegation of Brazil aligned itself with the Delegation of South Africa and requested additional information on the procedure. Many delegations had supported Option 1. It did not understand why some delegations which did not support the inclusion of Option 1 had made changes to Option 1. In the same way, the Delegation believed that the second part of Option 2 had actually been making an exception to the first part of the definition. It found that it was difficult to understand. However, the Delegation did not ask for any change. It understood that the countries which supported this option had all rights to defend their views. Therefore, the Delegation wished to keep the text of Option 1 as it had been discussed.

514. The Delegation of Ghana supported the statement made by the Delegation of South Africa. There were very simple legal definitions of “misappropriation” which did not get bogged down with so many conditions. It wished again to call for a very simple definition. The Delegation referred to 36 CFR 2.30, the Code of Federal Regulations of the United States of America, which defined misappropriation as “Obtaining property or services offered for sale or compensation without making payment or offering to pay.” It believed that this was succinct, concise definition that captured all the issues. It wished to work with the Delegation of the United States of America to ensure that those basic aspects of the American Law were reflected in what would be an international agreement. It would be an acknowledgment of the leadership role that the United States of America continued to play in that regards.

515. The Delegation of Nigeria, speaking on behalf of the African Group, believed that delegations should be able to engage constructively. Regarding the proposed changes to the text, it believed that the introduction made by the Delegation of the USA of the words “the unauthorized access/use” should go to Option 2 but not Option 1 of “misappropriation”. Option 1 had been supported by many delegations as the objective to be resolved, which the eventual instrument would address. To have misappropriation in tandem with unauthorized use

and access was not acceptable. The African Group believed that it was constructive engagement to have the “unauthorized access/use” in Option 2.

516. The Chair asked the Delegation of the USA whether it could accept the view of the Delegation of Nigeria, speaking on behalf of the African Group, and whether it wished to retain its amendment in Option 1.

517. The Delegation of the USA wished to retain its amendment in Option 1.

518. The Delegation of South Africa wondered what value the new mandate would have if delegations kept retaining the same positions. The new mandate requested the IGC to narrow existing gaps. What the IGC was doing was not narrowing, but broadening and further causing more gaps. It believed that the IGC needed to establish a better way of working together. If there were no rules, the IGC would not be able to narrow the gaps.

519. The Chair noted and reemphasized the importance of the statement made by the Delegation of South Africa. He encouraged Member States to address the spirit of the renewed mandate.

520. The Delegation of Ethiopia supported the statement made by the Delegation of South Africa. The exercise was to bridge the gap and it believed that the facilitators had done a very good job in terms of bridging the gaps. The Delegation felt a bit frustrated; however, as for instance, delegations could bring the language of Option 1 into Option 2 and make changes. It did not think that that would help and enable the IGC to bridge the gap. The IGC needed to reflect on how to make progress.

521. The Chair suggested trying the methodology he had proposed. Delegations had had very constructive dialogue over the past three days. It would be unfortunate if the IGC started to unravel what had been productively discussed. The Chair again encouraged Member States to honor the spirit of the mandate.

522. The Delegation of India supported the statements made by the delegations on the issue of what the IGC was expected to do during the week. There was no doubt that the facilitators' text was good. The IGC was making some progress and it would be very unfortunate if delegations were to start to unravel the text. The IGC would not only be defying the mandate but also going several steps back. No delegations had come to the IGC to waste time and to go back with a completely cluttered text. Firmness was required, as proposed by the Chair to make progress.

523. The Chair believed that Member States' positions were very clear. Delegations had had a healthy debate about misappropriation, but they had not come to a common understanding.

524. The representative of Tulalip Tribes suggested focusing on minimum standards. The introduction of the new text in Option 2 seemed to be trying to codify things as a matter of international law. He did not think that there was enough state experience and legal use in the states to really establish those things. Tulalip Tribes were sovereign owners of their TK, and they would have some problems with that idea. He pointed out that what had been introduced was a large number of concepts that had not been legally defined at national levels. Delegations should think through clearly on what should be done at the international level and what should be done at the national level. He reiterated that the IGC had to focus on convergence and minimum standards.

525. The Delegation of Australia acknowledged that it was not a proponent of either option. It only wanted to propose a way forward, and would understand if the proponents did not support its approach. The Delegation thought that the insertion of the term “unauthorized access/use”

could create a new entry in the list of terms, which should be placed between “source” and “utilization” in alphabetical order. This proposal preserved the integrity of Option 1 for its proponents and allowed the proponents of Option 2 to have their term. It also created a new term which was considered of value for some Member States.

526. The Chair asked the Delegation of the USA whether the proposal was acceptable.

527. The Delegation of the USA stated that it was attempting to bridge gaps. It had explained why Option 1 was not misappropriation and had suggested the more correct term for the definition given in the spirit of cooperation. It hoped that Member States would consider its proposal. The Delegation did not support the proposal made by the Delegation of Australia because what it was trying to do was to work with Option 1 to make it acceptable. It would like to keep it where it was and focus on that. It also pointed out that the second sentence of Option 2 should not be underlined because it was currently contained in document WIPO/GRTKF/IC/29/4. It hoped that delegations would be able to accept those amendments.

528. The Delegation of Brazil wondered whether it was useful to continue the current discussion as such. It aligned itself with the statements made by the Delegations of Ethiopia and South Africa that what the IGC was doing was unraveling the text and not bridging any gap.

529. The Chair suggested continuing the current discussion.

530. The Delegation of Namibia wished to reflect on the discussion about misappropriation. The vast majority of delegations had an interest in at least trying to prevent misappropriation. A few delegations which had large biotech industry sectors had an economic interest in encouraging misappropriation and providing space in the IP system for biopiracy to hide. The Delegation thought that the way to resolve that was to not focus on misappropriation at all, but to focus on transparency and functionality of the IP system which was really what the IGC was addressing. It might not be necessary to have misappropriation as a term in this document at all because if there was a functional mandatory disclosure provision, that would serve to prevent misappropriation in accordance with national ABS measures and international ABS arrangements. It asked delegations to consider getting rid of misappropriation in the list of terms because it was not an essential part of the text. The Delegation also recalled its suggestion made earlier on insertion of the word “biopiracy” with brackets in both Options 1 and 2.

531. The Chair invited the facilitators to introduce the next element.

532. Ms. Bagley stated that the next element was the definition of “source”. In document WIPO/GRTKF/IC/29/4, there were two options. The facilitators proposed to have a single definition as follows:

“[“Source” should be understood in its broadest sense, including a party that has acquired the genetic resources in accordance with the CBD, the multilateral system established by ITPGRFA, indigenous and local communities, and other sources such ex-situ collections and scientific literature.]”

533. The Delegation of Switzerland, with regard to “source”, thought that the distinction between primary and secondary source was important. Thus, it wished to maintain Option 2, which distinguished between primary and secondary source. The definition should reflect the language of the Nagoya Protocol and it believed that had not been fully done. There was an important part missing. The Delegation proposed the text as follows: “The party providing such resources that is the country of origin of such resources or a party that has acquired the genetic resources in accordance with the CBD.”

534. Ms. Bagley stated that Article 3.1(a) required to “disclose the providing country that is the country of origin”. She asked the Delegation of Switzerland whether Article 3.1(a) would meet its objectives and therefore not need to be separated.

535. The Delegation of Switzerland responded that it had a preference for cleaning up Article 3.1(a) and having the full definition of source in the list of terms.

536. The Delegation of the USA could not support the facilitators’ proposal on the definition of “source” nor the proposal of the Delegation of Switzerland. It understood that in the context of this instrument the source was a place where something had come from. A reference to the CBD was unacceptable in this context. Not all WIPO Members were parties to the CBD and it had concerns with reference to the CBD. Furthermore, it noted that GRs were material and, thus, they could not come from scientific literature. The Delegation proposed that the definition of source be amended as follows: “Source should be understood in its true sense, as the place from which a genetic resource was obtained, or the person or community from which traditional knowledge was obtained.” The Delegation also wished to make a global suggestion which was to bracket the term “party” throughout the text because it prejudged the nature of the instrument.

537. The Delegation of the EU, speaking on behalf of the EU and its Member States, believed that the facilitators’ text was a very broad definition which had introduced the notion of primary and secondary users and therefore would complicate issues. It was not sure as to why that definition had been chosen over the other definition. Therefore, it wished to retain Option 1.

538. The Delegation of Argentina wished to maintain Option 1.

539. The Chair invited the facilitators to introduce the next element.

540. Ms. Bagley stated that the next item was at the end of the preamble. It was the new phrase that should be in brackets at the very end of the preamble as follows: “Recognize that genetic resources in the form found in nature are not inventions and therefore no patent rights should be granted to such genetic resources.”

541. There was no comment. The Chair invited the facilitators to introduce the next element.

542. Ms. Bagley stated that the next item was policy objectives, which read as follows:

“The policy objectives of this instrument are to:

- (a) Enhance the efficacy and transparency of the [IP] [international patent] system;
- (b) Contribute to the prevention of misappropriation of genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources];
- (c) Facilitate [complementarity] [mutual supportiveness] with relevant international agreements relating to genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] and the IP system; and
- (d) Minimize the granting of erroneous [IP] [patent] rights.”

543. The Delegation of Australia stated that the proposed text was a dramatic improvement on what had been on the table. It urged other Member States to embrace that wholeheartedly. It noticed that the term “misappropriation” was in the document, but the term “biopiracy” was not.

544. The Delegation of Egypt proposed to add the chapeau “The objective of this instrument is to strengthen protection of genetic resources and traditional knowledge that is not acquired unlawfully through:”.

545. The Delegation of Nigeria, speaking on behalf of the African Group, supported the proposed policy objectives with minor changes. Policy Objective (a) was as follows: “Enhance the efficacy and transparency of the international [IP] patent system”. Regarding Policy Objective (b), it suggested deleting “their derivatives” after “genetic resources” and including “and their derivatives” after “associated traditional knowledge”.

546. The Delegation of Japan believed that biopiracy was not related to GRs. It suggested bracketing Policy Objectives (a), (b) and (c). It also proposed to bracket the proposal made by the Delegation of Egypt.

547. The Delegation of India believed that Policy Objective (a) did not really reflect the issues discussed in the IGC. Policy Objective (b) was the more operative one. It suggested changing the order of the two objectives so that Policy Objective (b) became the first operative paragraph.

548. The Delegation of Switzerland believed that the new text was a big improvement compared to the old wording. It was not quite convinced yet about whether there was a need to refer to “misappropriation”. It suggested bracketing Policy Objective (b).

549. The Delegation of the USA proposed to bracket Policy Objective (a). It did not agree that enhancing the efficacy and transparency of the IP system was an objective. The patent system was already very transparent. Disclosing hundreds or thousands of sources for patents that related to GRs would not enhance the efficacy or transparency of the patent system. Furthermore, it failed to see how the process would contribute towards the unauthorized access/use or the misappropriation of GRs or TK. By the time a patent application had been filed, access and use would have already happened. All the disclosure requirement might do was to make a patent too expensive or risky and would reduce patent protection for important inventions. The Delegation did not support the objective of facilitating the complementarity or mutual supportiveness with relevant international agreements. It was not clear what international agreements were referenced and how international agreements would support this text. It, however, supported Policy Objective (d) if it had been isolated from some of the bracketed text in the chapeau. Regarding Policy Objective (b), the Delegation suggested replacing “misappropriation” with “unauthorized access/use”.

550. The Delegation of Brazil believed that the text would become more difficult to read after this exercise. It requested clarification from the facilitators on the use of the word “relevant” in Policy Objective (c). It did not recall that any delegation had requested this or that there had been a discussion on this. It did not think that it would be advisable to include “relevant”. The Delegation further clarified that the word “relevant” must be deleted if there had been no discussion on it.

551. The Delegation of Nigeria proposed to add “their derivatives” after “associated traditional knowledge” in Policy Objective (c).

552. The representative of Tupaj Amaru was pleased to see the introduction of two important notions that he had advocated for many years. He proposed the policy objective as follows: “The present international instrument has as its main objective the legal protection of genetic resources, their derivatives and related traditional knowledge from acts and practices of illicit appropriation by biopiracy with their interrelations and effects in the issues of intellectual property.” He believed that his proposal should cover subparagraphs (a), (b), (c) and (d).

553. The Chair asked whether any delegation supported the proposal made by the representative of Tupaj Amaru.
554. The Delegations of South Africa and Egypt supported the proposal made by the representative of Tupaj Amaru.
555. The Delegation of Australia asked the Delegation of Brazil whether it referred to the term “relevant” which was in the Development Agenda coordination mechanism. It wondered how this was relevant given that the word “relevant” was a very common word. The Delegation asked clarification from the Delegation of Japan. The Delegation of Japan had stated that GRs were not relevant to patents. However, its understanding of the international patent classification system was that there were biological and biochemical and chemical aspects that were relevant to patents. The Delegation of the United States of America had said that transparency in the patent system was at an optimum. It might seem that way to those within patent offices but outside of the patent offices many stakeholders said otherwise. It wondered whether the Delegation of the USA would be able at some stage to provide evidence that disclosure requirements would make patents too costly.
556. The Delegation of Brazil responded that its question on the word “relevant” actually had been regarding the procedure. Its understanding was that the IGC was trying to convey in new text the portrait of what delegations had been discussing for the last three days. If the word “relevant” had not been part of the discussion, it should not be included in the text.
557. The Chair stated that the word “relevant” had not been discussed. The word had probably been added by the facilitators by error.
558. The Delegation of the USA wished to stay focused on the text at the moment and the process that was followed. It noted that the word “relevant” had been deleted from the facilitators’ text and not simply placed in brackets. It had understood that, if no Member State had voiced support for the facilitators’ text, it would not be moved to document WIPO/GRTKF/IC/29/4. The Delegation had not understood that the IGC had been considering the facilitators’ proposals on a word by word basis. It suggested that the word “relevant” be placed in brackets to reflect the comments made by the Delegation of Brazil. However, for the record it would appreciate further information as to why the term “relevant” was proposed to be deleted. The Delegation routinely spoke about relevant international agreements. It noted that some earlier interventions had indicated a preference for particular options in document WIPO/GRTKF/IC/29/4. As it understood this process, it had been asked whether to support specific paragraphs of the facilitators’ text. Delegations were not commenting directly on document WIPO/GRTKF/IC/29/4.
559. The Chair confirmed that the Committee was commenting on the facilitators’ text.
560. The Delegation of the EU, speaking on behalf the EU and its Member States, proposed Policy Objective (a) as follows: “To enhance transparency of the patent system to facilitate the possibility of access and benefit sharing through the disclosure of country of origin or source.” It also proposed to bracket Policy Objective (b).
561. The Delegation of South Africa suggested bracketing Policy Objective (d) and inserting “/allow” after “Minimize”.
562. The Delegation of Japan suggested bracketing the proposal made by the representative of Tupaj Amaru.
563. The Chair invited the facilitators to introduce the next element.

564. Ms. Bagley stated that the next item was the proposed new subject matter as follows:

“1.1 This instrument applies to genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources].”

565. The Delegation of the United States of America did not support this proposed text and suggested bracketing it. It also suggested bracketing the entire new texts proposed under the Policy Objective.

566. The Delegation of Nigeria, speaking on behalf of the African Group, supported the facilitators' text on subject matter with an insertion of “their derivatives” after “associated traditional knowledge”.

567. The Delegation of the EU, speaking on behalf of the EU and its Member States, did not support Article 1.1.

568. The Chair invited the facilitators to introduce the next element.

569. Ms. Bagley stated that the next item was the deletion of Article 2 “Scope of Instrument”.

570. The Delegation of Switzerland agreed with the deletion of Article 2.

571. The Delegation of Greece, speaking on behalf of Group B, appreciated the work done by the facilitators. It believed that there were some new concepts and ideas in the document. The Group had not had enough time to coordinate and properly reflect, and it would continue to work constructively and remain engaged in the process.

572. The Chair suspended the plenary.

573. [Note from the Secretariat: After an informal consultation with the Regional Coordinators, the Chair opened the plenary]. The Chair believed that the exercise on Thursday afternoon had not been as fruitful as it could have been. Earlier, delegations had had a very good dialogue. As the Chair, he took responsibility for the working methods and approach. As he had indicated, he would always review the way of doing the work and also consider Member States' views. The Chair suggested moving on to see if the Committee could make progress in the remaining time. In the previous days, the Committee had been focusing on developing an understanding of the core issues. Regarding the text, the only authoritative text would be the text contained in document WIPO/GRTKF/IC/29/4 with the deletion of Article 2. The Chair believed that there was consensus on that. The next step would be to consider the list of outstanding/pending issues which would be an output of IGC 29. The Chair wished to summarize the discussions in the last four days, some of which were clearly reflected by the facilitators. One of the main core issues which had been discussed was the definition of misappropriation in relation to the policy objective. Regarding policy objectives, the Chair believed that there were three core elements, which were efficacy and transparency, complimentary and mutual supportiveness with international agreements which was a central area where the IP system was intersected with, and the prevention or minimization of erroneous patents which reflected a view around defensive measures. There was no consensus on them. The Chair said that he was trying to find the definition of “common understanding” in the dictionaries, including the one indicated by the Delegation of the United States of America, but he could not find. He believed that the IGC narrowed the understanding on the policy objectives. One of the key issues was whether or not misappropriation should be retained as core element in the text in relation to the policy objectives. If so, clearly how it was defined. The next issue related to subject matter. He had actually thought that the IGC had come a long

way in trying to distill the elements of subject matter. It was unfortunate that delegations could not get consensus. The Chair urged Member States to consider the facilitators' proposal which was an elegant, short and clear explanation of subject matter. Another issue was whether the subject matter was only related to patents or all IP rights. Regarding disclosure requirements, there had been a lot of good work and commentary done in the discussion and captured by the facilitators in their text. The key element of which there was a better understanding was the content of disclosure. Even though there was no agreement, there had been a long way in understanding what the content should be. There was still a little work to do in relation to the sources of GRs. The Chair noted that the facilitators' text referred to national laws regarding compliance with ABS. He urged Member States to consider. It was fairly clear what the applicant should do if the country of origin was unknown. There was some narrowing in consensus on the obligation of the office to verify the content of disclosure. Regarding exceptions and limitations, the Chair believed that that was one area where obviously little progress had been made. The concept of public interests related to exceptions had been raised and would need to be discussed. Another sensitive issue related to GRs or derivatives found in nature or isolated there. Regarding the consequences of non-compliance, the positive area was revocation. Delegations had had a good frank exchange of views on revocation. Some works had been formulated. A lot of national experience had been reflected. The Delegation of Brazil and a few other delegations had indicated that revocation had been an extreme measure and really used. The Chair believed that there had been a much better understanding on why and how to formulate text in relation to that. Then the IGC could look at minimum and maximum standards inside and outside of the patent system. In relation to trigger, the IGC had got consensus on three elements, namely claim directly based on subject matter, utilization of subject matter and the need for physical access or access to non-tangible subject matter. Delegations had had a conversation about the relationship with national and domestic ABS regimes. That had been about the role of the IP and patent office in relation to notification of disclosure related to information to the Clearing House Mechanism of the CBD, the Nagoya Protocol and ITPGRFA. The IGC needed to review this area later. Regarding no disclosure/defensive measures which was not normative in nature, the Committee had started to consider the need for additional due diligence systems and mechanisms particularly relating to establishing due diligence frameworks within the Nagoya Protocol. Another important issue was databases. This was an important issue, because, whether or not with disclosure requirements, databases were considered as complimentary measures. Key issues needed to consider were whether or not databases be considered as supplementary measures to a disclosure requirement; issues on safeguard for TK that was widely held and/or publicly available; and burden on TK holders and Member States, such as the cost of establishing such databases, maintaining them and how to operate them. The Delegation of the United States of America and some other delegations had a number of ideas and the IGC could continue to have dialogue on that issue. There were also a number of other issues which needed to be finalized at IGC 30, which were relationship with International Agreements, including PCT and PLT; transboundary cooperation; and technical assistance, cooperation and capacity-building. The Chair believed that there had been good dialogue on Monday, Tuesday and Wednesday. There had been a number of interventions coming to a common understanding. It had been unfortunate that an agreement had not been able to be reached on how to reflect them in a consolidated document. As the renewed mandate requested, IGC 29 was required to agree on an indicative list of outstanding/pending issues to be tackled or solved at the next session. The Chair, Vice-Chairs and the facilitators had worked on the list and the Chair asked the IGC for its noting and transmission to IGC 30. The Chair said that the list had been guided by two main principles: (1) focusing on the core issues discussed at IGC 29 and refined to reflect with greater clarity; and (2) bearing in mind that IGC 30 would be the last GRs session before the 2017 WIPO General Assemblies, including other outstanding/pending issues for completeness and inclusiveness even though they had not been discussed.

574. The Chair suspended the plenary to allow delegations to look at the indicative list of outstanding/pending issues.

575. [Note from the Secretariat: The plenary was resumed after an informal consultation.] The Chair emphasized that the indicative list of outstanding/pending issues was a non-exhaustive list.

Decisions on Agenda Item 7:

576. The Committee discussed core issues, on the basis of documents WIPO/GRTKF/IC/29/4, WIPO/GRTKF/IC/29/5 and WIPO/GRTKF/IC/29/6, and decided to transmit the text in the annex to document WIPO/GRTKF/IC/29/4, with the deletion of Article 2, to the next session of the Committee. The articles as prepared by the facilitators will be referred to within the body of the report of the session. The Committee also transmitted to the next session of the Committee an "Indicative List of Outstanding/Pending Issues to be Tackled/Solved at the Next Session", copy annexed.

577. With regard to resources that Committee participants may wish to use as reference materials in their preparations for Committee sessions: (a) The Secretariat is requested to establish, well before the Thirtieth Session of the Committee, a new webpage consolidating all existing resources on regional, national, local and communities experiences (such as studies, collections of laws, submissions, databases, voluntary codes and protocols, and presentations) prepared by the WIPO Secretariat or submitted by Member States and observers for purposes of the Committee to date, and to report on this in an information document to the Thirtieth Session of the Committee; and (b) Member States and observers are invited to send to the Secretariat by March 31, 2016 references for any other resources that may be relevant for Committee participants as reference materials, and the Secretariat shall communicate a list of such references,

as provided, to the Thirtieth Session of the Committee in an information document.

578. The Committee noted the Secretariat's ongoing updating and improvement, with a focus on practical experiences, of the WIPO Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge prepared in 2004, invites Member States and observers to contribute information to this exercise and requests that the Secretariat complete the exercise as soon as possible.

579. The Committee also took note of documents WIPO/GRTKF/IC/29/7, WIPO/GRTKF/IC/29/INF/7, WIPO/GRTKF/IC/29/INF/8, WIPO/GRTKF/IC/29/INF/9 and WIPO/GRTKF/IC/29/INF/10.

AGENDA ITEM 8: ANY OTHER BUSINESS

Decision on Agenda Item 8:

580. There was no discussion under this item.

AGENDA ITEM 9: CLOSING OF THE SESSION

581. The Chair recognized his Vice-Chairs, with whom he had worked closely. A key task for the IGC would be to look at the working method for the next session, and also to prepare for the next session, noting the IGC would need to expedite its work if it was to achieve the mandate. There currently were three key approaches related to the objectives, which were disclosure, no disclosure but defensive non-normative measures, and databases which could be complementary to disclosure or support defensive measures. If the IGC was to progress, delegations would need to give these three approaches more air. Also delegations need to consider how to better utilize the experts within the IGC to refine these issues. Thus, an inclusive process was important. It was also important that well developed and considered proposals were brought forward to be considered within the inclusive environment. The Chair noted the difficulty with many Member States which were receiving instructions from capital and required time to review materials. One of the issues the Chair and Vice-Chairs would be considering was what work could be conducted intersessionally to support the IGC's work, which was in part reflected in the proposal of the USA to conduct a study. The Chair and Vice-Chairs would be engaging with Regional Coordinators intersessionally on those issues. The Chair thanked the Regional Coordinators for their support and perseverance. It was important that they had open and frank exchanges and worked towards the same outcome, achieving the mandate provided by the GA. The Chair thanked the facilitators, who had a thankless job and had worked tirelessly to develop proposals that reflected the interests of all Member States and moved the IGC's work forward. Even though the IGC had not been able to support their suggestions, the Chair asked all delegations to consider the facilitators' text

between sessions, as it had significant merit. The Chair thanked the Secretariat who had worked long hours during the session to support the Committee. He also thanked the interpreters who had the job of taking sometimes convoluted and quickly spoken language and making sense of it. The Chair thanked some key stakeholders, the Indigenous Caucus, industry representatives and representatives of civil societies. It was very important that they engaged with Member States and that Member States engaged with them. They were very important stakeholders and had important interests. The Chair also thanked all delegations for the positive spirit they had approached during the meeting, reflected in the significant interchanges on Monday, Tuesday and Wednesday. Accepting that IGC 29 had not made significant progress on the text, it would have a wealth of information in the report, including the facilitators' proposals which would enable the IGC to expedite its work at the next session. As a new Chair, he would reflect on the lessons from IGC 29 and consider ways that could be improved and worked. As he had indicated, he was an optimist and he was sure that delegations would all be in a better position to harvest the fruits of IGC 29 at the next session. He encouraged all Member States and stakeholders to engage with the seminar in May 2016 which he hoped would make all delegations well prepared for IGC 30. He understood that the intent was to focus on the core issues and hopefully delegations would be able to work out those issues in a less informal environment.

582. The Delegation of Bahamas, speaking on behalf of GRULAC, stated that after a hiatus of almost 18 months, the IGC had finally had the opportunity to discuss, once again, matters that were a priority for members of GRULAC and IPLCs. It had been its priority that the Committee should focus on narrowing existing gaps by coming to a common understanding of the core issues that needed to be addressed, to eventually agree on an international legal instrument that would ensure the effective protection of GRs. There had been substantive discussions, and the interest of GRULAC was that those discussions should lead to a narrowing of existing gaps in the consolidated document. GRULAC had also highlighted that it had wanted the Committee to ensure the effective use of the time allotted for the IGC meetings that were scheduled over the biennium – including the 10 days that had been allocated for the discussions on IP and GRs. Therefore, GRULAC called on all Member States to utilize the time that had been agreed, to engage in constructive discussions, and to work in a collegial manner and atmosphere. It understood that there were different positions represented in the Committee. Thus, it was its hope that the Committee could use the remaining time to move forward, and allow steady progress to the goal of an effective international legal instrument on GRs. It noted that a Seminar on Intellectual Property and Genetic Resources was scheduled for two days at end of May. It hoped that the indicative list of outstanding/pending issues to be dealt with at IGC 30 would inform the discussions in the more informal setting of the Seminar and, thus, assist all the concerned parties in working together in narrowing existing gaps. GRULAC hoped that there would be fruitful discussions and negotiations at IGC 30, so that the Committee could agree on an effective international legal instrument that would be for the benefit of all Member States of WIPO.

583. The Delegation of Indonesia, speaking on behalf of the LMCs, thanked the Chair for his able leadership in guiding the Committee through the deliberation of IGC 29, as well as the Vice-Chairs and the facilitators. The IGC's mandate stated that negotiations would be conducted with open and full engagement. In the first three days, the interactive dialogue on the core issues had reached certain understanding on several issues. It hoped that the IGC could maintain the same spirit of constructive engagement and IGC 30 could finalize the text on GRs.

584. The Delegation of Nigeria, speaking on behalf of the African Group, thanked the Chair and Vice-Chairs for their hard work, as well as the Secretariat, the facilitators and the interpreters. After the lapse of 2015, the African Group had had high hopes that the IGC could significantly advance on a minimum standard international legal instrument that would ensure the effective

protection of GRs, TK and their derivatives of indigenous and local communities from misappropriation. It was not clear for the African Group to judge whether the IGC had achieved significant common understanding in the past week. The IGC had been able to advance some way in the text by removing the article on scope of instrument. The African Group thought that after 16 or 17 years, if the IGC was still at a stage of agreeing on an indicative list of pending issues, it was a problem. Perhaps the idea could have been conversely looking at indicative list of agreed issues. Maybe this would help to engage good faith and constructive negotiations by all Member States. There was only one more IGC to discuss GR issues. So in developing a working methodology, the African Group placed emphasis on holding text-based negotiations to advance the work significantly. As had been mentioned by the Delegation of Bahamas, on behalf of GRULAC, it hoped that the Secretariat could take note of the indicative list of pending issues for the seminar. The African Group would remain engaged and continue to consult with Member States before IGC 30.

585. The Delegation of India, speaking on behalf of the Asia-Pacific Group, thanked the Chair, the two Vice-Chairs and the facilitators. At the same time, the Group had mixed feelings about how this meeting had progressed. It noted that all the efforts to bridge the gaps and the discussions, and especially the Q&A sessions, had brought new material in front of the Committee which could be utilized in bridging the gaps. The questions were how the IGC moved forward or whether the IGC would keep moving in circles. The IGC needed to find a way to move in a straight line. The Group wished to propose some concrete suggestions. Firstly, the Group welcomed the way that the Chair had appointed the facilitators to streamline the text. There was a need to streamline the methodology. The lessons learned should be used and the Committee needed to adapt itself so that some of the good practices in the past IGC sessions should not be discarded, especially the way which had been used to do text-based negotiations. Text-based negotiations were not exclusive things, but a mechanism by which the Committee bridged the gap. Considerable time in this session had gone into solving procedural problems. Some of the procedural problems were created artificially. The Committee had to be very careful about this. Another concrete suggestion was that the intersessional period should be used by devising some mechanism by which the dialogue kept continuing. Geneva-based delegations were able to meet together and some initiatives from the Chair would be very welcomed. The Group thanked the Secretariat sincerely for their hard work and the interpreters.

586. The Delegation of the EU, speaking on behalf of the EU and its Member States, recognizing the difficulty of the Chair's task, thanked the Chair, two Vice-Chairs and the facilitators for their unstinting efforts. This was a team that clearly worked well together. It also thanked the Secretariat for its support. The Delegation appreciated the high quality of the interventions heard during IGC 29, and commended all delegations for their constructive engagements. The Committee had held a number of meaningful exchanges that had helped to deepen understanding for the respective positions in a number of key areas. In line with the mandate, the Committee had identified a non-exhaustive list of outstanding/pending issues to be tackled at IGC 30. Regarding the question of revocation, the Delegation understood that the principle itself was up for further discussion and that no agreement had been reached on this issue. It believed that in order to register progress at IGC 30, it would be essential to reach agreement on the objectives. Without a common understanding on the central issue, the discussions on other substantive provisions would serve no real purpose. The Committee needed a clear sense of direction to move forward meaningfully towards the goal set out in the mandate. This was the rationale that underpinned the entire process. The work of IGC 30 would be based on all available documents, including document WIPO/GRTKF/IC/29/4. The Delegation was looking forward to the seminar which would be organized prior to IGC 30. In order to make the most of the seminar, it believed that it should be focused on a few core issues. Participation of patent experts on the panels would be welcomed to inform the discussions.

587. The Delegation of Latvia, speaking on behalf of CEBS, thanked the Chair for all his efforts and valuable guidance in the important discussions. It appreciated the flexible and responsive manner in which he had led the discussions. It thanked the facilitators for their work which it had found helpful. The Committee had had an interesting exchange during these days, which had given delegations clear picture of the current status of Member States' positions. As there was still a need to discuss issues in order to move forward, it expected that the seminar would bring more evidence from both experts in patent and in GR field. The Delegation of the EU, on behalf of the EU and its Member States, had provided a concrete and pragmatic proposal on the disclosure requirements, and it believed that this proposal could form a good basis for finding an agreement. The Group wished to take this opportunity to express its availability to engage with all interested stakeholders. It invited all Member States to give further consideration to this proposal. It expected that during IGC 30, the Committee would be able to narrow the existing gaps and resolve the issues. The Group thanked the interpreters and the Secretariat for their support.

588. The Delegation of China thanked the Chair and Vice-Chairs for their efforts. In particular, they had made good attempts on the new methodology. It thanked the Secretariat, facilitators, the interpreters and other delegations too. The Delegation believed that the present work had already laid down the good foundation for the future work, but to be frank, it could not say that it was totally satisfied. It believed that there was still a big gap among the opinions from the different parties, and delegations needed to strike a balance between the different interests. The aim was to make real progress and to promote the work of the IGC.

589. The Chair closed the session.

Decision on Agenda Item 9:

590. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6 and 7 on February 19, 2016. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated by March 29, 2016. Committee participants would be invited to submit written corrections to their interventions as included in the draft report before a final version of the draft report would then be circulated to Committee participants for adoption at the next session of the Committee.

[Annexes follow]

**LISTE DES PARTICIPANTS/
LIST OF PARTICIPANTS**

I. ÉTATS/STATES

(dans l'ordre alphabétique des noms français des États)

(in the alphabetical order of the names in French of the States)

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Nomonde MAIMELA (Ms.), Executive Manager, Companies and Intellectual Property Commission (CIPC), Department of Trade and Industry (DTI), Pretoria

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Masenoametsi LETLALA (Ms.), Foreign Service Officer, Global Governance and Continental Agenda, Department of International Relations and Cooperation, Pretoria

ALBANIE/ALBANIA

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ALGÉRIE/ALGERIA

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

Fayssal ALLEK, premier secrétaire, Mission permanente, Genève

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Pamela WILLE (Ms.), Counsellor, Economic Division, Permanent Mission, Geneva

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BANGLADESH

Mohamed Nazrul ISLAM, Minister Counsellor, Permanent Mission, Geneva

BARBADE/BARBADOS

Heather Armetha CLARKE (Ms.), Registrar, Corporate Affairs and Intellectual Property Office (CAIPO), Ministry of International Business and International Transport, Saint Michael

BÉNIN/BENIN

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VI. BUREAU/OFFICERS

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Vice-présidents/Vice-Chairs: Jukka LIEDES (Finland)
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Secrétaire/Secretary: Wend WENDLAND (OMPI/WIPO)

VII. BUREAU INTERNATIONAL DE L'ORGANISATION MONDIALE
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Minelik Alemu GETAHUN, sous-directeur général/Assistant Director General

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

[Annex II follows]

ANNEX II

INDICATIVE LIST OF OUTSTANDING/PENDING ISSUES TO BE TACKLED/SOLVED AT THE NEXT SESSION

1. List of terms

2. Preamble

3. Policy objectives

- Efficacy and transparency
- Whether misappropriation should be retained in the text (and if so, how it should be defined)
- Complementarity/mutual supportiveness with international agreements
- Prevention/minimization of “erroneous” patents (what is appropriate term)

4. Subject matter

- Should the instrument apply to:
 - o Any IP rights or only patent right
- In addition to GRs, should the instrument also apply to:
 - o Derivatives
 - o Associated TK/TK associated with GRs

5. Disclosure requirement

- Content of disclosure
 - o Origin and/or source of the GRs
 - o Information regarding compliance with ABS requirements including PIC
- Exceptions and limitations
 - o Type of exceptions
 - o Public interest related exceptions only
- IP/patent subject matter eligibility for GRs and/or derivative as found in nature or isolated therefrom
- Consequence of non-compliance
 - o Minimum and/or maximum standard agreement
 - o Measures/sanctions within and/or outside patent system
 - o Permissible conditions for revocation
- Trigger
 - o Claimed invention directly based on subject matter
 - o Utilization of subject matter
 - o Need for physical access or access to non-tangible subject matter
- Relationship with national and domestic ABS regimes
 - o Role of the IP/patent office in relation to notification of disclosure-related information to the Clearing House Mechanism of the CBD/NP/ITPGRFA

6. Defensive measures/No Disclosure

- Consideration of the need for additional due diligence measures/systems

7. Databases

- Databases as defensive measures or supplementary measures to a disclosure requirement
- Safeguards for TK that is widely held and/or publicly available
- Burden on traditional knowledge holders and member states

8. Relationship with International Agreements, including PCT and PLT

9. Transboundary Cooperation

10. Technical Assistance, Cooperation and Capacity-Building

[End of Annexes and of document]