

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

**Thirty-Second Session**  
**Geneva, November 28 to December 2, 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 Thirty-Second Session (“IGC 32”) in Geneva, from November 28 to December 2, 2016.
2. The following States were represented: Algeria, Angola, Argentina, Australia, Azerbaijan, Belarus, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Brazil, Canada, Chile, China, Colombia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Egypt, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Georgia, Ghana, Greece, Guatemala, Holy See, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Jamaica, Japan, Kenya, Latvia, Lebanon, Lithuania, Malaysia, Malawi, Malta, Mauritania, Mexico, Monaco, Mozambique, Myanmar, Nepal, New Zealand, Niger, Nigeria, Norway, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Slovakia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Tajikistan, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States of America, Uzbekistan, Vanuatu, Venezuela (Bolivarian Republic of), Yemen and Zimbabwe (91). The European Union (“the EU”) and its 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 Union (AU), European Patent Organisation (EPO), Food and Agriculture Organization of the United Nations (FAO), Organization of Islamic Cooperation (OIC) and South Centre (SC) (5).
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); Association for the International Collective Management of Audiovisual Works (AGICOA); Call of the Earth (COE); Civil Society Coalition (CSC); Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ); CropLife International (CROPLIFE); EcoLomics International; European Law Students’ Association (ELSA International); Friends World Committee for Consultation (FWCC); France Freedoms - Danielle Mitterrand Foundation; Health and Environment Program (HEP); Incomindios Switzerland; Indian Council of South America (CISA); Indigenous Information Network (IIN); Indigenous Peoples’ Center for Documentation, Research and Information (DoCip); International Trade Center for Development (CECIDE); International Video Federation (IVF); Instituto Indígena Brasileiro da Propriedade Intelectual (InBraPi); Massai Experience; Native American Rights Fund (NARF); Pacific Islands Forum Secretariat; Proyecto ETNOMAT, Departamento de Antropología Social, Universidad de Barcelona (España); Research Group on Cultural Property (RGCP); Società Italiana per la Museografia e i Beni Demoetnoantropologici (SIMBDEA); Traditions for Tomorrow; and Tulalip Tribes of Washington (27).
6. The list of participants is annexed to this report.
7. Document WIPO/GRTKF/IC/32/INF/2 provided an overview of the documents distributed for IGC 32.
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 IGC 32.

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

10. The Chair of the IGC, Mr. Ian Goss from Australia, opened the session and invited the Director General of WIPO to take the floor.

11. The Director General, Mr. Francis Gurry, welcomed all participants to this extremely important meeting and wished participants the best in their deliberations. All participants were familiar with the mandate set by the General Assembly (“GA”) in 2015, because this session was the fourth meeting in the biennium. It had been a very rigorous year. The Secretariat had also been asked to organize Seminars, which had been very successful. A Seminar had been held right before this present session of the IGC. He renewed his thanks to the talented and experienced moderators and speakers at the Seminar and, in particular, to the rapporteurs who would transmit the discussions held at the Seminar to the IGC. He thanked Mr. Goss, the Chair of the IGC, for his extremely dedicated and hard work. He thanked the two Vice-Chairs, namely Ambassador Robert Matheus Michael Tene from Indonesia and Mr. Jukka Liedes from Finland, for their valuable contributions. He said that the text reflected the current state of discussions on traditional knowledge (“TK”). Steady progress had been made in the course of the biennium, but there was a long way to go. He encouraged all participants to engage fully and openly, in trying to make progress so as to report positive results to the 2017 GA. He mentioned that the WIPO Voluntary Fund, since 2014, had not been possible to finance representatives of indigenous peoples and local communities (“IPLCs”). He made a renewed call to Member States to consider contributing to the Voluntary Fund to facilitate the presence of representatives of IPLCs and to encourage their participation within their own delegations. Finally, he welcomed Ms. Lucy Mulenkei, a member of the Maasai People in Kenya, Mr. Rodrigo De la Cruz Inlago, a member of the Kichwa/Kayambi Peoples in Ecuador, and Mr. Preston Hardison, the representative and policy analyst of the Tulalip Tribes in the United States of America, who would participate in the session’s Indigenous Panel.

12. The Chair thanked the Vice-Chairs, Ambassador Tene and Mr. Liedes, for their support and valuable contribution. They operated as a team and engaged frequently in and between meetings to consider how to progress the work of the IGC. He had consulted with Regional Coordinators in advance of the session and he thanked them for their guidance. He hoped that they would help build a pleasant working atmosphere. He recalled that the present IGC session, as previous sessions, was on live webcast on the WIPO website, which further improved its openness and transparency. This was a five-day session, and the last session dealing with TK. He intended to use all the time allocated. Pursuant to the new mandate, IGC 32 would focus on narrowing existing gaps, addressing unresolved issues, and considering options for a draft legal instrument(s). To make the most effective use of time, he intended to begin the sessions punctually, unless otherwise announced. To that end, opening statements of up to three minutes would be allowed by Regional Groups, the EU and the Like-Minded Countries (“the LMCs”). Any other opening statements could be handed to the Secretariat or sent by email and they would be reflected in the report. After consultation with Regional Coordinators and as there appeared to be no objection, he would also allow the Indigenous Caucus to make an opening statement. Member States and observers were strongly encouraged to interact with each other informally, as that increased the chances that Member States be aware of and perhaps support observers’ proposals. He acknowledged the importance and the value of the indigenous representatives, as well as representatives of civil society and industry. Those key stakeholders needed to have their views considered, and ultimately, any agreement would have to consider all of those views. He intended to meet with indigenous representatives and other stakeholders during the course of the week. The IGC should reach a decision on each agenda item as it went along. On Friday, December 2, 2016, the decisions as already agreed would be circulated for final confirmation by the IGC. The report of the session would be prepared after the session and circulated to all delegations for comment. The report of the session would be presented in all six languages for adoption at IGC 33 in 2017.

## AGENDA ITEM 2: ADOPTION OF THE AGENDA

### *Decision on Agenda Item 2:*

13. *The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/32/1 Prov. 2 for adoption and it was adopted.*

14. The Chair opened the floor for opening statements.

15. [Note from the Secretariat: Many delegations thanked the Chair, Vice-Chairs and Secretariat and expressed their gratitude for the preparation of the session.] The Delegation of Chile, speaking on behalf of the Group of Latin American and Caribbean Countries (“GRULAC”), thanked the Secretariat for the organization of the Seminar and the speakers for their committed participation. The exchange of national experiences and practical examples had allowed a deepening of the understanding of the challenges and the necessity and relevance of the negotiations carried out in the IGC. As defined by the 2015 GA, the mandate for the biennium was that the IGC would 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) relating to intellectual property (“IP”) which would ensure the balanced and effective protection of genetic resources (“GRs”), TK and traditional cultural expressions (“TCEs”). It looked forward to continuing negotiations on TK with a focus on addressing unresolved issues and considering options for a draft legal instrument that would allow bringing the positions closer and steering the working document towards a consensus proposal. The IGC should move forward in revising working document WIPO/GRTKF/IC/32/4, including reaching a common understanding on core issues related to TK. More specifically, it hoped that the present session would allow the IGC to make progress on four substantive issues: Policy Objectives; Subject Matter of the Instrument (Article 1); Beneficiaries of Protection (Article 2); and Scope of Protection (Article 3). It also recognized the importance of other issues, and the session should allow for the greatest possible progress. It was important to build on the existing work already carried out by the IGC. The Chair could count on the commitment of the Group to move forward.

16. The Delegation of Latvia, speaking on behalf of the Group of Central European and Baltic States (“CEBS”), said that IGC 31 had restarted the discussion on the core issues on the balanced and effective protection of TK, which had not been considered for over two years. The IGC had been able to find an agreement on some amendments to the text in order to streamline the text and to better reflect the positions of various Member States. It was crucial to have a meaningful discussion on the overall objectives of the instrument. In the framework of the IGC and of WIPO, the IGC could not solve all challenges arising from the misuse of TK. The IGC had to find a common understanding of the overarching objectives and of what was realistically achievable in order to have a focused and productive discussion on other elements such as beneficiaries or subject matter. Other instruments existed outside WIPO on the question of TK, and the issues which the IGC was working on would be complementary to those existing instruments and could only address concerns in the field of IP. The CEBS Group favored an evidence-based approach. It was possible to draw lessons from the experiences and discussions that had taken place in various Member States in elaborating TK legislation at the national level. Such crucial aspects as legal certainty and economic, social and cultural impacts should be carefully considered before reaching an agreement on any particular outcome. It supported a request for a study put forward by the Delegation of the EU, on behalf of the EU and its Member States, which aimed to analyze existing national legislation in relation to TK. The Seminar held the week before had provided interesting information and would enable an

evidence-based discussion. The CEBS Group would engage in a positive, constructive and realistic manner in the work ahead.

17. The Delegation of Turkey, speaking on behalf of Group B, noted that the Seminar had contributed to a sharing of national experiences in an evidence-based approach. That approach should be carried forward into the negotiations. As the webcast was available online, it hoped that it would constitute resourceful material for all stakeholders. It recognized the importance of the balanced and effective protection of GRs, TK and TCEs. The protection relating to those subjects should be designed in a manner that supported innovation and creativity, ensured legal certainty, and was practicable and recognized the distinct nature of each of those subjects. The mandate of the IGC provided that it should continue to expedite its work, with a focus on narrowing existing gaps. The primary focus would be to reach a common understanding on core issues, including the objectives. There was significant work to be done to narrow the gaps on the core issues and advance in a meaningful way. In the future work of the IGC, a common understanding could be increased, taking an evidence-based approach, including studies and examples of national experiences, domestic legislation and examples of protectable subject matter and subject matter that was not intended to be protected. It remained committed to contributing constructively towards achieving a mutually acceptable result.

18. The Delegation of Indonesia, speaking on behalf of the LMCs, said that its coalition represented more than 60 countries from three different groups within the IGC, namely the African Group, the Asia-Pacific Group and GRULAC. It assured of the LMCs' full support and cooperation in rendering the session a success. It extended its appreciation for the valuable contribution from all Member States and regional groups at the informal LMCs Roundtable on the Protection of Traditional Knowledge ("the Roundtable"). It was delighted to inform the IGC that most of the objectives of the Roundtable had been achieved. It reaffirmed its commitment to engage constructively in negotiating mutually acceptable outcomes on the protection of TK. It congratulated the Secretariat for the successful convening of the Seminar that provided much useful insights on issues facing the IGC. Those were important, not only for all Member States, but, more importantly, for IPLCs everywhere that had developed and generated tradition-based knowledge and innovation long before the modern IP system had been established. All communities had the right to maintain, control, protect and develop IP over their cultural heritage. It needed to push forward a greater recognition for both economic and moral rights of traditional and cultural heritage, including GRs, TK and TCEs. Substantial progress had been made on TK associated with GRs at IGC 29 and IGC 30. Significant progress had also been made on TK at IGC 31. It was confident that the current session and future sessions would yield progress as well. The IGC had to focus its discussion on the most important aspects in the text. It needed to minimize discussions and use its valuable time efficiently by not prolonging discussions on issues where positions were already well laid out and understood by all. On the issue of beneficiaries, there was no dispute that the main beneficiaries of the instrument were IPLCs. However, there were certain circumstances in which TK could not be specifically attributable to a particular IPLC. That usually occurred when TK was not specifically attributable or confined to an IPLC or it was not possible to identify the IPLC that had generated it. Understanding those circumstances, the provision on beneficiaries should address that concern and include other beneficiaries as defined by the national laws of Member States. Furthermore, the discussion on beneficiaries was closely related to the administration of rights. In order to reach a common understanding regarding beneficiaries, a discussion on administration of rights was of paramount importance. With regard to the scope of protection, there seemed to be converging views that emphasized the need to safeguard the economic and moral interests of the beneficiaries. For that purpose, it recalled the tiered approach. It invited the IGC to take into account the practical value of establishing the level of rights as determined by the diffusion of the TK and the character of its use. That would provide an opportunity to find convergence on core elements, namely subject matter of protection, beneficiaries, scope of protection, and exceptions and limitations. It recommended further discussing that last issue, as it was essential to ensure that those provisions were not too extensive so as not to compromise the

scope of protection. Noting the importance of the effective protection of GRs, TK and TCEs for all, the IGC should move forward by convening a diplomatic conference with a view to adopting a legally binding instrument(s) providing effective protection of GRs, TK and TCEs.

19. The Delegation of Nigeria, speaking on behalf of the African Group, looked forward to advancing the IGC's negotiations. It counted on the expertise, professionalism and engaging work style of the Chair, the Vice-Chairs and the Secretariat to facilitate that outcome. It assured all participants of its constructive and result-driven approach. It welcomed the Seminar as a useful resource for knowledge exchange and insights into both the challenges in the negotiations and the ideas on the way forward. There was a fundamental struggle on how to best acknowledge, promote and protect TK, the oldest form of knowledge known to humankind, in a modern IP system, which had been developed to promote the interests of industrialized economies. The challenge was whether the interest of TK holders and knowledge producers would also be accorded its rightful legal position within that framework. The Group hoped that it was the common objective of every participant at IGC 32 to try to narrow gaps, bearing in mind that it would conclude its negotiations on the interface between TK and IP until the stocktaking session scheduled for June 2017. A resolution of core issues such as beneficiaries, scope of protection and administration of rights would significantly advance the work of the IGC and set it on a path towards a coherent and practical legal instrument for the effective protection of TK in the modern international IP framework. That was the focus of the week, cognizant that such an outcome would demonstrate the progress made, the importance of all bodies of knowledge to human welfare, and in line with the mandate of the IGC, attainment of a common understanding. In that context, it supported the statement made by the Delegation of Indonesia on behalf of the LMCs. In reaffirming its readiness to work towards a successful session, it urged all participants to reflect deeper on the socio-economic value of TK to the body of knowledge that facilitated human and societal development, as recognized by the Sustainable Development Goals ("SDGs").

20. The Delegation of China was very pleased to work again alongside other States to carry out deepened text-based discussions. At IGC 31, the IGC had discussed four issues and the pending issues were to be discussed at the current session. That was the last session dedicated to TK in the biennium, and the IGC still faced an uphill struggle. It was willing to work alongside other countries to strive to move forward the discussions to achieve its goal, namely, to develop a legally binding international instrument(s) on the protection of GRs, TK and TCEs.

21. The Delegation of India, speaking on behalf of the Asia-Pacific Group, recalled the Seminar which was successfully put together by the Secretariat. The views, examples and arguments articulated by the speakers had provided many useful insights on the various outstanding issues facing the IGC. It recognized the LMCs' effort in trying to foster better understanding of those issues with a view to narrowing gaps through the Roundtable. Recognizing the critical role that TK, GRs and TCEs played in the areas of the pharmaceutical industry, food security, trade, environment, culture and sustainable development, their preservation, protection and promotion was important. Most of the members of the Group had reiterated that there was a need for a legally binding instrument(s) providing effective protection of GRs, TK and TCEs. However, some members had a different position. The Group remained committed to continuing discussions on the core issues in the effort to find common ground and work towards the finalization of the text. The definition of TK would lay down the foundation of the work. It should be inclusive and capture the unique characteristics of TK, and should be comprehensive and not require separate eligibility criteria. On beneficiaries, considering the varied circumstances in different countries, most of the members of the Group were of the view that it was pertinent to include States and national authorities within the definition of beneficiaries, if there were instances in which TK could not be directly attributed to a local community. Some members of the Group had a different position. Most of the members of the Group were of the view that Member States needed to recognize the important role played by the national authorities as trustees of TK where beneficiaries could not be identified and in

cases where beneficiaries were identified, State should be accorded the fiduciary role in consultation with local communities. Additionally, it was useful to consider Article 2 simultaneously with Article 5 on “Administration of Rights”. However, some members had a different position. On Scope of Protection, the instrument should strike a balance between economic and moral rights. The majority of the Group supported the tiered approach as the best mechanism to address the issues of secret, sacred, narrowly and widely diffused TK. However, some members of the Group had a different position. With regard to exceptions and limitations, the instrument should strike an optimal balance between the holders and users of TK, so as not to compromise its scope of protection. As IGC 32 would present the final opportunity in the biennium to discuss TK, it hoped that discussions would be fruitful and lead to visible progress. With the leadership of the Chair and the membership’s collective effort, IGC 32 would be able to narrow gaps and achieve progress, as mandated by the GA. It stood ready to engage constructively and offered its fullest cooperation.

22. The Delegation of the EU, speaking on behalf of the EU and its Member States, was looking forward to the second session on TK under the mandate. In relation to the Indicative List of Outstanding Issues, it stressed the importance of the objectives. Without a common understanding on the objectives, it was not realistic to achieve progress. Those objectives should be in line with WIPO’s mandate, and the IGC should not duplicate matters that had been dealt with in other instruments, such as the Convention on Biological Diversity (“the CBD”) or the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (“the Nagoya Protocol”). Further, there were important IP concepts, such as the public domain and the effect on all stakeholders, which should play a key role in the discussions. It stressed the usefulness of the different possibilities for the enhanced protection of TK that had already been placed before the IGC, such as awareness raising, encouraging use of existing legal frameworks, including the trademark, design, trade secret, geographical indications, and copyright systems, and improving access to those frameworks. It attached importance to respecting the mandate given by the GA. Therefore, the Delegation looked forward to a substantive debate that furthered mutual understanding of the facts rather than one geared towards reaching any particular type of outcome. First and foremost, agreement had to be found in relation to those basic issues. It continued to advocate for solid and evidence-based discussions that considered real world implications and feasibility in social, economic and legal terms, including enforcement. To that end, it supported a study on national experiences and how those might inform the discussions. It had re-submitted a working document, which requested the WIPO Secretariat to undertake a study of national experiences and domestic legislation and initiatives recently adopted in relation to the protection of TK. The re-submitted document had been slightly modified to take into account concerns expressed at IGC 31. To inform discussions at the IGC, the study should analyze domestic legislation and concrete examples of protectable subject matter and subject matter that was not intended to be protected. The study should also take into account the variety of measures that could be taken, some of which could be measures-based, while others could be rights-based.

23. The representative of PIMA, speaking on behalf of the Indigenous Caucus, said that there was a lack of funds in the Voluntary Fund. He was highly grateful to those countries that had donated to the Fund to enhance indigenous participation. The fund had stood at about 600 Swiss Francs for the past two years. The legitimacy of the proceedings would be put at risk if IPLCs could not participate. While statements were made on the high value of TK and TCEs, Member States were simultaneously failing to adequately support the participation of the holders and owners of TK and TCEs. Contributions to the Fund were only a first step. He was grateful to those countries that had consulted IPLCs on the development of national policies and legislation and to effectively inform and shape positions in the IGC. Full and effective participation also required considerable capacity-building and consultation. After 16 years of discussions and negotiations, the majority of the world’s approximately 370 million indigenous peoples and over 10,000 indigenous nations had very little understanding of what was being

negotiated in the IGC. In addition to the outreach efforts of the Secretariat, Member States had to extend the domestic consultations. IPLCs could not participate unless they were funded. The cost could represent several months of wages for many. The IGC had to find ways of improving participation by combining the Fund with other funding. Many highly capable representatives that had been invited to the Seminar or to the Indigenous Panel had indicated that they would like to participate in the negotiations but could not afford to stay beyond the funded days. He suggested revisiting the fund to make funds available in a gender and regionally balanced manner. He called upon members to promote the legitimacy of the proceedings in the eyes of the TK and TCEs owners by contributing to the Voluntary Fund to ensure full and effective participation.

24. [Note from the Secretariat: the following opening statement was submitted to the Secretariat in writing only.] The Delegation of Japan commended the facilitators for their continued dedication. The IGC had made good progress under its work program. Nevertheless, even after many years of discussion, the IGC had not been able to find a common understanding on the fundamental issues, namely, policy objectives, beneficiaries, subject matter and definition of misappropriation. Many gaps still remained. Sharing domestic experiences and practices was useful for everyone to gain a better understanding on those issues. In fact, the IGC had held valuable discussions at its past session based on presentations conducted by some Member States. It suggested that IGC 32 focus on preventing the erroneous grant of patents, which could be done by establishing and utilizing databases stored with non-secret TK. Together with the Delegations of Canada, the Republic of Korea and the United States of America (“the USA”), it had resubmitted the document entitled “Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources” (WIPO/GRTKF/IC/32/7). The discussions on that recommendation could complement and even facilitate text-based negotiations. It was ready to engage in a constructive spirit.

### **AGENDA ITEM 3: ADOPTION OF THE REPORT OF THE THIRTY-FIRST SESSION**

*Decision on Agenda Item 3:*

25. *The Chair submitted the draft report of the Thirty-First Session of the Committee (WIPO/GRTKF/IC/31/10 Prov. 2) for adoption and it was adopted.*

### **AGENDA ITEM 4: ACCREDITATION OF CERTAIN ORGANIZATIONS**

*Decision on Agenda Item 4:*

26. *The Committee unanimously approved the accreditation of the three organizations listed in the Annex to document WIPO/GRTKF/IC/32/2 as ad hoc observers, namely: Association Culturelle et Scientifique De Khenchela (ACSK); Association Debout Femmes Autochtones du Congo (ADFAC); and Indigenous World Association (IWA).*



**AGENDA ITEM 5: REPORTING ON THE SEMINAR ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (NOVEMBER 24 AND 25, 2016)**

27. The Chair invited the rapporteurs from the Seminar to deliver their reports.

28. Mr. Reynald Veillard, Counselor, Permanent Mission of Switzerland to the United Nations Office and other International Organizations in Geneva, reported on Roundtable 1 “Regional, National and Community Experiences Relevant to Identifying ‘Protectable Traditional Knowledge’ at an International Level” as below:

“Roundtable 1 addressed regional, national and community experiences relevant to identifying “protectable traditional knowledge” at an international level. It was moderated by Dr. Sharon B. Le Gall from the Faculty of Law of the University of the West Indies of Trinidad and Tobago.

The first speaker of the round table, Miss Lilyclaire Bellamy, Executive Director of the Jamaican Intellectual Property Office, emphasized the importance of a holistic approach to the protection of TK, as TK is closely linked to GR and TCEs. Her government wished to turn TK of medicines and food into an economic industry. She mentioned several examples, ranging from blue mountain coffee, cannabis for medicinal purposes, to bamboo architecture. She stressed that so far there were no specific laws regulating these products and processes, so the government aimed to update existing laws. She also referred to an article in the WIPO Magazine written by Mr. Wend Wendland on the digitization of indigenous music of the Maasai, which well described some of the emerging issues in the utilization of TK and TCEs.

Mr. Andrés Valladolid, President of the National Anti-Biopiracy Commission of Peru explained the Andean and Amazonian Cosmovision as regards TK. He mentioned that there are three types of TK in Peru, namely signs (senas), secrets (secretos), and knowledge (saberes). He referred to Law 27811, which protected TK of indigenous peoples and communities related to biological resources. Law 27811 established three types of registers: public registry, confidential registry, and local registers (held by the communities themselves). 3814 entries have been registered to date. He pointed out that TK did not need to be registered in order to be protected. He highlighted that Law 27811 did not provide economic rights for TK that had been made accessible to persons other than the indigenous peoples by mass communication media such as publications, or for TK related to biological resources that have become extensively known outside the communities before 1982.

Dr Avanti Perera from Sri Lanka traced the historical context of her country, which had contributed to the vast body of TK in the country, including indigenous medicine, agriculture, architecture, water supply, food security/habits and dispute settlements. These TKs were inter-generational, mostly orally transmitted, held by communities and were either narrowly or widely diffused within the communities. However, the current legal framework did not provide an adequate protection for TK. Despite some challenges, ongoing efforts to finalize a National Policy on TK, identify and document TK and prepare draft legislation could be seen as positive steps. She emphasized the importance that such a Policy had a tiered approach which covered in a differentiated way widely diffused and narrowly diffused knowledge.

Ms Madina Karmysheva from the State Service of Intellectual Property and Innovation of the Kyrgyz Republic reported that TK and associated GRs were increasingly becoming the target of economic interest. Therefore, in 2007 the Kyrgyz Republic adopted a law “On the protection of TK”. It did not apply to folklore and handicrafts. The scope of

protected TK covered TK which was “practically applicable in a particular sphere of human activity and having a positive result in their application”. TK could be registered and protected by individuals or groups. Registration was not subject to time limits. Patenting was not allowed for objects utilizing the TK. There was a database of TK maintained by the State Service which was used to consider patent applications. The Office also digitized TK and its sources and registered them in the database. She also reported on workshops, such as on building yurts and nomad games, which allowed TK to be documented and entered into the database.

Ms Lucy Mulenkei, Member of the Maasai People of Kenya, spoke of many challenges, among them the new technologies that came with the digital world that were changing the traditions of the people. For various reasons, TK is disappearing. Therefore, international legal instruments and the documentation of TK are crucial. She referred to the CBD and the Nagoya Protocol, which recognized the right of communities to give prior informed consent (“PIC”) and mutually agreed terms (“MAT”). She urged Member States to involve and support IPLCs at all levels of discussions and decision-making.

The Roundtable Moderator, Dr Sharon Le Gall, identified several commonalities regarding the scope of “protectable traditional knowledge” among all speakers’ presentations: (1) all referred to different categories of TK and spoke of the importance of identifying TK related to agriculture, medicine, architecture, among others - so the TK subject matter was broad. Questions remained on whether martial arts, nomadic games, etc., fell under TK and where exactly protectable TK should be cut off; (2) all emphasized the importance of maintaining institutions that facilitated the protection of TK, both modern and customary institutions; (3) all referred to different stages of policy development, regulation development and documentation: in some territories, there were policies to govern what was protected and how.

Following the presentations, the Seminar participants asked questions and discussed, *inter alia*, the following 8 points:

1. the meaning and the scope of “secret” TK;
2. the call by TK holders in the context of a tiered approach not to subject TK to uniform documentation with predefined parameters, but rather to recognize and comply with the customary laws and the specific obligations for transmission of different forms of TK as defined by TK holders;
3. means to resolve the tension that some TK was not specific to a particular community or was mixed with elements from different TK systems. Such means could, for instance, include regional protection or transboundary cooperation;
4. the definition of “national competent authority” and the role of local administration;
5. the reluctance of TK holders to document their TK and that sometimes they did not see value in documentation;
6. the method developed under the Peruvian Law 27811 of identifying cases of misappropriation by integrating three databases, namely the public database of TK, a database of patents, and a database of GRs from Peru;
7. combining two ways of thinking, namely (i) TK maintained by indigenous peoples being attributed to those peoples and (ii) TK being declared as cultural heritage of a nation or humanity;
8. clarifying what is meant by “protection of TK” as some understand that in the context of avoiding the extinction of the TK, and others as any act of access by non-TK holders, or acts of access without PIC.

In their summaries of the Roundtable discussion, the speakers noted:

- the strong commonalities among reported experiences;
- the broad scope of TK;

- that creating national databases was an option;
- the importance of having an international document/approach so that national databases could be connected and searched;
- the duty to protect TK and pass it on to future generations was another point mentioned, as well as the fact that TK holders were becoming fewer and that in some areas there were no TK holders left;
- the importance to focus on those issues that are unifying the international community (in the IGC) rather than on the differences.”

29. Mr. Fayssal Allek, First Secretary, Permanent Mission of the People’s Democratic Republic of Algeria to the United Nations Office at Geneva and other International Organizations in Switzerland, reported on Roundtable 2 “Perspectives on and Experiences with a ‘Tiered Approach’ to the Protection of Traditional Knowledge - Scope of Protection and Exceptions and Limitations” as below:

“The moderator, Professor Daniel Kraus, introduced the session. He opened the roundtable by recalling that a tiered approach to scope of protection responded to the fact that not all kinds of TK could necessarily be protected in the same way, in particular at an international level. In a tiered approach, different kinds or levels of rights or measures were granted, depending on the nature and characteristics of the subject matter, the level of control retained by the beneficiaries and its degree of diffusion. A tiered approach offered the opportunity to address the differences between sacred, secret, narrowly diffused and widely diffused TK.

As the first Speaker, Mrs. Soledad de la Torre Bossano provided an overview of recent developments in Ecuadorian legislation on TK management, and new policies for cultural diversity. She identified four categories of TK, namely sacred, secret, widely diffused and narrowly diffused, each with a specific scope of protection. Ms. de la Torre Bossano specified that protection measures for TK included contracts and registration of TK on a no disclosure principle.

As the second Speaker, Mr. Chidi Oguamanam raised the question whether something that was sacred or secret could also be narrowly or widely diffused. Using examples from several jurisdictions, including the Kente fabrics and designs from Ghana, the Adire fabrics and designs from Nigeria and the Cowichan sweaters from Canada, he emphasized that classifying TK into tiers was not always straightforward. Mr. Oguamanam explained that products could embody different degrees of cultural and spiritual claims and could also be the object of varied degrees of diffusion. There were thus different layers of looking at an artwork. TK had always had a problematic relationship with IP. The tiered approach was an innovative and pragmatic approach to the protection of TK, but in order to capture the historic and existing realities of forms of TK, the tiered approach had to focus on the specific character and context of a form of TK, as opposed to a global approach.

As the third Speaker, Ms. Miranda Risang Ayu Paler indicated that there were five tiers in Indonesia’s perspective on tiered approach, namely secret and sacred TK, sacred TK, narrowly diffused/closely held TK, widely diffused TK, and publicly available TK. She gave an overview of the legal means available for the protection of TK in Indonesia and highlighted relevant laws and regulations for the protection of TK and GRs. Ms. Risang Ayu Paler concluded with giving specific examples of types of TK that would fall in the different tiers in the Wulla Poddu Ritual Tarung ancestral village in East Nusa Tenggara, Indonesia.

As the fourth Speaker, Ms. Ann Marie Chischilly discussed the situation where TK was used in climate change adaptation plans. As some of these plans were funded by the American Bureau of Indian Affairs, anyone could access the information under the American Freedom of Information Act; and thus tribes had to be made aware that once they contributed their TK, it could be exposed. She indicated that some federal agencies were now adopting TK guidelines. Some American Indian tribes had adopted Tribal Council Resolutions to protect their TK. Not all tribes had a unified approach on TK but some regions worked together. There was a common understanding that secret/sacred knowledge should get the strongest rights. In the context of the tiered approach discussion, she emphasized that it was not because TK was widely available that it was not sacred. She added that a proper understanding of the use and context of TK was extremely important.

The last speaker, Ms. Manisha Desai, recalled that the biopharmaceutical research and development process took many years and that there were many actors involved in the process between the initiation and the conclusion of a research program. Existing forms of IP provided a balance between the needs of the right-holders and the needs of society at large, and all users of IP had to work within that balanced framework. For Ms. Desai, proposals for protection of TK did not reflect a similar balance. As with existing forms of IP, any new form of IP for TK should be balanced with regard to scope and term of protection, and should provide a clear proof of entitlement and notice to the public. She stated that such a balance would result in legal certainty for both right-holders and potential users.

In the ensuing discussions that followed the presentations, the possible overlaps between the tiers were explored. For example, where sacred/secret TK was embodied in widely or narrowly diffused TK. Who was going to decide what was widely or narrowly diffused, as well as the legal uncertainty that stemmed from these concepts. Some participants emphasized that close attention should be placed on customary protocols and that it would be important that the intent behind the tiered approach be clearly explained to the TK holders.”

30. Ms. Usana Berananda, Minister, Deputy Permanent Representative, Permanent Mission of Thailand to the World Trade Organization (WTO), reported on Roundtable 3 “Complementary Measures and Customary Law for the Protection of Traditional Knowledge: Examples and Lessons Learned” as below:

“The roundtable was moderated by Dr. Carolyn Deere Birkbeck. It explored various “complementary measures”, including databases, civil and criminal options as well as customary law to support a “rights-based” approach in the protection of TK. The relationship between customary law and international instrument was also discussed.

Dr. Ghazala Javed shared the experience of India in protecting TK at different levels through both legislative and administrative measures. The Traditional Knowledge Digital Library (“TKDL”) was a pioneer initiative towards defensive protection, and was used for prior art searches by International Patent Offices. The current National IPR policy of India aimed at expanding TKDL’s ambit while exploring the possibility of using it for R&D. Moreover, there had been documentation of TK at provincial and community levels. Databases were an important supplementary measure but have a limitation in providing holistic protection to different forms of TK. An international legal instrument was, therefore, a prerequisite to provide stronger protection.

Ms. Deborah Lashley-Johnson indicated that the two Joint Recommendations sponsored by Canada, Japan, the Republic of Korea and the US (Note by the Secretariat: documents WIPO/GRTKF/IC/32/6 and WIPO/GRTKF/IC/32/7) helped identify options for

achieving the shared objectives of preventing the erroneous grants of patents when the invention lacked novelty and ensuring ABS arrangements between users and providers of TK. At an international level, there had been difficulty in reaching consensus on a rights-based approach that would respect existing IP rights and the existing IP system, maintain the public domain and further dissemination and use of publicly available knowledge. What was achievable were steps countries and other stakeholders could take today concerning defensive protection measures to improve the quality of patent examination of applications involving GRs and associated TK and management of the access, research and/or subsequent IP through ABS agreements. She pointed out that through the adoptions of the two Joint Recommendations, complementary measures would have an international relevance.

Ms. Catherine Bunyassi Kahuria started by examining “Kenya Development Agenda 2010” which recognized the need for collaboration between the government, research and development institutions, indigenous and local communities, decision-makers, and TK and GRs managers for sustainable development. All county governments should establish and maintain a register which contained information relating to TK and TCEs collected and documented by the county government during the registration process. The county governments and other relevant institutions should co-operate with the national government in the establishment and maintenance of a special Repository at the Kenya Copyright Board, which was known as the “Traditional Knowledge Digital Repository” (TKDR). She concluded by stressing the need to raise awareness of IP issues, build trust between national authorities and IPLCs, enhance capacity and enforcement mechanism.

Ms. Silvia Leticia García Hernández indicated that in Guatemala there was a huge cultural diversity which comprised four different peoples, namely Maya, Garífuna, Xinca and Ladino peoples, with an overall population above 17 million people and a rich Mayan civilization. Complementary measures for the protection of TK were based on the national IP strategy whose third objective was to support the protection and conservation of TK, TCEs and GRs, as well as other relevant national policies. The work carried out by Mayan spiritual guides, healers or therapists, had recently been recognized by the Ministry of Health, and had been incorporated into the work of rural health centers, to provide assistance to communities. Furthermore, important work on voluntary codes of conduct had been undertaken by indigenous associations, such as Ak Tenamit, on education, health and agriculture-related aspects.

Mr. Rodrigo de la Cruz focused on the ability of IPLCs to protect their TK through unwritten customary laws and practices. He described the traditional practices of three peoples, namely, A'i/kofán, Tsáchila and Kichua Sarayaku in Ecuador's Amazon area. In these cultures there were well established governance and decision making structures regulated by customary law. The national legal framework provided that TK belonged to indigenous peoples, those rights should be imprescriptible rights, and self-determination should play a crucial role in this regard. Collective rights to TK were also supported by the United Nations Declaration on the Rights of Indigenous Peoples (“the UNDRIP”), and mechanisms for their protection were provided for under the CBD and the Nagoya Protocol. He noted that the majority of communities had their own mechanisms of intergenerational transmission of knowledge. Complementary measures based on customary law were very effective means of ensuring such knowledge transmission. The IGC should recognize the usefulness of these customary norms and consider how an international instrument can be supportive in order to enable the continuation and preservation of TK systems.

The ensuing discussion explored several issues including: the need to build trust and capacity of IPLCs; the extent to which customary law - although specific to each country

- could help design an international protection system; how communities could be supported to oppose patents which allegedly violated their rights over TK; and that community databases could be part of the solution although there was a huge capacity and technology gap that needed to be addressed. The importance of land rights, community trademarks and geographical indications were also discussed.”

31. Ms. Pilar Escobar, Counselor, Permanent Mission of Mexico to the United Nations Office and other International Organizations in Geneva, reported on Roundtable 4 “Perspectives on and Experiences with Other Issues: Sanctions and Remedies, Management of Rights, Term of Protection, Formalities, Transitional Measures, Relationship with other International Agreements, National Treatment and Transboundary Cooperation” as below:

“Roundtable 4, moderated by Dr. Marisella Ouma, discussed “Perspectives and experience on other issues: sanctions and resources, rights management, duration of protection, formalities, transitional measures, relationship with other international agreements, national treatment and cross-border cooperation”.

The main topics to which the participants referred included the following.

Ms. Anna Vuopala spoke of the relationship that any instrument relating to the protection of TK should have with other relevant international instruments. She noted that in the event of a treaty being agreed, it should be aligned with the Vienna Convention on the Law of Treaties of 1969, in particular Article 30 thereof. She added that treaties were normally based on the principle of national treatment. Alternatively, consideration could be given to establishing a set of guiding principles or guidelines, or possible rules of interpretation that could be used by Member States at the national level.

Ms. Vuopala stated that since the establishment of the IGC, a number of international agreements relating to TK have been adopted, such as the UNDRIP, the Nagoya Protocol and two UNESCO conventions which include provisions to avoid the impairment or suppression of rights. She emphasized that instrumentation should be mainly at the community level. In the absence of agreement on the main issues and in order to make use of synergies offered by existing instruments, consideration should also be given to the establishment of databases, lists and catalogues to improve transparency in this area at the national level. In this regard, she referred to the wiki-inventory on the intangible cultural heritage of Finland, which had been launched in February 2016 and involved all communities, including the Sami people of Finland. She suggested that the wiki could be taken as an example of how to prevent the undesired disclosure of TK, involving the State.

Dr. Sharon B. Le Gall addressed a number of issues having regard to the preparation of a legal framework for the CARICOM region to protect TK and TCEs. She noted that sanctions and remedies could include civil and criminal sanctions, as well as administrative sanctions, and public apologies to reflect the diversity of TK among the various actors.

The beneficiaries indicated that they should have the option of managing or exercising their rights directly or through a designated agency. Protection could be provided through compliance with certain criteria or be subject to prior registration. Registration could facilitate the administration of rights and transparency. Transitional measures could allow or exclude retroactivity, as well as intermediate solutions, to establish illegal use after a specific period of time.

Mutual support, complementarity, compatibility (where possible) and non-subordination should prevail in defining the relationship between a *sui generis* protection framework

and other international agreements. Although national treatment could be considered as a good starting point, it must be complemented by mutual recognition and reciprocity, while customary law applicable elsewhere must also be recognized in national jurisdictions. As TK holders could be found across national boundaries, it was important to have cross-border cooperation.

For her part, Ms. Timaima Vakadewabuka referred to the 2016 Bill on Traditional Knowledge and Traditional Cultural Expressions being prepared in Fiji with the support of WIPO. With regard to rights management, she noted that the IGC would have to consider three issues: (1) the form of participation of TK holders in the establishment of a competent authority; (2) whether or not the establishment of such authority was mandatory; and (3) whether there should be national flexibility in this regard. Regarding the transitional measures, she stated that the Fiji Bill included retroactivity as a general rule but acknowledged that it might engender difficulties with respect to TK that had been used in good faith. She suggested that an interim transitional solution could be agreed by consensus.

Thereafter, Ms. Ann Marie Chischilly took the floor, referring to three aspects of Navajo identity: balance, harmony and peace courts. She invited the IGC to use these elements as a source of inspiration for its work. She emphasized the need for cross-border cooperation and gave an example of the difficulties faced by the Navajo and Hopi peoples in asserting their rights in a situation where ceremonial masks were put up for auction.

Ms. Chischilly was in favor of capacity-building and educational activities in support of the implementation of any legal instrument, as part of the transitional measures. As a Navajo, she expressed doubts about the relevance of databases due to lack of trust between TK holders and third parties. She concluded by referring to the policy of informed consent that had been developed by the board of governors of Arizona in order to foster trust between native and non-native persons.

The discussion highlighted the need to ensure that third parties seeking access to TK know how to achieve it. Efforts should be made to reconcile their respective positions, to achieve a balance between different systems and therefore an instrument that would be of use to all stakeholders.”

32. The Chair thanked the rapporteurs for their clear, balanced and informative reports. The Chair opened the floor for any questions/comments.

33. The Delegation of Sudan aligned itself with the opening statement that had been delivered by the Delegation of Nigeria, on behalf of the African Group. It was grateful for the Seminar and its very fruitful roundtables, aiming at sharing experiences and lessons learned among participants on the protection of TK at the national, regional and international levels. It appreciated the work that had been done by the four rapporteurs.

34. The Delegation of Nigeria thanked the four rapporteurs for their excellent and comprehensive rendition of the presentations and discussions held during the Seminar. It hoped that the insights shared would positively impact the work of the IGC.

*Decision on Agenda Item 5:*

35. *The Committee took note of the oral reports from the rapporteurs: Mr. Reynald Veillard, Counselor, Permanent Mission of Switzerland to*

*the United Nations Office and other International Organizations in Geneva; Mr. Fayssal Allek, First Secretary, Permanent Mission of the People's Democratic Republic of Algeria to the United Nations Office at Geneva and other International Organizations in Switzerland; Ms. Usana Berananda, Minister, Deputy Permanent Representative, Permanent Mission of Thailand to the World Trade Organization (WTO); and Ms. María del Pilar Escobar Bautista, Counselor, Permanent Mission of Mexico to the United Nations Office and other International Organizations in Geneva.*

36. *The Committee also took note of document  
WIPO/GRTKF/IC/32/INF/9.*

## **AGENDA ITEM 6: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES**

37. The Chair provided an update on the Voluntary Fund and referred to the intervention by the representative of PIMA, on behalf of the Indigenous Caucus, on that issue. The Fund was depleted. He called upon delegations to consult internally and contribute to the Fund to keep it afloat. It was very important and went to the heart of the IGC's credibility on support for indigenous participation. He hoped that Member States could come forward with funds to support participation at IGC 33 and IGC 34. He referred to document WIPO/GRTKF/IC/32/INF/4, which provided information on the state of contributions and applications for support, and document WIPO/GRTKF/IC/32/3 on the appointment of the members of the Advisory Board. The IGC would later be invited to elect the members of the Board. The Chair proposed that His Excellency Ambassador Tene, one of the Vice-Chairs, serve as the Chair of the Advisory Board. The outcomes of the Board's deliberations would be reported in document WIPO/GRTKF/IC/32/INF/6.

38. The representative of INBRAPI supported the opening statement made by the representative of PIMA, on behalf of the Indigenous Caucus, on the absence of funds in the Voluntary Fund. She drew the attention of delegations to the legitimacy and the credibility of the negotiations in the future. She had participated since 2001 with the intention to cooperate and make progress on binding international instruments, which would provide effective protection to the TK, GRs and TCEs of IPLCs around the world. However, the moment was critical. IPLCs would no longer be present at the next sessions of the IGC if the Voluntary Fund did not receive additional funds. IPLCs would have to abandon the process, as they did not have the resources to continue to participate. They could not assess the impact of IP on the future use of their TK. Until then, IPLCs were mere observers in a discussion that dealt with the essence of their cultures, the sacred aspect of their spirituality, the elements that they had managed to conserve in secret, and the knowledge that they had shared in good faith. All that might be put in the public domain. She asked how the IGC could come to an agreement on an international IP instrument, which would ensure the effective and balanced protection of TK, GRs, and TCEs, without the full and effective participation of IPLCs who were their creators, maintainers, owners and holders.



39. [Note from the Secretariat]: The Indigenous Panel at IGC 32 addressed the following topic: “Outstanding/Pending Issues in the IGC Draft Articles on the Protection of Traditional Knowledge: Indigenous Peoples’ and Local Communities’ Perspectives. The keynote speaker was Ms. Lucy Mulenkei, Member of the Maasai People, Kenya. The two other panelists were: Mr. Rodrigo De la Cruz Inlago, Member of the Kichwa/Kayambi Peoples, Ecuador; and Mr. Preston Hardison, Representative and Policy Analyst, Tulalip Tribes, USA. The Chair of the Panel was Mr. Raymond Freyberg, Representative, Tulalip Tribes, USA. The presentations were made according to the program (WIPO/GRTKF/IC/32/INF/5) and are available on the TK website as received. Some highlights of the Panel are:

- Member States need to understand the needs of indigenous peoples at the national level. Indigenous peoples want nothing but to have their role respected and their rights recognized. Having a holistic approach is important. The brackets around “peoples” in the text should be removed.
- It is important to remind the delegations of Article 31 of the UNDRIP.
- It is important to put some measures in place to ensure the economic value of TK and ensure benefit-sharing.
- The IGC needs to look at the issues of transboundary cooperation and national treatment.
- The definition of TK should include the fundamental characteristics of TK pertaining to its collective nature. It should not be subject to any time limitation. The negotiated instrument needs to cover all kinds of TK.
- A rights-based approach to the protection is needed. The rights need to include both economic rights and moral rights.
- Regarding databases, the data deposited needs to be based on the prior consent of indigenous peoples, and the use and access to this information needs to directly benefit indigenous peoples based on fair benefit-sharing.
- The disclosure of the sources of origin of TK is the only way to ensure the acknowledgement of origin and a fair and equitable benefit-sharing.
- The instrument on TK cannot and should not undermine the implementation of the evolving human rights regime and should not have language that will preempt the development of those rights.
- The notion of public domain is not appropriate to be applied to much of TK.
- Secret and sacred TK should certainly be split. Many IPLCs considered all TK sacred. The concept of “widely diffused” is highly problematic.
- The IGC needs to discuss the issue of repatriation and retroactivity.

40. [Note from the Secretariat]: The Advisory Board of the WIPO Voluntary Fund met on November 30 and December 1, 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/32/INF/6, which was issued before the end of the session.

41. The representative of INBRAPI, speaking on behalf of the Indigenous Caucus, thanked the parties who had supported them throughout the IGC process so that their concerns and rights were reflected in the text. She also thanked the parties that had made possible their participation in the IGC process. She urged parties and organizations to contribute to the Voluntary Fund at that stage of the negotiations, as IPLCs were running the risk of seeing their full participation, which was guaranteed by the UNDRIP. She regretted that the voice of IPLCs would no longer be heard in the IGC after 16 years and 32 meetings of hard work. The IGC would not have sufficient credibility or legitimacy in order to fulfill its task. She said that they could not allow the decisions on their future to be taken without their full and effective participation.

42. *The Committee took note of documents WIPO/GRTKF/IC/32/3, WIPO/GRTKF/IC/32/INF/4 and WIPO/GRTKF/IC/32/INF/6.*

43. *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.*

44. *The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Roger Cho, representative, Incomindios, Switzerland; Mr. Rodrigo de la Cruz Inlago, representative, Call of the Earth – Llamado de la Tierra, Ecuador; Mr. Parviz Emomov, Second Secretary, Permanent Mission of Tajikistan, Geneva; Ms. Melody Lynn Mccoy, representative, Native American Rights Fund, United States of America; Ms. Nusta Maldonado, Third Secretary, Permanent Mission of Ecuador, Geneva; Mr. Carlo Maria Marengi, Intellectual Property and Trade Attaché, Permanent Mission of the Holy See, Geneva; Ms. Boipelo Sithole, First Secretary (Trade), Permanent Mission of Botswana, Geneva; and Mr. Arnel Talisayon, First Secretary and Consul, Permanent Mission of the Philippines, Geneva.*

45. *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: TRADITIONAL KNOWLEDGE**

46. The Chair recalled that he had consulted the Regional Coordinators on the working methodology for the session, especially for Agenda Item 7, and that the methodology and program were agreed. Regarding the result of IGC 32, a revised version of document WIPO/GRTKF/32/4 would be produced, using the same methodology as in previous IGC sessions. A Rev. 1 would be prepared and presented by Wednesday morning. Time would be given for comments and further suggestions, including textual proposals. A Rev. 2 would be prepared and presented for Friday morning and time would be given for general comments to

be included in the report. The plenary would be invited to note Rev. 2 and transmit it to IGC 34. Throughout the week, the facilitators would listen to all interventions in the plenary and in the informals, and undertake drafting and incorporate textual proposals to enable more focused and incremental progress. The facilitators could introduce and present their work on the screen. That “work in progress” provided an opportunity prior to a revision being produced for the facilitators to gain more guidance from Member States. During the plenary, delegations could provide additional comments on the outstanding pending issues discussed at IGC 31, and he would reflect on where to start with that work. He did not intend to repeat the discussions of IGC 31. Where divergences were clearly known and it was clear that the IGC would not be able to make further progress, he would move quickly on to areas where there was opportunity for progress. The plenary remained the decision-making body. The informals were there to facilitate the discussions in a smaller, informal setting, so as to reach a common understanding and to narrow existing gaps. The informals would be chaired by him or a Vice-Chair, with the active assistance of the facilitators. Each regional group would be represented by six delegations, one of which should be preferably the Regional Coordinator. In order to increase transparency, other Member States would be permitted to sit in on the informals without speaking rights. Indigenous representatives would be asked to nominate two members to participate and an additional two to observe without speaking rights. He said there was still no agreement on whether to include other stakeholders, particularly industry. During the informals, delegates (both Member States and indigenous representatives) could take the floor and make proposals. Given the nature of the informals, proposals from the indigenous representatives did not need Member States’ support within the informal setting. However, if those went forward, when presented in the plenary and identified as such by the facilitators, they would require Member States’ support to be retained. There would be no live drafting in the plenary or informals. Depending on progress made, the Chair could establish one or more small *ad hoc* contact groups to tackle a particular outstanding pending issue, so as to further narrow existing gaps. Such contact groups could be particularly useful with regard to issues that had been thoroughly discussed either in the plenary or informals but where divergent views remained. The composition of the contact groups depended on the issue to be tackled, but would typically comprise a representative from each region, depending on the issue and the Member States’ interests. He would appoint either one of the Vice-Chairs or a facilitator to chair the groups. Contact groups would have a short session and would report back to the plenary or informals. Ms. Margo Bagley from Mozambique and Ms. Ema Hao’uli from New Zealand would continue to be facilitators. They would assist the plenary and the informals by following the discussion closely and including the drafting proposals. They might take the floor and make proposals. They would review all the materials undertaken in drafting and prepare the revisions. Substantively, IGC 31 had focused on ensuring clarity around different Member States’ positions and, where possible, on narrowing gaps. That was reflected in the current working document, which incorporated a number of alternate options. IGC 32, which was the last meeting under the mandate on TK, would be critical to focus predominantly on narrowing existing gaps on substantive core issues, where possible, and on addressing the core issues which had not been addressed at IGC 31. The Chair believed that the core objective of the IGC was to narrow existing gaps, noting that that could only be achieved if the IGC reached a common understanding on core issues. He had asked the facilitators to reduce options based on the input from the deliberations, while maintaining the integrity of Member States’ policy positions. That was not always about attempting to retain the verbatim language of Member States’ positions, but rather maintaining the integrity of the policy intent. The facilitators might reintroduce some brackets and alternates within options, where the differences did not significantly alter the policy intent, though in the first instance, they might engage with specific Member States to see if compromise language could be found. If a Member State, on reviewing the facilitators’ language, wished to retain specific language, that would be honored. However, if the IGC was to make progress considering the divergent positions, he asked all participants to carefully consider any new language proposed by the facilitators. To make progress, the IGC would need to develop solutions that took account of the interests of all Member States and those of the key stakeholders in the process, including IPLCs, industry and civil society. He

stated that it was important to reflect on the significant diversity in the international environment within which TK operated, including the nature of the IPLCs, their customary laws and the historic context in which they existed; the variation in national approaches, including laws and treaties dealing with IPLCs; and the control they had over their knowledge and lands, and the transboundary nature of many IPLCs. An overly prescriptive “one size fits all” outcome was unlikely to be effective or practical. Whatever the form of the agreement, it would need to be principle-based around core elements or minimum standards with flexibility for implementation at the national level. He expected delegations to particularly consider that point when reflecting on some of the text in the working document. The Chair also commented on the word “balance”. In seeking to develop approaches to protect the interests of TK owners, as reflected in Article 31 of the UNDRIP, one needed to recognize that whatever agreements, measures and mechanisms would be put in place, they would need to operate within the IP system. While looking to protect the interests of IPLCs, the IGC would need to balance those interests with maintaining the integrity of the IP system, without which innovation and subsequent economic and social benefits would not flow. A critical element in maintaining that integrity was, as far as practical, providing legal certainty for rights holders. He asked delegations to reflect on discussions in relation to complementary measures. It was clear that the majority of members, notwithstanding their positions on other issues, recognized that those measures would underpin any outcome from the negotiations. It would be useful to consider how to find a pathway to progress work in that area. Reflecting on the opening statements in the morning, he had noted the desire for a focus on the central issues, including objectives, subject matter, beneficiaries (which were related to administration of rights when considering “nations” and “States”) and scope of protection (which was linked to exceptions and limitations). He also noted transboundary issues and customary law. The IGC might need to review some definitions in the list of terms and discuss Article 3 BIS. He emphasized that the Chair’s Information Note, which reflected his views only, was without prejudice to any Member State’s position and had no status. The Chair then commenced the discussion on the core issues, starting with objectives. He highlighted the comments made by the keynote speaker of the Seminar. She had identified three common elements that she believed were relevant: (1) prevent the misappropriation/misuse and unauthorized use of TK; (2) provide beneficiaries with the means to control their TK used beyond the traditional and customary context; and (3) encourage/protect tradition-based innovation. He wondered whether the prevention of granting erroneous patents was related to preventing misappropriation, and whether the IGC could find a way to merge those ideas into a single objective. Additional questions were: (1) whether the objectives were reflected in the substantive provisions; if not, whether they were redundant or could be moved to the preamble; and (2) whether the objectives were relevant to an instrument relating to the IP system. He opened the floor for comments on “Policy Objectives”.

47. The Delegation of Indonesia, speaking on behalf of the LMCs, said that positions were already very well laid out with regard to policy objectives. It preferred Alt 1. If Member States were not ready to move forward or change their position, it was fair to move on to other issues and come back to policy objectives later.

48. The Delegation of Nigeria, speaking on behalf of the African Group, shared the view that Member States’ positions were sufficiently clear. It preferred Alt 1. Many elements were represented throughout the text, depending on which alternatives each Member State or Group chose.

49. The Delegation of India aligned itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs. It supported Alt 1.

50. The Delegation of Thailand associated itself with the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Nigeria, on behalf of the African Group. Policy objectives had already been discussed at great length at the previous IGC sessions. It preferred Alt 1.

51. The Delegation of Switzerland also recognized that Member States' positions were sufficiently clear with regard to the policy objectives. It reiterated that they should focus on the protection of TK within the context of the IP system and not on the objectives that were already contained in other international instruments or that were not relevant to the IP system. That was important to ensure the mutual supportiveness of the instrument with other relevant existing agreements, such as the UNDRIP and the Nagoya Protocol. It remained open to work on the various alternatives in the text. Nevertheless, the Delegation shared the following observations with regard to the objective of preventing misappropriation/illegal appropriation/misuse/unauthorized use contained in Alt 1, and the objective of preventing the misuse/unlawful appropriation contained in Alt 2. Those objectives remained unclear. It recalled that considerable efforts had been made during the negotiation of the Nagoya Protocol to define those concepts in the context of GRs and TK associated with GRs. At the end, it had been decided not to include those terms in the Nagoya Protocol. Instead, the Nagoya Protocol, on the one hand, referred to compliance with domestic legislation or regulatory requirements on access and benefit sharing (Articles 15 and 16), and, on the other hand, it referred to compliance with mutually agreed terms for access and use of GRs and for TK associated with GRs (Article 18). Moreover, Article 12 stated that in implementing their obligations, Parties should take into account customary laws and community protocols of indigenous and local communities ("ILCs"). Thus, the Nagoya Protocol took a positive approach. Instead of focusing on illegal or wrong actions, it focused on measures to ensure the legal and appropriate use of GRs and TK associated with GRs with the aim of ensuring benefit-sharing. Therefore, in order to potentially narrow existing gaps, the IGC could take a positive approach in the context of elaborating the objectives of the international legal instrument. Instead of referring to misappropriation/misuse etc., the objective of the instrument would therefore aim to ensure the appropriate use of TK within the IP system in accordance with national law, and by taking into account customary laws and the rights of ILCs over such knowledge. That would also allow contributing to the fair and equitable sharing of benefits, as an effect or result of implementing the provisions of the international legal instrument rather than an objective as such.

52. The Delegation of Jamaica stated that the IGC should not tend to arrive at a prescriptive decision, because fine-tuning work could be done at the national level in domestic legislation. 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, and the Delegation of India. It said the intervention by the Delegation of Switzerland could be looked at in the informals, as it would help to move forward.

53. The Delegation of Malaysia supported the statements made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegations of India and Thailand. The current objective defined very well the fundamental operating text. It was more appropriate to focus on other core issues, such as beneficiaries, scope of protection, limitations and exceptions, and administration of rights.

54. The Delegation of Sudan supported the statement made by the Delegation of Nigeria, on behalf of the African Group, that the topic had already been discussed at the previous sessions. It preferred Alt 1.

55. The Delegation of the EU, speaking on behalf of the EU and its Member States, stressed the importance of the link with IP and not to duplicate matters. Alt 2 was the better option. It would support a reference to innovation, as innovation and protection of innovation were WIPO's core mandate. That covered all sorts of creation and innovation and was not tied to a specific category. It was still unclear what tradition-based creation and innovation covered and the Delegation looked forward to more discussions on that later.

56. The Delegation of the USA proposed language borrowing from Alt 1 and compatible with Article 3BIS, keeping within the context of the IP system. It proposed a new Alt 4: "The

objective of this instrument is to prevent the erroneous grant of intellectual property rights that are directly based on protected traditional knowledge obtained by unlawful appropriation". It still supported Alt 3, which described what it viewed as core objectives of the IGC's work, i.e., to promote the sharing of ideas and knowledge and recognize the value of a vibrant public domain. Historically, societies had benefitted from an exchange of ideas and knowledge, and IP rights were a means of incentivizing that behavior. The copyright system, for example, rewarded authors by giving them a limited-in-time right to exclude others from copying the author's expressions of an idea but not a right to exclude others from using the idea itself. Similarly, the patent system encouraged inventors to disclose their invention so that others could learn from others and make use of the patented invention once it expired. It was not to reward exclusive rights but to promote the dissemination of knowledge. The protection and enforcement of a new IP right on TK should be commensurate with the protection of traditional IP reflecting a balance of interests and a balance of rights and obligations. That was why Alt 3 borrowed from the language of Article 7 of the Agreement on Trade-Related Aspects of Intellectual Property ("the TRIPS Agreement").

57. The Delegation of Canada shared some of the views expressed by the Delegation of Switzerland regarding the need for the objectives to clearly establish that any instrument would operate within the IP system. It also stressed the need for clarity of certain concepts and terms outlined in that section. For example, the concept of "traditional and customary context" in paragraph 1(b) was unclear. The concept of "tradition-based innovation" in paragraph 1(d) was opposed to the concept of promotion of innovation in general. It supported the statement by the Delegation of the EU, on behalf of the EU and its Member States. That was linked to the balance between the need to operate within the IP system and the need for an instrument to maintain the integrity of the IP system. The concept of the promotion of innovation was reflected in the provision on limitations and exceptions and in the provision on complementary measures. It welcomed an exploration of those issues.

58. The Delegation of China supported the statements made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegations of India and Thailand. The meeting had a very heavy agenda, so it hoped that the focus would be on the core issues. It supported Alt 1.

59. The Delegation of Indonesia, speaking on behalf of the LMCs, took note of the statements made by the Delegations of Switzerland and Canada. With further consultation within its group, it might approach the respective delegations. Concerning the new proposal by the Delegation of the USA on Alt 4, since it still supported Alt 3, it would be worth considering that the proposal be included within Alt 3 to make sure that the text was not cluttered.

60. The Delegation of Japan reiterated that the Policy Objectives were very important for the IGC's work and needed to be clear and concise. It was inappropriate to associate the issues of access and benefit-sharing ("ABS") with the IP system such as paragraph (c) of Alt 1. Therefore, paragraph (c) should not be included. On the other hand, the preventing the erroneous granting of patents was essential, so it supported the proposal made by the Delegation of the USA. That concept should be introduced in Alt 2 and Alt 3. It emphasized the importance of paragraph (d). However, the word "tradition-based" had to be bracketed because the instrument should aim to encourage and protect creativity and innovation generally and should not be limited to "traditional-based" ones.

61. The Delegation of Brazil aligned itself with the opening statement made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Chile, on behalf of GRULAC. It supported Alt 1. Instead of drafting a new Alt 4, Alt 3 should be reformulated.

62. The Delegation of Pakistan aligned itself with the statements made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of India. It supported Alt 1 but also supported the Chair's proposal on constructively looking at the process and moving forward.

63. The Delegation of Nigeria clarified some comments made by colleagues on the context of the IP system for the various proposals on Policy Objectives. Trade secrets were part of the IP system and were not fully aligned with the patent system. As the IGC made efforts to navigate those differences and narrow gaps, it was important to recognize that what many demandeurs had put on the table was fully consistent with IP at large, even if not with the patent system. So all the bodies of the IP system should be recognized.

64. The Chair opened the floor for the comments on Article 2 “Beneficiaries”.

65. The Delegation of Indonesia, speaking on behalf of the LMCs, said that there was some way to converge the language in Alt 2 and Alt 3. The role of the State was important when it was not practicable to identify the IPLCs or when the TK was already narrowly diffused and not attributable to one local communities within one country. There were other circumstances where the TK was part of the national identity and States should be able to step in as beneficiaries and custodians. That issue could be handled under “Administration of Rights”. If States could act as beneficiaries, States should be mentioned in the article on beneficiaries. It suggested combining Alt 2 and Alt 3 by putting “States” and “nations” in brackets in Article 2.1. As to Article 2.2, if one was referring to States as custodians, it should be moved to administration of rights, otherwise mixed elements from Alt 2 and Alt 3 could reflect situations where States could act as custodians and, where applicable, in consultation with IPLCs and stakeholders in accordance with national law.

66. The Delegation of Nigeria, speaking on behalf the African Group, expressed its preference for Alt 2, because it encompassed States. A number of African countries did not have IPLCs and there was no separation between the peoples of one country. It saw room to work with Alt 3 because it spoke about other beneficiaries, and while Alt 3 did not mention States, “other beneficiaries” could also mean the State as determined under national law. It saw merit in Article 2.1. Article 2.2 in Alt 3 could be deleted. In Article 5, it supported the alternative, which was simple.

67. The Delegation of Egypt said that a definition did not come out of nowhere. Definitions were the result of culture. The Delegation was dubious about the use of the terms “indigenous peoples” or “local communities” because IPLCs were entitled to make use of cultural works but culture had its role in formulating terms and definitions. One could not say that the circumstances that had led to the creation of a nation like the Egyptian nation, which was one of the oldest nations in the world, were the same, whether geographically, culturally or historically, as those that had created countries like the USA or Switzerland. The IGC was trying to build something in favor of humanity as a whole. The Delegation was not against the term of indigenous peoples, but Egypt did not have such a term. Geographically, Egypt was partly in Africa and partly in Asia. Culturally, it was African, Arab and Mediterranean, and had been impacted by many civilizations and cultures. Egypt was a melting pot of cultures and civilizations. Egypt had created a culturally diverse civilization over thousands of years. There had to be a term that referred to the case like Egypt. TK was a cultural result, transmitted over many years. The IGC had to think outside the box. IP law gave a basis, but the IGC had to move beyond that and build something in favor of IPLCs, States and nations.

68. The Delegation of Thailand supported Alt 2. As proposed by the Delegation of Indonesia, on behalf of the LMCs, it supported merging Alt 2 and Alt 3 to achieve Article 2.1 in Alt 3. Article 2.2 could be moved to Article 5.

69. The Delegation of India aligned itself with the statements made by the Delegation of Indonesia, on behalf of the LMCs, the Delegation of Nigeria, on behalf of the African Group, and the Delegation of Thailand. In India, along with secret, sacred and narrowly diffused TK, there were examples of widely available TK that could not be identified to a particular community and

had become inherent part of the State. It supported Alt 3 with the addition of the word “States” after “indigenous and local communities” in Article 2.1. It was open to considering shifting Article 2.2 to Article 5.

70. The Delegation of Jamaica supported the intervention made by the Delegation of India on the role of the State.

71. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported ILCs as the beneficiaries. A competent authority as appropriate should solely act as a custodian with the consent of the beneficiaries and should not have any rights itself. Taking into account the eligibility criteria, for instance, that the TK was directly linked with the ILCs, it would be difficult to envisage rights for a competent authority. Article 5 should cover the administration of interests.

72. The Delegation of Indonesia, speaking on behalf of the LMCs, said, in the spirit of making progress, contributing constructively and narrowing existing gaps, that it would take away its textual proposal under Article 2.2 and go along to support Alt 3. It could consider moving Article 2.2 to Article 5. That would take care of Alt 2, which did not have support from many Member States.

73. The Delegation of Ghana aligned itself with the statement made by the Delegation of Nigeria, on behalf of the African Group. In Ghana, the current law recognized the State as a beneficiary and there was also a national agency that monitored the protection of TK on behalf of the people. Article 4.2 of the Copyright Act of 2005, Act 690, provided as follows: “The rights of folklore are vested in the President on behalf of and in trust for the people of the Republic.” Article 59 established the National Folklore Board, which acted as a national competent authority and among the functions of that body was the administration, monitoring and registering of expressions of folklore on behalf of the public and also preserving and monitoring the use of such expressions again on behalf of the public, and also promoting activities for the dissemination of expressions of folklore. The term folklore was used but it was consistent with what was viewed as TK. To the extent that it referred to folklore, the law referred to TK. When it came to those two issues, the State as the beneficiary and the establishment of a national competent authority, those issues were consistent under its national law.

74. The Delegation of Tunisia aligned itself with the statement made by the Delegation of Nigeria, on behalf of the African Group, on Alt 2, given the fact that in Tunisia reference was made to the Tunisian people without any other distinction.

75. The Delegation of Sri Lanka pointed out that both Alt 2 and Alt 3 referred to IPLCs with the prefix “where applicable” and that did not sufficiently address its concerns. The IGC had to work towards a compromise, and that was not the compromise made by those that did not have indigenous communities and those that did.

76. The Delegation of China said, as mentioned by the Delegations of India, Nigeria, on behalf the African Group, and Egypt, that some countries could not associate TK with communities or did not have any indigenous communities at all. Those countries still had TK worthy of protection. That issue could be solved by using either “State” or “nation”. It agreed with the Delegation of Egypt that it was not against countries that had indigenous groups to have the rights, but it also recognized some countries that did not have indigenous groups. They had to use “nation” or “State” and that was why those terms had to be in that article.

77. The Delegation of Canada raised an issue that was part of the draft text for some time but had not been discussed which was the concept of “local communities”. It recognized the need for that flexibility. However, while it might be obvious for some and not obvious for others, it wondered which groups would be captured and which TK and whether any criteria of protection



would apply to local communities. It asked whether those criteria would be distinct from those applicable to indigenous peoples, and if not, there would need to be different criteria. Under beneficiaries, for those proposing that a State be a beneficiary, it wondered whether it was also the case for local communities. It asked whether the same scope and conditions of protection would apply to local communities as to indigenous peoples. As the inclusion of local communities would broaden the scope of any instrument by some margin, a common understanding had to be reached not only on issues related to indigenous peoples but also on issues related to local communities. Member States' practice in that area as well as the views of IPLCs was critical. It was not opposed to the term "local communities" in the text. It wished to have a discussion to clarify what it entailed, including on the basis of Member States' practice.

78. The Delegation of Switzerland said that IPLCs should be the beneficiaries of the protection of TK in the instrument. They were the creators, conservers and holders of TK. Moreover, that would also be consistent with the relevant provisions of the UNDRIP as well as of the CBD and the Nagoya Protocol. Should the IGC decide to further explore if and how national or State authorities could be included as beneficiaries, at least the following questions should be addressed and carefully discussed: (1) Which safeguards would be needed to ensure that the interests and rights of IPLCs would not be undermined by including nations or States as beneficiaries? (2) How could it be ensured that the benefits shared through such national or State authorities would be directed towards the protection and safeguarding of TK of IPLCs? (3) Which criteria would be needed at the international level in order to clearly decide which beneficiary would receive the benefits in each situation? The Delegation was not expecting to get the answers to those questions in the plenary, but in the informals.

79. The Delegation of Malaysia associated itself with the statements made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of China. Malaysia was a country of rich and diverse culture. In many circumstances, the knowledge had been shared and exchanged within the different communities. As such, it had previously favored Alt 2 as that correctly reflected the situation in Malaysia and in other countries with diverse cultures. However, in the spirit of constructive flexibility, it supported Alt 3, which not only recognized indigenous communities as beneficiaries but also provided the option of submitting competent bodies as custodians. Additionally, it would be beneficial to consider an alternative of the article on beneficiaries with Article 5 on "Administration of Rights".

80. The Delegation of Thailand supported the Delegation of India's proposed addition of the word "State" in Alt 3. That addition was a good solution in combining Alt 2 and Alt 3. Article 2.2 could go to Alt 3.

81. The Delegation of Japan reiterated that beneficiaries should be specified in relation to TK, as having a distinctive link between TK and the cultural identity of the beneficiaries. Therefore, including States and nations as beneficiaries was problematic and significantly diluted such links. The IGC needed to give further consideration to Alt 1, whether it was appropriate to limit the scope of beneficiaries to IPLCs. In addition, the meaning of "local communities" should be clearly defined.

82. The Delegation of Paraguay said that it understood that the concept of nations was seeking to cover the realities in countries that could not determine the origin of TK. It indicated that the concept of nation was not clear from a legal point of view. Therefore, it wished to continue to discuss and try to address that concern.

83. The Delegation of the USA noted that a group of members had proposed that States could be beneficiaries in circumstances where TK could not be attributed to an ILC. However, the proposed definitions of TK stated in the "Use of Terms" section might not be consistent with that proposal. For example, the definition of TK in Alt 1 stated that TK was knowledge that was created, maintained and developed by IPLCs. In that case, "nations/states" was in brackets.

Also the definition of TK in Alt 2 stated that TK was knowledge that was created, maintained, controlled, protected and developed by IPLCs, with “nations” in brackets. If TK was no longer attributed to an ILC, it wondered how the knowledge was maintained, controlled and protected by that community. It appeared that the situation envisioned where States proposed to be the beneficiaries conflicted with those definitions. The only instance in the proposed definitions that could consider States as beneficiaries was the situation where States themselves could create, maintain and develop the knowledge. The discussion about whether States could be beneficiaries should be premised upon whether States could create TK. With respect to Article 2, it supported Alt 1, paragraph 2.1. Regarding paragraph 2.2, beneficiaries of the IP system was society at large because the system promoted creativity and innovation and it might disseminate information as well. Simply the beneficiaries of protected TK should include those who held and maintained the protected TK. Further, the language in Alt 1 paragraph 2.2 on custodians of TK was redundant to language already contained in Article 5. Issues relating to the approval and involvement of appropriate custodians should therefore be reserved for discussion related to Article 5. On Alt 2, paragraph 2.1, it sought clarification regarding the definition and intent of the terms “States” and “nations.” It wondered whether those terms meant national governments or described particular ILCs. Article 2.2 appeared to indicate that States were national governments and that paragraph permitted only States to establish national authorities to determine beneficiaries. Further, the Chair’s Information Note asked Member States to consider giving latitude to national or customary law regarding the definition of beneficiaries, given the different situations regarding TK holders throughout the world. It supported studying that aspect and wanted to better understand why the terms “States” or “nations” should be included within the scope of beneficiaries especially through evidence-based studies and analysis using real world examples. The Chair’s Note also explained that one way forward might be to include States or nations as beneficiaries but to provide them with a different, presumably narrower scope of protection. It was interested in hearing what other Member States felt about that proposal and what types of scope might be envisioned. Nevertheless, it still had concerns about the inclusion of nations and States as beneficiaries.

84. The Delegation of the Islamic Republic of Iran supported the statement made by the Delegation of Indonesia, on behalf of the LMCs. It supported Alt 3, which included the main beneficiaries of the instrument, namely IPLCs. It was preserving policy space for States at the national level to determine other beneficiaries under national law. The main beneficiaries of TK protection had to be IPLCs, but not exclusively. It was essential to recognize the rule of each State in identifying the beneficiaries under each jurisdiction. Preserving policy space for the Member States to determine the beneficiaries was a way out of the existing standstill.

85. The Chair opened the floor for comments on subject matter.

86. The Delegation of Indonesia, speaking on behalf of the LMCs, said that its position at IGC 31 had been Alt 2. In the spirit of moving forward, it could support Alt 1 by mentioning that the subject matter of protection was TK. There was no dispute that the instrument was about TK and the IGC should not get trapped in an endless discussion on the definition of TK. Alt 4 and Alt 3 could be converged, with the criteria included in Alt 3.

87. The Delegation of Thailand had previously supported Alt 3. But in the spirit of moving forward and in order to eliminate too many alternatives, it supported Alt 1 with the understanding that the IGC would opt for Alt 1 in “Use of Terms” on that matter.

88. The Delegation of Nigeria, speaking on behalf of the African Group, supported Alt 1.

89. The Delegation of India aligned itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs, and the statement made by the Delegation of Thailand. It supported Alt 1, but TK had to be defined appropriately in “Use of Terms” as reflected in Alt 3. It did not support eligibility criteria in Article 1.

90. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that the eligibility criteria should be included in Article 1 and not in the definition. It supported Alt 2.

91. The Delegation of the Islamic Republic of Iran preferred Alt 1. It supported the statement by the Delegation of Indonesia, on behalf of the LMCs.

92. The Delegation of the USA supported Alt 4. It was not in favor of combining Alt 3 and Alt 4. It could not accept the criteria for eligibility that might allow information that was widely known outside of the community to be protected as TK. It was also unclear how nations/States created or developed TK. If those listed fields of TK were not an exhaustive list, it wondered why those fields were chosen but not others. It asked whether the recitation of that list in Alt 3 could be included as examples.

93. The Delegation of Japan said that enhanced clarity was essential to avoid possible disputes on whether or not protection should be provided to TK at the international level. The criteria of “traditional” needed to be clarified. In addition, wordings such as “from generation to generation” and “associated with the cultural heritage of the beneficiaries” were not appropriate as a subject matter of the instrument because their meanings were vague. Moreover, there could be possible conflicts over the same or almost the same TK between different holders. In other words, the same or almost the same TK might exist in different regions independently from each other. Enhancing clarity was essential in order to avoid any possible disputes.

94. The Delegation of Nigeria sought clarification on the intervention of the Delegation of the USA on Alt 4. That alternative mentioned criteria, characteristics and term, which were not the object of the article. There were three other articles implicated in Alt 4. It wondered how to approach that. It also referred to the concern expressed by the Delegation of Japan about “from generation to generation” and “traditional”. There were international instruments that used those same terms for TK. It wondered if the legal status of those international instruments and the national laws that implemented them was being questioned. It wondered why the same formulation could not be used in the Draft Articles, which were dealing with the same subject matter. Referring to the same holders of TK across borders was the subject of another article. It wished to keep those topics separate in specific articles so as to have a cleaner text.

95. The Delegation of Chile said that it was clear that the instrument applied to TK. It was studying the idea of introducing criteria of eligibility in the alternatives, so as to generate clarity on what knowledge was protected. It preferred not to incorporate a timeframe. It sought alternatives from other delegations to reach consensus on that issue.

96. The Delegation of the USA clarified that its previous intervention was with respect to Alt 3. It wished to respond to the comments by the Delegation of Chile on Alt 4. Similar to the approach taken in other IP frameworks, Alt 1 should begin to narrow down what type of TK was eligible for protection. The second part of the analysis that defined protected TK was found in Article 3. Those types of eligibility requirements were universally relied upon by IP-related regimes including by the IP laws of Member States in the IGC. Such conditions should be used to determine what TK was eligible for protection. It acknowledged the concerns raised at IGC 31 and raised again by the Delegation of Chile regarding the temporal requirement where TK eligible for protection had to be transmitted from generation to generation for a term of not less than 50 years. Some Member States had said that a term of years might not be appropriate in the context of TK, as some ILCs might measure the passage of time in different ways. However, some temporal requirement was important. The Delegation proposed to discuss the question of whether protected TK should be maintained over a certain number of generations. That understanding was consistent with other TK definitions as most Member States recognized that TK was transmitted between generations or from generation to generation. In determining over how many generations TK had to be maintained, one had to consider the nature and dynamics

of TK and of family structures. For example, it was common throughout the world, including in the USA, for multiple generations to live together. For example, grandparents, parents and children very often lived under the same roof. Sometimes a family was especially fortunate, great-grandparents might also be living and, in some cases, also live with the family. In those cases the grandparent or great-grandparent might create TK one morning, for example, a new recipe for food, and share that information with the rest of the family throughout the day. By the evening, one could say the TK had been passed down through three or four generations, creating a form of protected TK in less than 24 hours. Instituting a balanced temporal condition as a criterion for eligibility provided a clear path for determining what TK might be protected. Since situations commonly existed where four generations might be present at a given time, it proposed to include a temporal condition that required TK to be maintained over five generations before being eligible for protection. That could be an alternative to the 50-year requirement. It hoped that the new proposal might be considered by Member States and it looked forward to discussing the appropriate number of generations that TK should be maintained in order to be eligible for protection.

97. The representative of the Tulalip Tribes stated that, with the definition proposed by the Delegation of the USA, it would become very difficult for new TK to be protected. If a tradition or innovation based on a tradition happened in one generation, in the next generations it would not be protected. While it was not protected, it could be become widespread and be used by others, because there was no protection. He wondered how to ensure the protection then, if five generations had passed. Once it had been widely practiced and used by others because there was no protection in the early generations, there would never really be any protection.

98. The Delegation of Niger said that the temporal factor, as proposed by the Delegations of the USA and Japan, was not relevant. Reports and surveys going back to 2001 stated that the term "traditional" did not relate to duration but more to the method of creation. Therefore, what was important was not the duration of time over which TK was used but the way in which it was transmitted from one generation to another. It said that the Delegation of Japan had recognized that, as recorded in document WIPO/GRTKF/IC/24/8. An important aspect of TK was that its creation, use or utilization were part of the traditional culture of the community. "Traditional" did not necessarily mean that the knowledge was old. That issue had already been settled back in 2001. TK could be learned from people from the same generation. Often such TK was developed and enriched by those who had inherited it.

99. The Delegation of Egypt referred to the intervention by the Delegation of Niger and said that there were several elements, which made knowledge traditional, and duration was part of it. There was also the question of the spread of knowledge, and how it was transferred, not through formal education, but from one generation to another, from relatives, from grandparents, parents. Japan had a project called Living Human Treasures that was used by UNESCO for the living traditions. The heritage of Japan was being kept for the next generations. That project had become worldwide in order to maintain TK and TCEs, as the same was true for folklore. It was moving, and not fixed. The most important criterion was how it moved from one generation, not through formal education but orally.

100. The Delegation of South Africa supported the statement by the Delegation of Nigeria, on behalf of the African Group. It opted for Alt 1. Delegations should not make it more complicated by bringing in criteria of eligibility and a term. The discussions on the term of protection should be confined to Article 7.

101. The Delegation of Nigeria said that the time issue was a challenge. In the example given by the Delegation of the USA, the grandmother would be entitled to a patent or to choose to protect her recipe under some other form of IP, but it would not be TK because it was not tied to a community. Passing it on to her daughter and her granddaughter did not constitute a community. It would be helpful to have a better example to show what the concerns were with

regard to the term. A number of issues were being conflated because there was an article about term and that was distinct from the criteria of eligibility. It was important to keep in mind that the IGC was creating an analogous regime that would interface and engage with the IP system, and not every category of IP actually had a finite term. For example, trade secrets had no time limitation. It would be unwise and imprudent to preemptively adopt an arbitrary time provision as a way to circumscribe the knowledge of IPLCs. Delegations should consider how to think about term in relation to the scope of protection and to the kind of TK at issue. On the concern about widely diffused TK, it was important to keep in mind that the objective was a minimum standards agreement. While some countries would not want to recognize certain kinds of rights in widely diffused TK, other countries might. If nothing was done, national laws could do whatever they wanted. The idea was to create some minimum baselines where that category of IP could be addressed in a coherent way.

102. The Delegation of Japan supported the statement made by the Delegation of the USA. Criteria for eligibility could play an important role in defining the subject matter and therefore should be appropriately laid out in the instrument. Concrete examples of national experiences and practices could help draw a line between “traditional” knowledge on one hand and “contemporary” knowledge on the other.

103. The Delegation of Sri Lanka said that both Alt 1 and Alt 2 referred to TK being dynamic and evolving. That would prevent the protection of TK that evolved more frequently than every 50 years.

104. The Delegation of Indonesia said there was no dispute that the subject matter of the instrument was TK. For clarity, the provision on subject matter should be kept to a minimum and simply state that the subject matter of protection was TK. It supported Alt 1. Criteria for eligibility should be discussed in Article 7. The idea of a timeframe was not relevant.

105. The Delegation of Brazil was against the inclusion of criteria for eligibility in Alt 4 as they were out of place.

106. The Delegation of Nigeria, speaking on behalf the African Group, said that it was interesting to listen to the example of TK, however in reality that was not how it worked for the producers of knowledge. It supported Alt 1. Criteria of eligibility should not be there. It referred to the characteristics of TK contained in Alt 1 and in “Use of Terms”, which it supported. Member States could refer to those to understand what characteristics should define TK for the purposes of the instrument.

107. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that it was an interesting discussion, which raised fundamental questions. It asked if the proponents believed that every community or culture in the world possessed a form of TK. And if so, it wondered where should be the line between what was TK and what constituted the public domain, in order to preserve the public domain, which was the common platform from which all future knowledge and inventions had historically been derived.

108. The Delegation of Ghana associated itself with the statement made by the Delegation of Nigeria, on behalf of the African Group. It also highlighted certain difficulties with Alt 4. Alt 4 would require that elements currently protected would enter the public domain after 50 years. It doubted that it really was the intent of the proposal by the Delegation of Japan. It recalled that the reason for the IGC was that TK did not fit well into some of the rigid criteria of IP. The IGC had made some advances by recognizing that groups could own rights to TK. It was difficult to understand why knowledge that would have been protected for centuries should suddenly be given a lifespan of just 50 years. That was not what people understood by TK. Alt 1 was quite simple. It introduced TK as subject matter and provided for such in a definition section. On

criteria for eligibility, the IGC should proceed based on consensus. There was no justification to talk about criteria when it came to subject matter of protection.

109. The Delegation of India supported the statement made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegations of Brazil and Nigeria. It did not support eligibility criteria in Article 1. Alt 1 should suffice, with the condition that the language of Alt 3 be reflected in "Use of Terms".

110. The Delegation of Malaysia supported the statement made by the Delegation of Indonesia, on behalf of the LMCs. The criteria of eligibility should not be within the instrument.

111. The Delegation of the USA responded to the question raised by the Delegation of Ghana about whether subject matter would fall into the public domain after 50 years or a term of generations according to Alt 4. That was not correct. Alt 4 established criteria for eligibility that would be used in connection with the definition of protected TK, which was contained in the terms. Protected TK had to satisfy the criteria for eligibility in Article 1 as well as the conditions of Article 3. There was a broad definition of TK contained in the definitions or list of terms. It was interested in hearing examples of new TK, TK that had been generated and that had to be protected as TK right away. As pointed out by the Delegation of Nigeria, for new subject matter, IP rights were available for protection. It wished to hear examples of new TK that would be prejudiced by not being protected under the instrument.

112. The Delegation of China supported the statements made by the Delegations of India and Indonesia. The article on subject matter should not address criteria for eligibility. That could be discussed under other articles such as limitations and exceptions. Otherwise, if the subject matter were narrowly defined, it would not be conducive to the protection of TK.

113. The Delegation of Nigeria asked the Delegation of the USA whether the various criteria in Alt 4 had been developed in consultation with IPLCs. It wished to make sure that the IGC was working with a mindset that the IPLCs might be interested in using the traditional IP system in addition to following their own customary and local practices, consistent with their own lifestyles and world views. It should not be an either/or.

114. [Note from the Secretariat: The following took place on the next day, November 29, 2016.] The Chair said the facilitators had reflected on the discussion that had taken place the day before and would be presenting some initial proposals and thoughts based on those discussions. He emphasized that the material presented was simply work-in-progress, and it had no status and was not a revision. It was just some ideas and thoughts that the facilitators thought were worthy of presenting and getting initial comments on before working on the first revision. He invited the facilitators to present their work.

115. Ms. Bagley, speaking on behalf of the facilitators, said that they had been able to make progress on four provisions of the Draft Articles. They had endeavored to capture Member State positions, keeping clarity. It was not a revision of the Draft Articles, but simply a facilitators' "work-in-progress". She would introduce the suggested changes regarding objectives and subject matter and Ms. Hao'uli would talk about beneficiaries and administration of rights. Changes to the latter had only been made to accommodate changes made to the article on beneficiaries. As facilitators, they greatly appreciated the willingness of Member States to engage informally to ensure that they were, as far as possible, accurately capturing the various positions expressed. They would continue to come to Member States for clarification and with suggested modifications in their efforts to faithfully and effectively move the text forward. Regarding "Policy Objectives", there were two changes. First, the addition of a new Alt 3 introduced by the facilitators based on the proposal from the Delegation of Switzerland. That provision took a positive as opposed to a negative approach to the goals of the agreement. It read: "The objective of this instrument is to support the appropriate use of

traditional knowledge within the intellectual property system in accordance with national law, recognizing the rights of traditional knowledge holders.” Instead of focusing on misappropriation, unlawful appropriation or misuse, all of which were terms which the IGC had had some difficulty defining and incorporating, it focused on supporting appropriate use of TK and rights of TK holders over such knowledge. Second, there was a new Alt 4 that combined the prior Alt 3 with Alt 4 proposed by the Delegation of the USA. The prior Alt 3 had also been introduced by the Delegation of the USA. The facilitators had revised the structure to accommodate the different objectives, so that it currently read: “The objectives of this instrument are to: (a) contribute toward the protection of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of protected traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations; (b) recognize the value of a vibrant public domain, the body of knowledge that is available for all to use and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain; and (c) prevent the erroneous grant of intellectual property rights that are directly based on protected traditional knowledge obtained by unlawful appropriation.” The key changes were the addition of paragraph (c) and turning the original two paragraphs into lettered elements. On subject matter, they had deleted Alt 3, as there appeared to be consensus among delegations to support remaining Alt 1, Alt 2 or Alt 4. They had modified Alt 4 (which, since they had deleted Alt 3, was the new Alt 3) as requested by the Delegation of the USA to insert a period of five generations as an alternative to 50 years. As the Delegation of the USA had indicated, it had introduced that not as a term of protection, which would be dealt with under Article 7, but rather as a requirement for TK to be protected under the instrument. The facilitators noted significant Member States’ disagreement with such a time period imposed as a character of TK or criteria for TK. As Member States focused on the text as a minimum standard agreement in relation to Article 3, the perceived need for a time restraint might be eliminated.

116. Ms. Hao’uli, speaking on behalf of the facilitators, commented on Article 2 “Beneficiaries” and Article 5 “Administration of Rights and Interests”. The “work-in-progress” on Article 2 contained two alternatives. Alt 1 read: “Beneficiaries of this instrument are indigenous [peoples] and local communities who hold protected traditional knowledge.” The Delegations of Japan and the EU, on behalf of the EU and its Member States, had supported Alt 1. The new Alt 2 was from the old Alt 3. The facilitators had taken on board the comments made by the Delegation of Indonesia, on behalf of the LMCs, the Delegation of Nigeria, on behalf of the African Group, and other Member States on the fact that they could support the old Alt 3, rather than the old Alt 2. They had removed Alt 2. New Alt 2, as paragraph 2.1 of the old Alt 3, read: “The beneficiaries of this instrument include, where applicable, indigenous [peoples], local communities, and other beneficiaries as may be determined under national law.” However, the Delegation of China was seeking to retain a mention of “States” and/or “nations” and it suggested inserting new language to read: “The beneficiaries of this instrument include, where applicable, indigenous [peoples], local communities, other beneficiaries such as states [and nations], as may be determined under national law.” They had moved paragraph 2.2 of Alt 3 to Article 5. That reflected comments made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Nigeria, on behalf of the African Group. Article 5 discussed the establishment or the designation of competent bodies by Member States to act as custodians of beneficiaries. They had only made changes to Article 5 to reflect comments made around Article 2 and moving the old alternatives of paragraph 2.2. Those were now Alt 3 and Alt 4 of Article 5.1. Alt 3 of Article 5.1 stated: “Member States may also designate competent bodies to act as custodians on behalf of beneficiaries, with the [consent]/[direct involvement, and approval] of the beneficiaries, in accordance with national law.” The facilitators had looked at the reference of communicating the identity of any competent body to WIPO in paragraph 5.2. Alt 4 of Article 5.1 was old Alt 3 of paragraph 2.2, and stated: “Member States may also designate, as deemed appropriate, competent bodies to act as custodians on behalf of the beneficiaries in accordance with national law.” Given that there had not been a great deal of discussion around Article 5, they had not narrowed the alternatives for Article 5.1. More discussion should be had

on Article 5.1. She asked whether there should be a positive requirement that beneficiaries consent to that designation. That was in new Alt 3. She asked whether there should be a requirement that that was done without prejudice to beneficiaries' rights to administer their rights and interests themselves according to customary protocols, laws and practices (Alt 1) or just leave the matter to national laws (Alt 2).

117. The Chair opened the floor for initial reactions on those ideas.

118. [Note from the Secretariat: all speakers thanked the facilitators for their work]. The Delegation of Nigeria, speaking on behalf of the African Group, on "Policy Objectives", preferred Alt 1, but would look at Alt 3 as introduced by the Delegation of Switzerland. On Article 1, it preferred Alt 1. On the beneficiaries, it was grateful to the facilitators for adequately capturing the position of the African Group and of the LMCs for the new Alt 2, including a deletion of paragraph 2.2. On Article 5, it was a little confusing because there was Alt 2 and three other alternatives for paragraph 5.1. It preferred the Alt 2 in paragraph 5.1, not any of the new alternatives. It could support paragraph 5.2.

119. Ms. Bagley, speaking on behalf of the facilitators, appreciated the comments made by the Delegation of Nigeria, on behalf of the African Group. She said it was indeed confusing to have all of the alternatives for paragraph 5.1 in Article 5. Their purpose had been to make sure not to lose those paragraphs 2.2, each of which was from Article 3. They were parking them in Article 5 with the understanding that Article 5 would be discussed later and Member States would have the opportunity to select which formulation they thought best.

120. The Delegation of Chile, speaking on behalf of GRULAC, was still looking at the proposal. In its national capacity, it understood that Article 5 contained a lot of different proposals trying to reflect who the beneficiaries were, and how that pertained to IPLCs. It had met with the Indigenous Caucus. It was important to talk to them as beneficiaries. However, there was legislation in some countries that indicated different kinds of beneficiaries and the IGC had to incorporate those to ensure flexibility. The Delegation was analyzing Article 5, which sought to provide a space for those who were seeking to have the stewardship role for the State in cases where the indigenous community was not easily identifiable, for example.

121. The Delegation of Switzerland said that the additional alternative was indeed based on a statement made by its Delegation in the plenary. It was, however, just an idea that it had put forward and was not a text proposal as such. The idea was to take a positive approach for the instrument. The objective of the instrument was to ensure the appropriate use of TK within the IP system in accordance with national law and to take into account customary laws and the rights of indigenous communities with such knowledge. That would then support benefit-sharing. The intention behind that different approach was to find a way forward on contentious issues over several concepts in the different options for the Policy Objectives such as misappropriation, illegal appropriation, illegal use and unlawful appropriation. The idea was based on the wording in provisions in existing instruments related to TK, in particular the Nagoya Protocol and UNDRIP. Terms such as "in accordance with domestic law and customary laws" were used in Articles 7 and 12 of the Nagoya Protocol in the context of TK associated with GRs. The intention was to use each internationally agreed language in the context of TK as much as possible. It was an attempt to define an objective, which would allow IP and TK systems to exist in a harmonious, mutually supportive way. The Delegation would study the text proposal by the facilitators in more detail to see if its idea was captured. It was looking forward to discussing that proposal with other delegations.

122. The Delegation of India, on "Policy Objectives", supported Alt 1 and in Alt 4 it wanted to square bracket "directly" and "protected" in paragraph (c). Regarding "Subject Matter", it



supported Alt 1 but wanted to see that reflected in Rev. 1 in “Use of Terms”. Regarding Article 2, it wished to include “including legal entity” after “other beneficiaries” in Alt 2. The same applied to “Policy Objectives” and Article 1, because in cases of widely spread TK, it was the legal entity that was taking care of the interests and should be the beneficiary for such kind of TK. On Article 5, it needed more time and reserved its right to make comments later.

123. The Delegation of South Africa said that, on “Policy Objectives”, the same interest groups were promoting Alt 2 and the new Alt 4. The alternatives should be combined into one so that the interests were covered rather than scattering the ideas all over the page. In paragraph 2 of Alt 1, that idea was repeated in Alt 4(c). Those could be brought together, so Alt 1 was covered. It was the same interest groups that were pushing for that idea so they should consolidate their perspectives. On the issue of “Administration of Rights”, it required time to look at that, so that it could move forward and narrow the gaps.

124. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 1 of “Policy Objectives”. As to Alt 2 and Alt 4, it was worth exploring ways to combine them. It welcomed the proposal by the Delegation of Switzerland on the positive approach, subject to further consultations within the Group. On “Subject Matter”, it preferred Alt 1. On “Beneficiaries”, it preferred Alt 2. On “Administration of Rights”, it wished to go back to the Group before taking any official position.

125. The Delegation of Brazil preferred Alt 2 of Article 2. It was a good way to find flexibility, which was necessary to accommodate the different realities and perceptions that Member States had when addressing those subjects. Regarding Article 5, it understood that States might have a role to play in some countries, especially where the identification of the beneficiaries was not possible. It looked forward to discussing that during the informals.

126. The Delegation of China preferred Alt 1 of “Policy Objectives”, but it was ready to discuss other alternatives. On “Subject Matter”, Alt 1 was simple but Alt 2 gave clearer definitions. That had to be coordinated with the definitions of the terms. On Article 2, Alt 2 talked about other beneficiaries, which covered States or nations. At the international level, consideration should be fully given to national concerns. It suggested adding “such as nations or States” after “other beneficiaries”.

127. The Delegation of Paraguay preferred Alt 2 of Article 2.

128. The Delegation of the Plurinational State of Bolivia said that the view expressed on the policy objectives was about preventing misappropriation or misuse of TK. It was very important to generate an instrument that was active in the area of protecting rights, not just declarative. On Article 1, the paragraph on criteria for eligibility should not be inserted, given that defining criteria for eligibility governing TK was contrary to the nature of TK, especially when a term was set on TK.

129. The Delegation of the USA looked forward to looking at the amendments made by the facilitators and discussing those further.

130. [Note from the Secretariat: This part of the session took place after the informals and the distribution of Rev. 1 of “The Protection of Traditional Knowledge: Draft Articles” dated November 30, 2016 (“Rev. 1”) prepared by the facilitators.] The Chair said that the facilitators would introduce Rev. 1 and explain the context and rationale underlying the changes. He would then open the floor for technical questions and clarifications from delegations. He would encourage delegations to further consider Rev. 1 before reconvening in plenary at a later stage. He recalled that the facilitators were impartial and worked in good faith, in a professional and

balanced way, in accordance with the agreed drafting rules. Rev. 1 clearly attempted to give greater clarity to the different alternative approaches and to identify potential areas where gaps could be narrowed. He asked delegations to listen and reflect on what the facilitators would say rather than to dive straight into their own interventions. He invited the facilitators to introduce Rev. 1.

131. Ms. Bagley, speaking on behalf of the facilitators, said that the facilitators had made varying degrees of progress on half of the articles. They appreciated the productive discussions and the desire to seek common ground by delegations. They had made a good faith effort to accurately reflect the various Member States' positions while retaining or improving clarity in the text. In some articles, they had introduced new language or revised unclear wording as inspired by Member States' interventions. To the extent that such adjustments were unhelpful or counterproductive, they would be happy to make corrective adjustments. Rev. 1 had no status and the revisions could be easily corrected. The first change was the numbering of the draft articles. "Policy Objectives" was now Article 1. That was consistent with many international agreements, both binding and non-binding. It was not prejudging the nature of the ultimate instrument. Based on a Member State's intervention, paragraph 2 of Alt 1 had been deleted as more properly belonging to Alt 4, where it had already been added. They had also introduced other changes, namely, a new Alt 3, introduced by the facilitators that took a positive approach to the goals of the agreement. They had edited the prior Alt 3, which was now Alt 4, largely comprising of adding the objective of the erroneous grant of patents to prior Alt 3 and revising the wording to reflect a plurality of objectives, so there were then paragraphs (a), (b) and (c). With regard to new Alt 3, several delegations had indicated that they would consider the language introduced by the facilitators further. It would be helpful to ascertain whether there was any Member State supporting for that wording or whether it should be deleted. The next provision was "Use of Terms", where the only change was that it was now Article 2. "Subject Matter of the Instrument" resided in Article 3. As noted in the facilitators' "work-in-progress", they had deleted prior Alt 3 as all delegations had supported either Alt 1, Alt 2, or prior Alt 4, which had been renumbered as new Alt 3. That was a narrowing of gaps in accordance with the mandate. They had also modified prior Alt 4, which was now Alt 3, as requested by the Delegation of the USA in plenary, to insert a period of five generations as an alternative to 50 years. That was not a term of protection but rather a criterion or requirement for TK to be protected under the instrument. Beneficiaries were addressed in Article 4. Prior Alt 2 had been deleted, as Member States had supported either Alt 1 or old Alt 3, which was new Alt 2. New Alt 2 had been modified based on Member States' interventions to indicate that States or nations could be identified as beneficiaries in accordance with national law. The first line had also been tightened by replacing "beneficiaries include, where applicable" with "beneficiaries are." That change was made due to the rather open-ended nature of the remainder of the sentence. Paragraph 2.2 from each of the alternatives had been removed and either incorporated into "Administration of Rights" or deleted as redundant. Article 5 was "Scope of and Conditions of Protection". Alt 1 remained the same. Alt 2, however, had been modified to incorporate the language of Alt 1, as a new chapeau for paragraph 5.1, as suggested by several Member States. Paragraphs 5.2 and 5.3 of Alt 2 had also been modified to incorporate a delegation's suggestion to clarify that Member States would not directly ensure certain actions but would rather take appropriate measures with the aim of ensuring certain rights for beneficiaries and certain obligations for users of TK. Paragraph 5.4 of Alt 2 had also been amended with language provided by Member States to address TK not protected under paragraphs 5.2 or 5.3. It stated: "Where the traditional knowledge is not protected under paragraphs 5.2 or 5.3, Member States [should/shall] use best endeavors to protect the integrity of traditional knowledge, in consultation with beneficiaries where applicable." The facilitators had also deleted prior Alt 3, as it no longer enjoyed the support of any Member State, and had renumbered old Alt 4 as new Alt 3. Regarding Alt 2, paragraphs 5.2 and 5.3, subparagraph (b)

read: “Users attribute said protected traditional knowledge to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge.” The facilitators had questions regarding the meaning of that phrase and how Member States and users should address it. She asked Member States that had supported that wording to provide clarification to see whether it could be further modified or deleted.

132. Ms. Hao’uli, speaking on behalf of the facilitators, presented Article 6, previously Article 3 BIS, which had been titled “[Complementary] Defensive Measures”. In paragraph 6.3, they had added brackets around the final sentence, as requested. They had inserted the words “publicly accessible” to what were now paragraphs 6.5 and 6.6. As requested by the Indigenous Caucus in the informals, they had bracketed the new additions of “publicly accessible”. She asked whether a Member State would support the brackets. They had also been asked to bracket paragraph 3.7. Otherwise Article 6 was unchanged. Article 7 “Sanctions” had two alternatives. New Alt 1 came from an intervention made in the informals, and read: “Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument.” The second one was unedited, except for numbering changes. Article 8 had not been discussed, so it was not edited, apart from numbering. Article 9 “Administration of Rights/Interests” had three alternatives. Alt 1 and Alt 2 were very similar to those in facilitators’ “work-in-progress” document, with some changes based on interventions made in the informals, and taken from an alternative of paragraph 2 of the old article on beneficiaries. Alt 3 was a new proposal presented by Member States in the informals. It stated: “Member States may establish a competent authority, in accordance with national law, that is responsible for the receipt, documentation, storage and online publication of information relating to traditional knowledge, in relation to the publicly accessible national traditional knowledge databases provided for by this [instrument.]” Article 10 “Exceptions and Limitations” had two alternatives. Alt 1 was an intervention made in the informals and stated: “In complying with the obligations set forth in this instrument, Member States may in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such exceptions and limitations shall not unduly prejudice the implementation of this instrument.” Alt 2 was essentially the previous text, with some edits to the specific exceptions section that had been presented by Member States in the informals. Paragraph 10.3 read: “[In addition to the limitations and exceptions provided for under Paragraph 1,] [Member States]/[Contracting Parties] may adopt appropriate limitations or exceptions, in accordance with national law, for the following purposes.” The facilitators had been asked to make a change to paragraph 10.3(c) to protect public health or the environment, and also to insert paragraph (e), which stated: “to exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.” That text was taken virtually verbatim from paragraph 6 of the article. Articles 11 and 12 had not been discussed in the informals, so no changes had been made. Article 14 “Relationship with other International Agreements” had been modified by the insertion of paragraph 14.2, which the facilitators deemed a non-derogation provision. As requested, they had placed that provision, but Member States might wish to consider whether it would be more appropriate as a standalone article. Article 15 “National Treatment” had not been discussed, so only the numbering had been amended. Article 16 “Transboundary Cooperation”, previously made up of two paragraphs, had been reformulated to state: “Where the same [protected] traditional knowledge [under Article 5] is found within the territory of more than one [Member State]/[Contracting Party], or is shared by one or more indigenous and local communities in several [Member States]/[Contracting Parties], those [Member States]/ [Contracting Parties] [should]/[shall] endeavor to cooperate, as appropriate, with the involvement of the indigenous and local communities concerned, with a

view to implementing the objectives of this [instrument].]" Article 16 was bracketed as requested by Member States in the informals.

133. [Note from the Secretariat: This part of the session took place after a break.] The Chair opened the floor for general comments on Rev. 1.

134. [Note from the Secretariat: all speakers thanked the facilitators for their work]. The Delegation of Nigeria, speaking on behalf of the African Group, said that Rev. 1 was a cleaner version. It had less bracketing and synthesized the alternatives and the ideas of different proponents. It was a very good basis for continued discussion.

135. The Delegation of India, speaking on behalf of the Asia-Pacific Group, said that Rev. 1 attempted to capture the different positions of all Member States. Most of the Group members had a common position on the articles. Members would reflect their detailed positions in their national capacity. It was hopeful that progress would be made in narrowing the gaps and that Rev. 2 would be cleaner and have fewer brackets. It stood ready to participate constructively and offered its full cooperation.

136. The Delegation of Canada wished to contribute despite the differences within the text. It was not convinced that the new text had really assisted in understanding the text and its implications.

137. The Delegation of Turkey, speaking on behalf of Group B, said that the members of the Group would present their own positions.

138. The Delegation of Indonesia, speaking on behalf of the LMCs, said that Rev. 1 sufficiently captured all the different positions of Member States. It was ready to engage constructively.

139. The Delegation of Egypt said that Rev. 1 was undoubtedly a step forward. It supported the comments made by the Delegation of Nigeria, on behalf of the African Group. It was concerned that, while considerable progress had been made, there were still many divergent views. It urged IGC participants to show some goodwill and not to get bogged down by square brackets or certain terms that really had no impact on the meaning of the instrument.

140. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that thanks to the flexibility shown by a number of delegations, some obstacles to progress seemed to have been removed. At the same time, significant gaps still remained and basic differences had not been resolved. Delegations had to be realistic and recognized that there was no common policy objective at the moment. The IGC had to continue to focus its discussions on the core issues as identified in the mandate. In relation to Rev. 1, it would focus its comments on the core issues and reserved its position in relation to the articles, which had only been briefly discussed.

141. The Delegation of India said that the narrowing of the gaps was a step forward and looked forward to engaging positively in the plenary and informals.

142. The Delegation of Chile, speaking on behalf of GRULAC, said it only had time to look at the first four articles. On the other articles, the members of the Group would express themselves in their national capacity.

143. The Delegation of Thailand supported the statements made by the Delegation of India, on behalf of the Asia-Pacific Group, and the Delegation of Indonesia, on behalf of the LMCs, which reflected positions achieved in the spirit of constructive engagement and fair exchanges,

committing to reducing existing gaps and focusing on important key issues. It reserved its right to comment on some articles when necessary.

144. The Delegation of China noted that all positions were very clear. The IGC, through diligent effort, needed to coordinate more. It was ready to participate constructively in follow-up meetings.

145. The Delegation of the USA noted that although the number of alternatives in the text had been reduced, there were still a number of fundamental differences in the positions. It looked forward to continuing the discussions to help narrow the gaps and resolve those differences.

146. The representative of HEP supported the views expressed by the Delegation of Nigeria, on behalf of the African Group.

147. The Chair opened the floor for comments on “Policy Objectives”.

148. The Delegation of the Plurinational State of Bolivia observed that paragraph 2 of Alt 1 had not been retained. That had to be addressed, because the policy objectives had to be designed to prevent the erroneous grant of IP rights that were directly based on protected TK.

149. The Delegation of Nigeria, speaking on behalf of the African Group, supported Alt 1 and also supported that it was currently the first article of the instrument. It also supported the move of paragraph (ii) in Alt 1 to Alt 4. With regard to Alt 3 as introduced by the Delegation of Switzerland, it sought more clarity on the meaning of “support the appropriate use of TK within the IP system”.

150. Ms. Bagley, speaking on behalf of the facilitators, confirmed that it was a facilitators’ formulation, based on the idea of the Delegation of Switzerland. It had two prongs. One was a positive view, in terms of TK being used appropriately. The challenging term “misappropriation” could be deleted. The second challenging concept was the fair and equitable sharing of benefits, which could be subsumed within the idea of appropriate use, although not completely, but could also be seen as relating to the recognition of the rights of TK holders. That captured the idea of preventing the granting of erroneous IP rights. It had been retained because the facilitators felt that it might provide an opportunity to narrow some gaps. If no Member State supported it, it would be removed.

151. The Delegation of Switzerland appreciated that the facilitators had taken up its idea for the positive approach in Alt 3. It also thanked the delegations that had expressed their interest in the text. That approach had several advantages and could help bridge existing gaps. For instance, it allowed elaborating either measures or rights in an international instrument related to TK in a mutually agreeable way. It did not prejudice any outcome of the IGC’s work. It might come back with proposals to fine-tune the text at a later stage. It was looking forward to further discussing those alternatives. It supported that that text remained in the text.

152. The Delegation of Chile, speaking on behalf of GRULAC, preferred Alt 1, without prejudice to there being different views within the Group about Rev. 1. With regard to Alt 3, it thanked the Delegation of Switzerland for its proposal and for seeking a way out. The way that the language was couched could work as a preamble. The wording of Alt 4 was more associated with complementary measures than with policy objectives. Although it was not the Group’s preference, in the new subparagraph (c), it proposed replacing “directly based on” with “involving the utilization of” to be consistent with Article 14.

153. The Delegation of Indonesia, speaking on behalf of the LMCs, supported the new numbering of the articles. In Article 1, it supported Alt 1. It was worth pursuing further discussions on Alt 3 and its positive approach on the appropriate use of TK.

154. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported Alt 2. However, it wanted to bracket and delete “tradition-based”. It supported a reference to innovation that covered all sorts of creation and innovation and was not tied to a specific category. It was unclear what “tradition-based” covered and it looked forward to explanations. Alt 4 contained many concepts that it supported, such as the reference to the public domain, the concept of the protection of innovation, the transfer and dissemination of knowledge and the prevention of the erroneous grant of patents. In relation to Alt 1, it noted that the Nagoya Protocol already covered the fair and equitable sharing of benefits. In relation to Alt 3, it would need more time to consider it in greater depth.

155. The Delegation of Sri Lanka supported the view expressed by the Delegation of Indonesia, on behalf of the LMCs, the Delegation of Chile, on behalf of GRULAC, and the Delegation of Nigeria, on behalf of the African Group. Alt 1 was its preference. In Alt 3, “beneficiaries” could replace “TK holders”.

156. The Delegation of India aligned itself with the statements made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Chile, on behalf of GRULAC. It supported Alt 1.

157. The Delegation of the Islamic Republic of Iran aligned itself with the Delegation of India, on behalf of Asia-Pacific Group, and the Delegation of Indonesia, on behalf of the LMCs. It supported Alt 1. Concerning Alt 3, there was still some ambiguity about its added value. Maybe the positive approach could be merged into Alt 2.

158. The Delegation of China supported Alt 1, but with the addition of previous paragraph 2, currently paragraph Alt 4(c). It was important to state the importance of preventing misuse.

159. The Delegation of Brazil associated itself with the statements made by the Delegation of Chile, on behalf of GRULAC, and the Delegation of Indonesia, on behalf of the LMCs. It supported Alt 1. The language of Alt 3 seemed more appropriate for a preamble. On Alt 4, it supported the statement made by the Delegation of Chile, on behalf of GRULAC. Regarding paragraph (c), it requested to bracket “directly based on” and to include the language as provided in Article 14 “involving the utilization of”.

160. The Delegation of Canada continued to assess each one of the alternatives. It noted the proposal to remove paragraph 2 from Alt 1. Since it wished to keep a certain leeway in the consideration of its options and not to restrict itself to a single alternative, it wished to continue to explore all relevant options in consultation with communities and stakeholders in Canada. The removal of that paragraph and in general the division of the text into mutually exclusive options limited its leeway. It was important to recognize itself in the largest number of options including Alt 1, rather than having to necessarily choose a camp prematurely. It preferred keeping paragraph 2 of Alt 1, whether in square brackets or not. It wished to have square brackets around “tradition-based” in subparagraph (d) of Alt 1. It remained committed to the objective of reducing current divergences.

161. The Delegation of the Russian Federation agreed with the intervention of the Delegation of Canada. It supported Alt 3 but still believed that Alt 4 should be retained as well. It regretted that some provisions were being removed from all four alternatives. Perhaps there was a way

of reconciling the alternatives to unite some of the valuable aspects of each and every one of those proposals.

162. The Delegation of Chile aligned itself with the position expressed by the Delegation of Chile, on behalf of GRULAC, with regard to Alt 1. It also aligned itself with the statements made by the Delegations of the Plurinational State of Bolivia and Canada. It wanted to ensure that paragraph 2 of Alt 1 continue to be reflected.

163. The representative of INBRAPI highlighted that Alt 1 included a number of elements that were present in other international instruments. But the Nagoya Protocol only covered GRs. The elements featured in Alt 1 might cover TK that was not protected. It was important to progress on that issue. Alt 3 included some interesting elements such as the recognition of the rights of TK holders. She was flexible on coming up with policy objectives that would cover the various interests and concerns of the parties with a view to making progress.

164. The Delegation of Thailand associated itself with the statements made by the Delegation of Nigeria, on behalf of the African Group, the Delegation of Chile, on behalf of GRULAC, and the Delegation of Indonesia, on behalf of the LMCs, on supporting Alt 1, which clearly outlined the main objectives of the instrument. It was however interested in Alt 3, as the language appeared clean and straightforward, but it was not yet clear on the notion of the appropriate use of TK within the IP system and therefore it was not yet in a position to support it.

165. The Delegation of Australia said it was important that the objectives reflect the current IP context and the gaps in current international law. Alt 3 provided a useful way to achieve that, focusing on the positive aspects that were achievable under the instrument. It preferred for the formulation to remain as “TK holders” until further discussed, noting common understanding had not yet been reached on beneficiaries, particularly around States and nations.

166. The Delegation of Malaysia supported the statement made by the Delegation of India, on behalf of the Asia-Pacific Group, and the Delegation of Indonesia, on behalf of the LMCs. It was fundamental that the instrument provided effective protection of TK.

167. The Delegation of Japan said that, regarding paragraph (c) of Alt 4, the concept of preventing the erroneous granting of patents was essential regardless of whether the IP rights were directly based on protected TK obtained by unlawful appropriation or not. It suggested replacing paragraph (c) of Alt 4 with the deleted paragraph 2 of Alt 1 as follows: “Prevent the erroneous grant of IP rights over TK and TK associated with GR.” It also supported the statement made by the Delegation of the EU, on behalf of the EU and its Member States, about the word “tradition-based” of Alt 2 because it was unclear.

168. The Delegation of Ecuador supported Alt 1 with the inclusion of old paragraph 2. The text contained in Alt 3 could feature in the preamble rather than in the objectives.

169. The Delegation of Argentina referred to the statement made by the Delegation of Chile, on behalf of GRULAC, and preferred Alt 1 with paragraph 2. It was still considering Alt 3.

170. The Delegation of Sudan supported Alt 1 and the position put forward by the Delegation of Nigeria, on behalf of the African Group.

171. The Delegation of Paraguay aligned itself with the statement made by the Delegation of Chile, on behalf of GRULAC, and supported Alt 1 with paragraph 2.

172. The Delegation of Indonesia said that if paragraph 2 was put back into Alt 1, it should be in brackets as it was before.

173. The Delegation of the Republic of Korea supported Alt 4, which was appropriate and balanced. Regarding Alt 2 and Alt 3, it was flexible but needed more time to look in to the sentences in detail.

174. The Chair opened the floor for comments on Article 3.

175. The Delegation of Indonesia, speaking on behalf of the LMCs, supported Alt 1 in conjunction with Alt 1 on the definition of TK under "Use of Terms".

176. The representative of the Assembly of Armenians of Western Armenia expressed her pleasure in the progress made. She invited Member States to take into account the question of the indigenous peoples and nations under the UNDRIP.

177. The Delegation of Nigeria, speaking on behalf of the African Group, supported Alt 1, with the understanding that it supported Alt 1 in the definition of TK in "Use of Terms".

178. The Delegation of India, speaking on behalf of the Asia-Pacific Group, aligned itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Nigeria, on behalf of the African Group, and supported Alt 1, with the understanding that under "Use of Terms" Alt 1 was retained for defining TK. It was not comfortable with the criteria of eligibility and maintained its earlier position. Article 3 should be inclusive in nature, keeping in mind the varied nature of TK and should not be restrictive.

179. The Delegation of the Islamic Republic of Iran aligned itself with the statement made by the Delegation of Nigeria, on behalf of the African Group, the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of India, on behalf of the Asia-Pacific Group. It supported Alt 1 and did not support the inclusion of criteria of eligibility.

180. The Delegation of Chile thanked the proponents of Alt 3 for their comments. However, it did not agree with the inclusion of the term element. Therefore, it should be in square brackets up to the word "eligibility".

181. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported Alt 2 and wished to keep the eligibility criteria in the article.

182. The Delegation of the Plurinational State of Bolivia said that the IGC should continue to analyze both Alt 1 and Alt 2. It did not accept the eligibility criteria, as they were not in line with the goal of the instrument, and certainly not the figure of 50 years or five generations.

183. The Delegation of Malaysia could go along with the statement made by the Delegation of Indonesia, on behalf of the LMCs, and supported Alt 1. It did not support criteria of eligibility.

184. The Delegation of Paraguay agreed with the Delegation of the Plurinational State of Bolivia and found it surprising that the article also looked at criteria for eligibility. It preferred Alt 1 or possibly Alt 2.

185. The Delegation of the Russian Federation preferred Alt 3, provided that Article 2 contained the definition of TK. The heading of paragraph 2 "Criteria of Eligibility" could be deleted but the text itself should be retained.



186. The Delegation of China supported Alt 1, but it was not against Alt 2. “Use of Terms” could be included in Article 2.

187. The Chair opened the floor for comments on Article 4.

188. The Delegation of Chile, speaking on behalf of GRULAC, said that IPLCs were beneficiaries of the instrument by definition. It was open to the possibility of supporting Alt 2 with a reference to “other beneficiaries as determined under national law”. That language gave each country room to determine what beneficiaries should be included. Yet the inclusion of concepts such as “State” or “nation” was of considerable concern because it created confusion. The concept of “nation” had not achieved international consensus as a definition, therefore it made the approval of an instrument more difficult. “State” could be mentioned in Article 5 as a possible custodian of TK. For the sake of consensus, it was ready to accept the phrase “as may be determined by national law” on the understanding that many delegations had agreed to accept other beneficiaries in a flexible manner, but that was a concession in order to accommodate those other delegations. Hence, it supported Alt 2 but with the removal of the phrase “such as States and/or nations”.

189. The Delegation of Nigeria, speaking on behalf of the African Group, supported Alt 2 as a basis for further discussion. It expressed its flexibility to work with “and other beneficiaries” with the understanding that it could encompass all beneficiaries determined under national law. It hoped to reach an early consensus. Alt 2 was the best alternative for discussion.

190. The Delegation of Indonesia, speaking on behalf of the LMCs, supported Alt 2 as a good basis for further discussion. There was no dispute that the main beneficiaries of the instrument would be the IPLCs, but there were some circumstances where other beneficiaries could be determined under national law. It was ready to engage in a constructive way to reach an early consensus on beneficiaries.

191. The Delegation of the Plurinational State of Bolivia referred the statement made by the Delegation of Chile, on behalf of GRULAC, and supported Alt 2, but with the deletion of the phrase “such as states and/or nations”, since they were not the beneficiaries. Alt 1 dealt with “protected” TK, which was a controversial phrase.

192. The Delegation of the Islamic Republic of Iran supported Alt 2, minus the word “nation” which was already square bracketed. It shared the concerns expressed by the Delegation of Chile, on behalf of GRULAC.

193. The Delegation of Ecuador said that beneficiaries should be IPLCs.

194. The Delegation of the EU, speaking on behalf of the EU and its Member States, was in favor of Alt 1, which stated clearly that the beneficiaries were the ILCs, being the creators and holders of TK.

195. The Delegation of India aligned itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs, and supported Alt 2 in the present form.

196. The Delegation of China understood the concerns regarding the terms “nation” and “State”, but in China the concept of “indigenous people” did not exist. Making nations beneficiaries was a very good solution. It was ready to make efforts to reach consensus. Alt 2 reflected the positions of different sides very well. The IGC should specifically give guidance in that international instrument. Some delegations were concerned about “nation”. It offered adjusting the wording to alleviate their concerns, for example, “other beneficiaries under national law or

nations defined within a country". Another option could be to specify that that would apply in the countries that did not have indigenous peoples.

197. The Delegation of Thailand supported Alt 2 with the words "such as States and nations" in the text. It was happy to engage positively on the notion of "other beneficiaries" in order to reach consensus on that.

198. The Delegation of Canada reiterated its concern about Alt 2, which had an entirely discretionary approach to the designation of beneficiaries, particularly where the phrase "and other beneficiaries" was concerned. The definition of beneficiaries would be left up to national legislation and that would render moot the effort undertaken to develop parameters on that question and would create a high level of uncertainty. It understood that some Member States wished to designate beneficiaries on the basis of their specific circumstances but the solution should be through creating a better common understanding of those circumstances. It asked who was meant under "other beneficiaries", apart from a nation or a State or entities not covered elsewhere in the document.

199. The Delegation of Japan preferred Alt 1, which did not include nations or States as beneficiaries. It supported the statement made by the Delegation of Canada.

200. The Delegation of the Republic of Korea preferred Alt 1 because the beneficiaries should be IPLCs who had made, preserved and handed down TK, which was consistent with the objective of the instrument.

201. The Delegation of Algeria supported the statement made by the Delegation of Nigeria, on behalf of the African Group, and support Alt 2, which was more flexible and sufficiently so to provide space for countries to include other beneficiaries. It was up to national law to determine who such beneficiaries would be on the basis of the specific circumstances of the countries concerned.

202. The Delegation of Malaysia had previously raised the concern about nation or States as beneficiaries. However in the current text it could support the position of the Delegation of Indonesia, on behalf of the LMCs, and go along with the new Alt 2.

203. The representative of the Assembly of Armenians of Western Armenia supported the statement made by the Delegation of China and referred to Article 9 of the UNDRIP, which stated: "Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right."

204. The representative of INBRAPI said that in both alternatives the word "peoples" and the final "s" remained in brackets, which was a problem. "Indigenous peoples and local communities" had been agreed and internationally approved at the 12th Conference of the Parties of the CBD, and the ILO 169 Convention on Indigenous and Tribal Peoples also used the expression. Many countries were parties to those agreements. She asked Member States to be flexible and remove the square brackets. Whatever the final language might be, the language would be in accord with Article 14. Since the beginning of the IGC in 2001, IPLCs had to be the beneficiaries of protection, as they were the creators of TK. States had an administrative role to play, but including them as beneficiaries was not going to create any more legal certainty and might indeed create difficulties for the instrument in the future.

205. The Delegation of France responded to the statement made by the representative of INBRAPI. It wished to ensure that the language was used in conformity with its constitutional requirements. It could not use the terms “indigenous peoples” or “minorities” since collective rights would be granted. It did not wish to see the notion of indigenous peoples in international agreements which it was negotiating, inasmuch as it would separate the elements of the French people and would run counter to its Constitution as to the unity and indivisibility of the French people. It accepted the terms “indigenous people” in international law unless it was obliged to recognize collective rights based upon cultural, ethnic or religious rights. It only recognized rights based on individual rights. The Nagoya Protocol recognized the rights of States and not of indigenous peoples. The Nagoya Protocol developed specific elements in order to take into account the situation of those communities and to ensure that they participated in the process. However, those provisions were drafted in such a way so as to be clear that that was done only on the basis of the national legislation of the parties. It confirmed maintaining the square brackets around the word “peoples” or asked to simply delete the word.

206. The Chair opened the floor for comments on Article 5.

207. The Delegation of Nigeria, speaking on behalf of the African Group, supported Alt 2. It welcomed the inclusion of paragraph 5.1, which provided a framework and spoke to the economic and moral interests of the beneficiaries. Paragraphs 5.2, 5.3 and 5.4 provided the appropriate level of rights for the holders and producers of TK.

208. The Delegation of the USA, in order to find a common way forward on databases, suggested a new Alt 4 as followed: “Recognizing the importance of cooperation in consultation with indigenous and local communities in determining access to traditional knowledge, Member States should endeavor to, subject to and consistent with national and customary law, facilitate and encourage the development of the following national traditional knowledge databases to which beneficiaries may voluntarily contribute their traditional knowledge. 5.1 Publicly accessible national traditional knowledge databases for the purpose of transparency, certainty, conservation, and transboundary cooperation and to facilitate and encourage as appropriate the creation, exchange and dissemination of and access to traditional knowledge. 5.2 National traditional knowledge databases accessible only by intellectual property offices for the purpose of prevention of the erroneous grant of intellectual property rights. Intellectual property offices should seek to ensure that such information is maintained in confidence except where the information is cited during the examination of an application for intellectual property protection. 5.3 Nonpublic national traditional knowledge databases for the purpose of codifying and conserving traditional knowledge within indigenous and local communities. Nonpublic national traditional knowledge databases should only be accessible by beneficiaries in accordance with their respective customary laws and establish practices that govern the access or use of such traditional knowledge.”

209. The Delegation of Indonesia, speaking on behalf the LMCs, supported Alt 2 as it appeared, with the addition of paragraph 5.1. It supported new language of paragraph 5.4 and acknowledged the flexibilities and constructive spirit that Member States had shown in coming up with a very nice Alt 2 that reflected all positions and interests. Subject to further consultation with the members and as a question to the Delegation of the USA, it wondered how the new Alt 4, if it were to be stand-alone, would fit under the scope of protection. It would be more appropriate to put that text under Article 6 on complementary measures.

210. The representative of the Tulalip Tribes said the proposal by the Delegation of the USA was very interesting, but would fit better under complementary measures. He wondered if it was a replacement of the text or a modification of the text there. He had a textual proposition,

which he hoped would be supported or at least considered. On Alt 2 which he supported, he wished to add “in a manner consistent with Article 14.2” at the end of the sentence. That referred to the non-derogation proposal. It was important to have that internal reference as a safeguard in the interpretation of Article 5.

211. The Delegation of the USA supported the change proposed by the representative of the Tulalip Tribes. It offered giving a full explanation of why Alt 4 belonged in Article 5 versus Article 6 in the informals.

212. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported Alt 1 as a stand-alone option. In relation to the principle of attribution, it noted that such a provision should not diminish legal certainty and society at large. It was unclear at what level attribution would have to be decided and when and where it would apply. It looked forward to hearing practical examples.

213. The Delegation of Sri Lanka agreed with the statement of the Delegation of Indonesia, on behalf of the LMCs, and supported Alt 2. It suggested changing “and/or” between “administrative” and “policy measures” both in paragraphs 5.2 and 5.3 to just “or”.

214. The Delegation of Brazil supported the tiered approach as a creative way of addressing the characteristics and strength of protection of TK. It supported the inclusion of paragraph 5.1 in Alt 2, and echoed the questions raised by the Delegation of Indonesia, on behalf of the LMCs, regarding the proposal by the Delegation of the USA. It belonged to the article on complementary measures.

215. The Delegation of South Africa concurred with the Delegation of Nigeria, on behalf of the African Group. On the new proposal by the Delegation of the USA, in addition to the question raised by the Delegation of Indonesia, on behalf of the LMCs, Alt 3 of Article 9 was another place where the same issue was discussed. The same issue on databases was being spreading throughout the whole document. It looked forward to some justification.

216. The Delegation of Nigeria, speaking on behalf of the African Group, needed to see the text proposed by the Delegation of the USA in writing to fully understand it. It did not support a prescription of how databases should be an obligation. That would fall more under the complementary measures. It wondered if that proposal had taken into account oral forms of TK.

217. The Delegation of Chile said that, on Alt 2, its impression of the informal discussions was to describe the instrument in the chapeau in paragraph 1 and that the rest should be a voluntary guide for the implementation of the instrument. Consequently, the IGC had to find some language to clarify that.

218. The Delegation of the Islamic Republic of Iran, in line with the statement made by the Delegation of Indonesia, on behalf of the LMCs, supported Alt 2. It looked forward to explanations on the proposal made by the Delegation of the USA.

219. The Delegation of India aligned itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs, and supported Alt 2, as, for all levels in a tiered approach, adequate protection should be provided. It had agreed to revise Alt 2, especially paragraph 5.4. It reflected its position to follow the principle of exclusion for the knowledge that was not covered under secret and narrowly diffused. It also agreed with the Delegation of Indonesia, on behalf of the LMCS, in understanding the need of placement of the new formulation by the Delegation of the USA in Article 6.

220. The Delegation of the Plurinational State of Bolivia noted that the title of the article should be “Scope of Protection” without any conditions, because that diluted the spirit of the instrument. Article 5 should not include any conditions of any kind. It asked to remove the phrase in square brackets from the title. It was still analyzing the language of Alt 2.

221. The Delegation of Canada referred to the contribution of indigenous representatives to the effect that IPLCs considered their TK in general sacred and/or secret. It believed that in order for an international instrument to reflect a common objective and enable decision-making, the IGC needed to have a detailed and concrete understanding of the implications of those considerations for the instrument. That analysis was crucial in order to determine whether the tiered approach under Article 5 was really appropriate for a coherent and consensual instrument. The Delegation wished to continue to exchange the lessons learned by Member States which were planning or had recently implemented TK regimes at the national level to explore those particular concerns.

222. The Delegation of the Russian Federation was concerned by the use of secret TK in the text, as all alternatives provided that the State should ensure its protection. Any secret was subject to a special type of protection. It referred to the comments in the Chair’s Information Notes on secret TK. It was hard to imagine a situation where a State should ensure the protection measures, let alone interfere in all situations where secret TK was involved and allow secret information to get out. Also, where TK was kept secret and where it was held by the beneficiaries in accordance with certain measures, and on the understanding that it should be used and known only within a specific group, a State could not ensure anything about the secrecy of the information. If suddenly the community believed that the secret was no longer relevant and shared the secret, it was no longer a secret and TK would fall into a different category, that was, narrowly or widely diffused. It was also not clear who the “users” were referring to in that context.

223. The Delegation of Malaysia supported the statement made by the Delegation of Indonesia, on behalf of the LMCs. It supported Alt 2, which comprehensively captured the elements that provided for a balanced instrument. The tiered approach was clearer with the new introduction of chapeau and the new text in paragraphs 5.2, 5.3 and 5.4 respectively.

224. The Delegation of China said that Alt 2 was a relatively reasonable choice because the tiered approach provided the necessary protection. It noted that elements of paragraph 3.3 from the former, original Alt 3 which had been deleted could be included into Alt 2.

225. The Chair opened the floor for comment on Article 6.

226. The Delegation of Canada wished to have Article 6 be renumbered as Article 5 BIS to reflect the fact that it formed integral part of the discussion on the scope of protection. Databases were important measures to consider as defensive measures. Databases had to be voluntary in nature. They should be established in coordination with IPLCs so as to prevent knowledge from entering the public domain. It stood ready to work with other participants to ensure that the proposal on databases reflected all perspectives.

227. The Delegation of Switzerland questioned the effect and suitability of adding “defensive” in the title. Not all measures listed in that article were necessarily defensive measures, for instance, paragraph (d). It requested bracketing the word “defensive”. It took note of the intervention made by the Delegation of Canada and would further consider and evaluate whether that was an approach that could be supported.

228. The Delegation of Nigeria, speaking on behalf of the African Group, said that it was unclear whether the article was about defensive or complementary measures. It did not support the intervention by the Delegation of Canada that it should be renumbered as Article 5 BIS. It did not reject the utility of databases but it should be a complementary, voluntary exercise. The variety of databases applicable for TK made it difficult to meet the provisions proposed in Article 6.

229. The Delegation of the EU, speaking on behalf of the EU and its Member States, was interested in the discussions on databases and supported in general measures such as the use of databases. It looked forward to continuing those discussions.

230. The Delegation of Chile aligned itself with the statement made by the Delegation of Switzerland with regard to the language of the title.

231. The representative of the Tulalip Tribes, speaking on behalf of the Indigenous Caucus, aligned himself with the comments made by the Delegation of Switzerland and the Delegation of Nigeria, on behalf of the African Group. He pointed out that “publicly accessible” was a red line for the Indigenous Caucus. One should not be putting together international databases of publicly accessible TK because of the considerable issues that one would have to resolve before it could be made available. It did not dispute the value and purpose of databases. There were actually multiple purposes that databases could be used for. The IGC’s discussions were focusing on databases related to patents, but there were other kinds of databases for different purposes and they might have different rules associated with them. He looked forward to the discussion on databases. If the proponents of “publicly accessible” could remove that language, he would go a long way to converge on some language around databases.

232. The Delegation of Brazil supported the request by the Delegation of Switzerland to bracket “defensive” and supported the statement made by the Delegation of Nigeria, on behalf of the African Group. Databases might prove to be useful but their coverage might be limited to TK currently known. Therefore, they should be seen not as a replacement of TK protection but rather as a complement to the general TK protection framework.

233. The Chair opened the floor for comments on Article 7.

234. The Delegation of Indonesia, speaking on behalf of the LMCs, welcomed the inclusion of Alt 1. It was simple enough for everything to be covered under sanctions, remedies and exercise of rights.

235. The Delegation of Canada noted the new proposals with regard to exceptions and limitations, and to sanctions, remedies and application of rights. Those proposals were too succinct, did not ensure balance between flexibility and legal certainty, and did not validate if there was a common understanding of those issues in the IGC. It reserved its right to comment on those proposals and other new proposals.

236. The Delegation of Nigeria, speaking on behalf of the African Group, as proponents of Alt 1, welcomed the support of the Delegation of Indonesia, on behalf of the LMCs. It was very simple language and it was unclear what was the difficulty that had been expressed by the Delegation of Canada. It would appreciate more specific comments as to the problems perceived in Alt 1.

237. The Delegation of the EU, speaking on behalf of the EU and its Member States, reserved its right to comment on the new proposals included in the text.

238. The Delegation of the Islamic Republic of Iran supported the statement made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Nigeria, on behalf of the African Group, on Alt 1.

239. The Chair opened the floor for comments on Article 9.

240. The Delegation of Nigeria, speaking on behalf of the African Group, supported Alt 2.

241. The Delegation of Indonesia, speaking on behalf of the LMCs, supported Alt 2. Regarding the new proposal for Alt 3, the Delegation of South Africa had already raised the point that some issues included within Alt 3 were also conveyed in Article 6. It looked forward to having a healthy discussion on why those issues had to appear in so many articles.

242. The Delegation of the EU, speaking on behalf of the EU and its Member States, wished to include the language of “free prior and informed consent” in Alt 2. On the wording “authority” or “authorities”, it wondered how more authorities would work together and how legal certainty would be guaranteed. A competent authority as appropriate should solely act as a custodian with the consent of the beneficiaries and should not have any rights itself.

243. The Delegation of Chile understood that those were national authorities or agencies, which could also be related to foreign beneficiaries. It asked for more justification on the removal of paragraph 5.2 because that paragraph could contribute to cooperation between Member States to ensure the exercise of the rights of beneficiaries.

244. Ms. Bagley, speaking on behalf of the facilitators, responded that the facilitators had neglected to mention the deletion of paragraph 5.2, which dealt with the identity of an authority established under paragraph 1 being communicated to the International Bureau of WIPO. That deletion was a decision made by the facilitators. If any Member State would prefer for it to remain in the text, they could certainly reintroduce it.

245. The representative of INBRAPI said that Alt 1 was distorted in its meaning, because in document WIPO/GRTKF/IC/32/4, it featured as “in coordination with TK holders”. It had then been changed to “beneficiaries” and that was a problem when there was confusion between States and indigenous peoples, because the States would be establishing competent authorities together with themselves. Alt 1 did not make any sense. So the best was Alt 2. She underlined that IPLCs needed to participate in those processes. Including “free prior and informed consent of IPLCs” was important in establishing the national authority provided it was possible. That was the reality in Brazil. They were part of the national authority. She asked parties to consider that proposal in connection with the proposal by the Delegation of the EU, on behalf of the EU and its Member States.

246. The Delegation of Switzerland shared the concerns raised by the representative of INBRAPI with regard to beneficiaries. If beneficiaries included States, it did not see how that would be working. The text should retain the reference to TK holders.

247. The Chair opened the floor for comments on Article 10.

248. The Delegation of Nigeria, speaking on behalf of the African Group, welcomed Alt 1, which was the language it had proposed. It wanted to include a line that was missing when the language had been read out in the informals. It read: “In complying with the obligations set forth in this instrument, Member States may, in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such exceptions and limitations

shall not..." which would be inserted before "conflict with the interests of beneficiaries nor unduly prejudice the implementation of this instrument." That was a simple provision that catered to the general and specific exceptions contained in Alt 2.

249. The Delegation of Indonesia, speaking on behalf of the LMCs, supported Alt 1 as it appeared in the text. It was flexible enough to support the addition just proposed by the Delegation of Nigeria, on behalf of the African Group.

250. The representative of the Tulalip Tribes aligned himself with the last two interventions. Alt 2 had so many loopholes. When looking at it, he was wondering what would be protected under the instrument. It had all those unqualified uses of TK. There was that assumption that if it was noncommercial or for the good of humanity or the good of the environment, it was okay. Alt 1 had all the elements. He might want to add a few words here and there, but with the addition proposed by the Delegation of the Nigeria, on behalf of the African Group, it would work. The kind of TRIPS-like exclusion from protection of diagnostic, therapeutic and surgical methods was in the TRIPS context of secular knowledge. Yet those techniques were often the core of sacred and spiritual TK. Shaman and healers were often practicing those techniques and those were the kind of things that IPLCs wanted to least share with the outside world. Cases of extreme urgency could also be discussed, but the standard kinds of TRIPS-like exemptions were inappropriate.

251. The Delegation of Sri Lanka supported Alt 1 as it appeared in the text. It asked that the added words proposed by the Delegation of Nigeria, on behalf of the African Group, be put in brackets.

252. The Delegation of Ghana aligned itself with the new proposal made by the Delegation of Nigeria, on behalf of the African Group. The language in the proposal reflected standard language, which was presently found in major international IP instruments. It was simple, flexible and would adequately care for any issues or concerns that might arise.

253. The Delegation of Brazil favored a simpler and more flexible approach as provided in Alt 1. It wished to see the full text of the proposal by the Delegation of Nigeria, on behalf of the African Group, in order to analyze it.

254. The Delegation of the Islamic Republic of Iran supported Alt 1 and was flexible concerning the new proposal of the Delegation of Nigeria, on behalf of the African Group.

255. The Delegation of China supported Alt 1 and asked to see the proposal made by the Delegation of Nigeria, on behalf of the African Group in detail.

256. The Delegation of Thailand aligned itself with the language proposed by the Delegation of Nigeria, on behalf of the African Group. It was precise and clear enough to provide exceptions and limitations. It had a problem with Alt 2 because it would not look good for the instrument itself if they were longer than the provision on the scope of protection itself.

257. The Delegation of Nigeria, speaking on behalf of the African Group, said that its proposal was drawn from Articles 13 and 30 of the TRIPS Agreement and Article 9 of the Berne Convention for the Protection of Artistic and Literary Works ("the Berne Convention"). That was familiar language that one could find comfort with.

258. The Chair opened the floor for comments on Article 14.



259. The representative of Tulalip Tribes supported the changes made by the facilitators. It would be entirely appropriate to place that in a non-derogation clause and have it stand-alone because it referred to a broader set of rights and constructive arrangements with States as well as international instruments.
260. The Delegation of Indonesia, speaking on behalf of the LMCs, stated that further discussion was needed to find the right place to put paragraph 14.2. It was looking forward to a constructive discussion regarding that matter.
261. The Delegation of the Islamic Republic of Iran shared the position of the Delegation of Indonesia, on behalf of the LMCs, that the best place for paragraph 14.2 was not Article 14.
262. The Delegation of the USA, as the proponent of paragraph 14.2, said it would be happy to move to the appropriate placement, perhaps as a separate article.
263. The Chair opened the floor for comments on Article 16.
264. The Delegation of Nigeria, speaking on behalf of the African Group, supported the bridged merger of both previous provisions as a basis for future discussion. It was more coherent.
265. The Delegation of Indonesia, speaking on behalf of the LMCs, welcomed the changes made by the facilitators in merging two sub-articles into one article. It was simpler and easier to read and understand. It was in favor of that formulation and looked forward to further discussions.
266. The Chair concluded the discussion on Rev. 1, and opened the discussions on document WIPO/GRTKF/IC/32/6.
267. The Delegation of the USA introduced document WIPO/GRTKF/IC/32/6 entitled “Joint Recommendation on Genetic Resources and associated Traditional Knowledge” cosponsored by the Delegations of Canada, Japan, Norway, the Republic of Korea and the USA. It had previously produced that document at IGC 31 under document WIPO/GRTKF/IC/31/5. The proposed joint recommendation envisioned the appropriate use of legal, policy or administrative measures to prevent patents from being granted erroneously where prior disclosed GRs or TK would defeat the novelty or inventive step of claimed inventions. It also envisioned the use of opposition measures, encouragement of voluntary codes of conduct and the creation and exchange of databases for determining novelty and inventive step. It welcomed further discussions on national experiences and was willing to work with others on best practices. It emphasized that the joint recommendation could be used as a confidence-building measure to help the IGC move forward on key issues concerning TK. The proposed joint recommendation could be negotiated, finalized, and adopted without affecting the work of the IGC and other working documents. It invited other delegations to express their comments and support for the proposal and welcomed additional cosponsors. It looked forward to continued discussions on the proposed joint recommendation.
268. The Chair opened the discussions on document WIPO/GRTKF/IC/32/7.
269. The Delegation of Japan introduced document WIPO/GRTKF/IC/32/7 entitled “Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources”. Firstly, paragraph 18 laid out several key issues, which included contents to be stored in databases and allowable format for the content. Those were important aspects in terms of understanding the function and benefit of

the database. Secondly, paragraph 19 referred to the necessity of feasibility studies to be conducted by the WIPO Secretariat. Particularly, a prototype of the proposed WIPO portal site would help to get the whole perspective of the database and define future steps. Most of the Member States shared a common recognition in terms of the importance of establishing databases as a defensive measure to prevent the erroneous granting of patents for inventions dealing with TK and TK associated with GRs. Based on that recognition, it had been contributing to the discussions in the IGC and other fora. It would be more appropriate to establish databases that provide information required for examiners to conduct prior art searches and judge novelty and inventive steps of patent applications, rather than introducing a mandatory disclosure requirement. Utilizing the proposed databases during the patent examination process would improve the quality of patent examination in the area of TK and ensure the appropriate protection of TK. It looked forward to continuing discussions on the joint recommendation with Member States.

270. The Delegation of the USA supported the comments made by the Delegation of Japan, as a cosponsor of the proposed joint recommendation. The proposal was a valuable component of the IGC's work to negotiate an international legal instrument(s) for the effective protection of GRs and TK. More specifically, it helped to address concerns relating to the erroneous grant of patents. It was essential that the IGC continue to engage on that proposal and continue to provide constructive, substantive comments in order to address questions and concerns raised in past sessions on the draft proposal. It looked forward to discussing the proposed database system, including issues raised in an effort to improve it. It invited other delegations to express their support for this proposal and welcomed additional questions or improvements upon the recommendation that other Member States might have.

271. The Delegation of the Russian Federation supported the proposal in the document introduced by the Delegation of Japan. It would allow experts to carry out more effective prior art searches and look for reference material on GRs and non-secret TK associated with GRs, and that would consequently reduce the likelihood of erroneous granting of patents. It also supported document WIPO/GRTKF/IC/32/6 and agreed with the recommendation set forth in that document, which was a good basis for the work of the IGC. It might be adopted by the IGC as guidelines for the protection of TK.

272. The Delegation of the Republic of Korea, as a cosponsor, supported the two documents that had been introduced. It could not overemphasize the importance of protecting TK and GRs associated with TK against erroneously granted patent rights. The most effective form of protection was the establishment and use of database systems. That was a critical, feasible method for reducing the number of erroneously granted patents in each Member State.

273. The representative of the Tulalip Tribes objected to the idea of those being called "defensive" databases. The defensive approach to protect IPLCs against the grant of erroneous patents could actually lead to more harm than good. The grant of erroneous patents was only one issue among many. Many IPLCs were trying to deal with their cultural survival. Making their TK widely available could actually lead to harm other than patent harm. One had to be very careful about that. Also, one could not talk about a portal system until all of the database issues had been resolved. He understood the purpose of the database approach: it was to avoid going through the disclosure of origin. That put enormous burdens on IPLCs to document knowledge just in case there would be misappropriation in the IP system. There were also cultural issues at stake. In some countries, IPLCs might be willing to put their information in such databases. In the USA, it was not the case. Most elders had said they would never put their knowledge in such a database. He understood that the proposal was to put in the databases published material that was already out there. One might argue that such material

was in the public domain, but he disputed that. IPLCs believed that it was not evidence of prior art in the public domain but evidence of a property right that they held. If it could be localized to them, it was their property right. There were many principles in international and national law that suggested there should be no limitation on the protection of TK. It was an inherent right, part of their cultural heritage and cultural identity. He was not against databases *per se*. If there could be some language that would have a minimal system to ensure protection against information entering the databases without the PIC of IPLCs or against their rights, and if one could ensure that those were privately maintained for the purpose of patent examination or for a specific use, he could consider that language. As it stood, he could not support that document.

274. The representative of INBRAPI, speaking on behalf of the Indigenous Caucus, said that although there were good experiences with databases on the protection of TK and GRs, the IGC needed to consider the various circumstances at the national and regional levels. In Brazil, for example, there were 275 languages, the majority of which had not been studied. They featured in the UNESCO Atlas of World Languages in Danger. Indigenous communities and others with an oral tradition faced a great challenge in writing down their oral knowledge to ensure its protection. She had reservations with regard to the creation of databases as defensive protection, until it could be ensured that IPLCs had their own access to their own databases on knowledge, which belonged to them. The knowledge should not be in the public domain before it could be protected.

275. The Delegation of Canada supported the proposal on databases, as databases could be used as a means to prevent the erroneous grant of patents. Cognizant of the various concerns expressed, it wished to explore the proposals with all participants.

276. The Delegation of China said that databases were indeed very valuable for the prevention of the erroneous grant of patents. However, a database was costly and it wondered who would pay the cost. It also referred to the tiered approach and said that with databases, there was a risk that more people would know the TK, which would weaken the protection.

277. The Chair opened the discussions on document WIPO/GRTKF/IC/32/8.

278. The Delegation of Canada introduced document WIPO/GRTKF/IC/32/8 entitled "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." Up-to-date information on the issues outlined in the proposal would help inform and advance the work of the IGC. That information was essential for the matter at hand because TK associated with GRs was a subset of TK in general. The proposed study, which would update the 2004 "Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge", would provide concrete, up-to-date information on existing national laws, practices and experiences. That would be consistent with and support the IGC's mandate, which called for an evidence-based approach, and to reach a common understanding on core issues. The study would provide a highly valuable corpus of information that would have benefits not only for the IGC, but also more generally, providing a useful reference. It welcomed the Secretariat's work in compiling and making available information on existing laws and measures, but what was missing was a detailed, comparative study about how those laws and measures functioned in practice, and how their provisions were applied and interpreted by administrative and judicial bodies, how they performed, but also how they were perceived by ILCs, the user community (including academia and industry), and by the public in general. Overall, further and detailed information on concrete Member State practice would support the IGC in identifying the most appropriate way forward. It looked forward to a further discussion of that proposal, whether in the IGC or bilaterally.

279. The Delegation of the USA supported the comments made by the Delegation of Canada, as a cosponsor of the proposal. It referred to the 2016/2017 IGC mandate. In past sessions, the IGC had had constructive discussions about national laws and how disclosure requirements and ABS systems functioned. Those discussions had helped to advance the IGC's work on the text. The study was intended to carry forward that work without slowing down the work of the IGC. It invited other delegations to express their support for the proposal and welcomed questions or suggestions that other delegations might have to improve upon the study.

280. The Delegation of the Russian Federation, as cosponsor of the document, supported the proposal. The issues set forth in the document were those to be addressed by patent offices, which carried out the process of disclosure. It had initiated its own relevant survey of patent offices and had received some responses, which it was studying. That would help in the protection of TK. The document might not be supported by the IGC at that stage but in that case it would continue to work in that area on the questions contained therein. It asked Member States to consider and study those issues to help move forward.

281. The Delegation of the Republic of Korea, as cosponsor, supported the proposal for the terms of reference for a study by the WIPO Secretariat. Considering the necessity for a fact-based analysis of whether disclosure requirements addressed concerns regarding erroneous patents and misappropriations and whether disclosure requirements affected the incentive to innovate, that study was essential. It would enhance understanding on core TK issues in a practical setting and narrow gaps among Member States.

282. The Chair opened the discussions on document WIPO/GRTKF/IC/32/9.

283. The Delegation of the EU, speaking on behalf of the EU and its Member States, firmly believed that the IGC's work had to be guided by solid evidence on the implications and feasibility in social, economic and legal terms. It supported studies in general as an appropriate tool for its work. It reintroduced its revised proposal to request the Secretariat to undertake a study of national experiences and domestic legislation and initiatives in relation to the protection of TK. The study should in particular cover the period of the last five to 10 years. The study should help to inform discussions on TK, following an evidence-based approach in compliance with paragraph (d) of the IGC mandate. The study should build on existing material and other studies already conducted by the Secretariat in relation to TK. The Gap Analysis conducted in 2008 sought to identify gaps, whereas its aim was to provide an overview of recently adopted regimes designed to protect TK and therefore complement the work of the Gap Analysis, with a view to anchor the work in an evidence-based approach. The main focus of the study should be to analyze existing domestic/national legislation and initiatives on TK applied in the Member States of WIPO or regional areas, some of which could be measures-based, while others could be rights-based. The study should also include concrete examples of protected subject matter. On the one hand, the study should review recently adopted national and regional IP regimes such as IP laws, regulations, measures and procedures, by which the TK could be protected. It would be useful to know what the role of trademark, design, copyright, trade secrets or GI legislation was in connection with TK. On the other hand, other alternative, recently adopted IP rights or other regimes should be considered. It would be interesting to know how key definitions such as "traditional knowledge", "traditional", "misappropriation", scope and beneficiaries had been defined; whether those alternative regimes were sufficient to ensure adequate protection for TK and proved to be useful in TK protection. The question of legal certainty for all stakeholders under those regimes had to be examined. The study should address the issue of existing databases, such as those created for the purpose of keeping TK for other generations. The shared experience with the databases provided in the study could

shed some light on their practical impact on patent procedures. Last but not least, it had listened with interest to the many examples provided in informal discussions by indigenous representatives of national measures from which they benefited. It wished the study to also examine on a systematic basis the impact of national measures and practices on ILCs.

284. The Delegation of Georgia, speaking on behalf of CEBS, supported the request for a study put forward by the Delegation of the EU, on behalf of the EU and its Member States, to analyze existing national TK legislation.

285. The Delegation of Japan said that concrete examples of national experiences and practices could help better understand the issues. It supported the proposal made by the Delegation of EU, on behalf of the EU and its Member States.

286. The Delegation of the USA was pleased that the study envisioned analyzing domestic legislation and its application to concrete examples of what was protectable TK and what was in the public domain. Its new submission, including examples of products that originated from TK, could be a valuable point of reference.

287. The Delegation of Chile supported that initiative. Carrying out such a study according to the terms of reference proposed would improve the discussions and ensure the best possible result for the beneficiaries of the instrument. It asked for a clear timeline for the presentation of the results so that it could be a real support and not have a negative impact on carrying out the two outstanding meetings on TCEs. That was in line with the mandate in paragraph (d), which indicated that that kind of study should not delay the process.

288. The Delegation of Canada said the proposal could complement the study in document WIPO/GRTKF/IC/32/8. It supported all initiatives aimed at enhancing its knowledge of current and concrete Member State practice with a view to rely on the evidence-based approach contemplated in the mandate. It looked forward to further discussions of those proposals.

289. The Delegation of Ghana questioned the relevance and utility of additional national studies at that stage of the process. The start of the process had been followed by extensive national studies that had developed sufficient information to guide the work. The IGC was nearing completion of an instrument on TK, so conducting additional studies would simply be unduly delaying the process. Since the 80s the vast majority of African countries had followed the proposals jointly produced by WIPO and UNESCO and had come up with national laws on TK. It had a treaty that elaborated extensively on the relevant issues that were being discussed. If there was any consensus at all, the IGC could simply look at those examples from Africa. Additional studies might not be necessary.

290. The Delegation of Guatemala supported the initiative proposed by the Delegation of the EU, on behalf of the EU and its Member States, on carrying out the study on national measures and experiences with regard to TK.

291. The Delegation of the Czech Republic supported the proposal by the Delegation of the EU, on behalf of the EU and its Member States, as the IGC was still in a learning process and needed not only a collection of existing national systems for the protection of TK but also to analyze and understand them comprehensively. It also supported the proposal made by the Delegation of Canada.

292. The Delegation of the Russian Federation supported the proposal of the Delegation of the EU, on behalf of the EU and its Member States, as it was useful for countries and for the work of

the IGC. The suggested study should focus on analyzing both domestic legislation of Member States and concrete examples of protectable subject matter, subject matter that was not intended to be protected, and measures that could be taken to protect TK, both measures-based and rights-based, in order to inform further discussion at the IGC.

293. The Delegation of the Republic of Korea supported the proposal by the Delegation of the EU, on behalf of the EU and its Member States. The study-based approach would be helpful for Member States to understand and analyze the current situation and reach consensus on core issues at future sessions.

294. The Delegation of Nigeria, speaking on behalf of the African Group, took note of the proposal by the Delegation of the EU, on behalf of the EU and its Member States. The study could be useful in helping Member States learn best practices from the various African Member States that had instruments for the protection of TK. Yet to undertake that study now would unduly delay the process of the negotiations, keeping in mind the mandate of the IGC.

295. The Delegation of the EU, speaking on behalf of the EU and its Member States, responded to the many interventions that supported its study proposal and spoke to those delegations that had expressed concerns about a delay of the discussions on TK. That was not the case. In order to demonstrate its proactive engagement, it would be happy to look at the proposal made by the Delegation of Chile that had suggested a timeline for the study that would fit within the current mandate.

296. The Chair opened the discussions on document WIPO/GRTKF/IC/32/10.

297. The Delegation of the USA introduced document WIPO/GRTKF/IC/32/10 entitled "Identifying Examples of Traditional Knowledge to Stimulate a Discussion of What Should be Protectable Subject Matter and What is Not Intended to be Protected". It appreciated the responsiveness of the Secretariat in making the document available on short notice. The IGC had been mandated to reach an agreement on an international legal instrument(s) relating to IP that would ensure the balanced and effective protection of TK. In advancing its work, the IGC was expected 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 was not intended to be protected. The IGC's mandate also required Member States to place the primary focus on reaching a common understanding on core issues, including what TK was entitled to protection at an international level and what TK was not meant to be protected. The paper was intended to contribute towards the common understanding by identifying some of the many well-known products and activities that were based on TK in order to facilitate a discussion on which TK should be protected and what should be available for all to make and use without restriction. It hoped those examples would help the IGC develop a better understanding of the issues. It also hoped that it would make a positive contribution to the text-based negotiations. It welcomed any comments and consideration.

298. The Delegation of Ghana took note of the submission by the Delegation of the USA. The document offered an interesting overview of ancient practices. It welcomed the initiative as a demonstration of the commitment of the Delegation of the USA to advance the work of the IGC. To assist in the review of the document, it requested the Delegation of the USA to clarify whether the examples cited qualified as TK in the modern era. The title of the document was confusing because the text of the document did not refer to the matter cited to constitute examples of TK, but rather to well-known products and activities rooted in TK. A difficulty arose because a practice had been rooted in TK centuries ago, but might not be currently observed as such. The document did not categorically state that examples did not constitute TK. It was

therefore an open question whether the document met the terms of the IGC mandate which required “examples of protectable subject matter and subject matter that was not intended to be protected.” Given that ambiguity and pending clarification of the Delegation of the USA, the examples should be evaluated taking into account the definition of TK developed in the Draft Articles. The definition identified at least four important characteristics: (1) creation by indigenous groups, (2) linkage with social identity or social heritage of the indigenous groups, (3) transmission from generation to generation, and (4) that the TK exist currently in various forms. Clearly, in document WIPO/GRTKF/IC/32/10, the TK mentioned did not meet all those criteria, so it ought not to be considered as TK as per the Draft Articles. In the first example cited, traditional syringes made with animal bladders were injecting medicine in the skin in the same manner syringes were currently used. It asked whether that practice currently existed among the Native Americans, as noted in the submission. If that indigenous group did not currently observe the practice, it should not qualify as TK. To conclude, it appreciated the initiative by the Delegation of the USA and looked forward to their guidance or clarification on whether the examples provided qualified as TK of indigenous peoples, which currently existed, so as to fall within the scope of the definition of TK.

299. The Delegation of Japan thanked the Delegation of the USA for preparing the document, which would help better understand what should be protectable subject matter and what was not intended to be protected, through examples.

300. The representative of the Tulalip Tribes was interested in thinking about the document but could not accept it as it was. He had not intervened on the document presented by the Delegation of the EU, on behalf of the EU and its Member States, because he had concerns, like the African Group, that it might delay the discussions. He was not sure that an in-depth approach was needed. The information was available in the studies that had been performed. On the other hand, what was missing in the proposal was that it was not looking at the perspectives of IPLCs. He was willing to provide input on the issues. The proposal by the Delegation of the USA illustrated a major flaw in the process. How IPLCs thought those systems were operating, and how those definitions of TK were working or not working had to be taken into account. What he was looking for was an acknowledgment that IPLCs should be full partners in the process. He was very appreciative of the many gains made thus far. If States were proposing studies and terms of reference for databases, it could not just be from a State's point of view. It had to involve IPLCs, have mechanisms to receive their input, and have them reflected in the outcomes.

301. The Delegation of the Republic of Korea thanked the Delegation of the USA for preparing the document. Through the document, one could acknowledge that there were some well-known products and activities such as popcorn and football that were based on TK. The document also made one realize how much TK had enriched and had been closely related with people's lives for a long time. It supported the suggestion made by the Delegation of the USA to reach understanding on what should be protectable subject matter and what was not intended to be protected at the international level. It wished to actively engage in a discussion on that issue.

302. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the Delegation of the USA for its document, which compiled some examples of widely diffused TK, in order to stimulate a discussion of what should be protectable subject matter and what was not intended to be protected. It welcomed a debate anchored in concrete examples. In relation to one of the examples given, football, it was surprised that the paper had omitted any reference to European involvement in the development of the world's most successful sport.

303. The Delegation of the USA acknowledged the example of transboundary TK provided by the Delegation of the EU, on behalf of the EU and its Member States, at the outset. It thanked the Delegation of Ghana for asking which of those examples should be considered as TK when looking at the definition in the Draft Articles. It had not yet taken a position on that issue but it was very helpful that the Delegation of Ghana had initiated the discussion by analyzing the first example. It would be happy to contribute to the discussion. That was precisely the type of conversation that the paper was intended to inspire. It referred to the comment that some additional types of examples should be included and welcomed those examples, whether from an indigenous people's perspective or any other perspective, because those examples would help build on the conversation. It thanked all those that had supported the proposal.

304. The Chair closed the discussion in the plenary and moved to the informals.

305. [Note from the Secretariat: this part of the session took place on the last day of the session and after the distribution of Rev.2.] The Chair thanked the facilitators for their hard work and invited them to introduce Rev. 2.

306. Ms. Bagley, speaking on behalf of the facilitators, said that, the facilitators appreciated the productive discussions with delegations and the Member States' support for Rev. 1. Rev 1 was a solid and helpful basis to work towards a Rev. 2. They had tried throughout the document to minimize the bracketing in favor of the use of alternatives to allow divergent positions to be clearly identified, and opportunities for convergence to be clearly illuminated, so that robust discussions on the differing positions of delegations could take place, hopefully leading to an improved text. They had made a good faith effort to accurately reflect the various Member States' positions, while retaining clarity in the text. As they had done previously in some articles, they had introduced new language or revised unclear wording, as inspired by Member State interventions. She introduced Article 1 "Policy Objectives", which contained four alternatives. Alt 1 was a fairly detailed provision that had been amended to reintroduce bracketed paragraph 2, directed to aiding the prevention of the erroneous grant of IP rights as requested by several delegations. Upon the request of the Delegation of Canada to have "tradition-based" bracketed in Alt 1, a new option for subparagraph (d) had been added with "tradition-based" removed. Similarly, the phrase "tradition-based" had been deleted in Alt 2, further illuminating those distinctive positions. Alt 3, a positive provision originally introduced by the facilitators, had received some Member States' support and had been retained in the text, with the addition of "ensure" as an alternative to "support", "protection" as an alternative to "use", and "traditional knowledge holders" as an alternative to "beneficiaries", all as requested by Member States. Alt 4, paragraph (c) had been modified to include the bracketed language over TK and TK associated with GRs, as an alternative to "that are directly based on protected traditional knowledge obtained by unlawful appropriation". So it now read: "prevent the erroneous grant of intellectual property rights [over traditional knowledge and traditional knowledge associated with genetic resources][that are directly based on protected traditional knowledge obtained by unlawful appropriation]." Article 3 also contained four alternatives. The first three were unchanged from Rev. 1, and the fourth alternative had been added pursuant to the intervention by the Delegation of Chile to reflect the approach of Alt 3, but without the temporal criteria for eligibility, nor the phrase "criteria for eligibility". Article 4 contained only two alternatives. The second had been modified to include brackets around "such as States and/or nations". The facilitators noted that the Member States were working through varying formulations through that article, noting it was a topic that would be revisited at IGC 33 on TCEs. In Article 5, the title had been amended to reflect the addition of the word "positive" before "protection". Article 5 contained three alternatives, all of which were bracketed. Alt 1 remained unchanged. Alt 2 had been modified in several respects. Paragraph 5.1 from Rev. 1 had been converted into a chapeau to the remaining subsections. At the request of the representative of the Indigenous



Caucus, “and in a manner consistent with Article 14” had been added to the chapeau. At the request of the Delegation of Chile, the facilitators had added “in particular” to lead into the detailed provisions. In paragraphs (a) and (b), “or” had been replaced with “and/or” as per an intervention by the Delegation of Sri Lanka and in paragraphs (a)(i) and (ii), the moral right of attribution and the right to the use of their TK in a manner that respected the integrity of such TK had replaced the prior language, which required users to attribute knowledge to beneficiaries, and use the knowledge in a manner that respected the cultural norms and practices of the beneficiaries, as well as the inalienable, indivisible and imprescriptible nature of TK, but did not make clear that it was the beneficiaries who had the moral rights in relation to their TK. The facilitators noted that that language that had been deleted was retained in Alt 3. Paragraph 5.2(b) of Alt 3 had been modified to delete “users attribute said knowledge to beneficiaries” and insert “users identify clearly-discernable holders of the traditional knowledge when using said traditional knowledge”. Article 5 BIS was Article 6 in Rev. 1 and had been renumbered as Article 5 BIS. In order to attempt to accommodate a new database provision introduced by the Delegation of the USA as another tiered alternative for Article 5, the facilitators concluded that Article 5 BIS would be a more logical place for the provision because Article 5 was directed to positive protection for TK and was not limited to tiered approaches as evidenced by Alt 1. For that reason and to clarify the commonalities and distinctions between Articles 5 and 5 BIS, “protection” in brackets had been added to the title of Article 5. Article 5 BIS had an amended on the title with “protection” replacing “measures” to indicate the alternative nature of that article to Article 5. As the Delegation of the USA had correctly noted, a database could provide a narrow form of defensive protection against patent granting on the TK or obvious variance of the TK for a limited category of TK. But such protection was limited to the classification of the knowledge as prior art. That was different, for example, to information in an unexpired patent, while prior art was also subject to positive rights. As such, that was a fundamentally different view of the kind of protection to which TK should be entitled. So Article 5 BIS, directed to that different form of protection, seemed most appropriate. Furthermore, there were areas of duplication between the new database protection provision and portions of the complementary and defensive protection provision, which also supported the conclusion that the two provisions belonged to the same article. Article 5 BIS had the database protection provision, introduced in plenary, which encouraged Member States to develop in consultation with IPLCs national TK databases for publicly accessible national TK, databases accessible only by IP offices and databases for non-public TK for codifying and conserving TK within IPLCs. All three types of databases were for voluntary contribution of TK by IPLCs. The second section of the article had the subheading “complementary and defensive protection” and retained the language from Article 6 of Rev. 1. The facilitators noted that there were several redundant concepts in the database protection and complementary and defensive protection sections that could be combined and streamlined. They encouraged Member States to consider the appropriateness and the viability of engaging in such efforts.

307. Ms. Hao’uli, speaking on behalf of the facilitators, introduced Article 6. Alt 1 was an African Group proposal, which they had retained unchanged from Rev. 1. Alt 2 contained only a couple of minor changes, but was otherwise the original sanctions article. Border measures had been removed from Article 6.1, and there was a new paragraph 6.7 that stated: “If an infringement of the rights protected by this instrument is determined in the procedure established in Paragraph 6.1, the sanctions may consider the inclusion of restorative justice measures, according to the nature and effect of the infringement.” That was a textual proposal made by Member States in the informals. In Article 7, Alt 1 had been proposed by Member States in the informals and stated: “Where required by national law, the users of traditional knowledge shall comply with requirements concerning source and/or origin of traditional knowledge.” Alt 2 and Alt 3 were both based on the disclosure text in the original working document and were separated into two alternatives to show two different positions. In both

alternatives, they had removed references to the plant variety system. Throughout Alt 2, references to patent and plant variety rights had been removed so that the disclosure requirement would apply to IP applications generally, and in Article 7.4, in Alt 2, the text was previously paragraph 5 in that article and it had been simplified by Member States in the informals. It now stated: “[Rights arising from a grant shall be revoked and rendered unenforceable when the applicant has failed to comply with mandatory requirements or provided false or fraudulent information.]” Alt 3 was structurally the same as Alt 2. Throughout the alternative, the reference to patent and IP applications had been retained. The term “protected” was also added before TK where that term appeared. In paragraph 7.1, the words “relates to or” were bracketed and substituted with “directly.” The sentence read: “[Patent] intellectual property applications that concern [an invention] any process or product that [relates to or] [directly] uses protected traditional knowledge [...]”. In paragraphs 7.4 and 7.5, there were some differences from Alt 2, which reflected previous text from the working document, with some edits from Member States. They essentially stated that rights arising from a granted patent were not affected by failure to comply with the disclosure requirement and revocation would only occur where an applicant had knowingly provided false or fraudulent information. Alt 4 was unchanged text stating that there was no disclosure requirement. In Article 8, Alt 1 remained the alternative for the position of requiring some formal consultation or consent of the beneficiaries on the establishment of the competent authority for the administration of beneficiaries’ rights or interests. Alt 2 represented the position that the Member States might have competent authorities. They had been asked by the Delegation of the EU to include PIC, which was already contained in Alt 1. So to maintain the integrity of the alternatives, they had not added it to Alt 2. They had ensured that all the ideas of Alt 2 were captured in Alt 1. They had outlined the text in Alt 2 to Alt 1 to administer the rights, and they hoped that adequately addressed the concerns. Alt 2 remained unchanged. In Alt 1, the Delegation of Switzerland had made the good point that referring to States as beneficiaries was problematic because States could not consult with themselves. They preferred the term “traditional knowledge holders” there. Alt 3 was a proposal by the Delegation of the USA. Some amendments were made and the Member States might establish competent authorities in accordance with national and customary law that were responsible for the national TK databases provided for by the instrument. Responsibilities might include the receipt, documentation, storage, and online publication of information relating to TK. They felt that that might better belong to Article 8 BIS but they had left it as was. In Article 9, Alt 1 was an African Group proposal which they had inserted in Rev. 1, containing in addition a text that the Group had raised in the plenary, as well as text proposed by another group in the informals to the effect that any exemptions and limitations adopted by Member States should not unreasonably conflict with the interest of the beneficiaries. Alt 2 from Rev. 1 was unchanged. Alt 3 was proposed by Member States in the informals and stated: “In complying with the obligations set forth in this instrument, Member States may adopt exceptions and limitations as may be determined under national and customary law.” Articles 10, 11 and 12 remained unchanged, except for numbering. In Article 13, textual proposals were made in the informals regarding the inclusion of references to the UNDRIP, and they had inserted them as paragraphs 13.2 and 13.3: “[13.2 Nothing in this instrument shall be interpreted as prejudicing or detrimental to the rights of indigenous peoples enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.] [13.3 In case of legal conflict, the rights of the indigenous peoples included in the aforementioned Declaration shall prevail and all interpretation shall be guided by the provisions of the said Declaration.]” Paragraph 13.3 was problematic as not all Member States had ratified the UNDRIP. They were not sure if that text was consistent with that purpose. Regarding Article 14 “Non-derogation”, they had made that text, which had been introduced by the Delegation of the USA, a stand-alone provision as a result of a lot of discussion in the plenary and informals. Article 15 and Article 16 were unchanged from Rev. 1.

308. [Note from the Secretariat: this part of the session took place after a break.] The Chair recalled that there were other documents also noted and discussed at the session, namely documents WIPO/GRTKF/IC/32/5, WIPO/GRTKF/IC/32/6, WIPO/GRTKF/IC/32/7, WIPO/GRTKF/IC/32/8, WIPO/GRTKF/IC/32/9, WIPO/GRTKF/IC/32/10, WIPO/GRTKF/IC/32/INF/7 and WIPO/GRTKF/IC/32/INF/8. The decision under item 7 would properly reflect that as at IGC 31. Those documents included proposals for studies, which some Member States had been discussing informally. He invited the proponents to consult with Member States intersessionally and, if they wished, to come back to IGC 33 with a concrete proposal with clear terms of reference, timelines, and modalities. In that regard, the Secretariat could assist in providing practical information on timelines and modalities and delegations were invited to contact the Secretariat, if they wished. On Rev. 2, he recalled that as per the agreed methodology and work program, the plenary would be asked to identify any errors or omissions in Rev. 2. Any other comments on Rev. 2, such as new proposals, drafting improvements, and any other substantive comments, would be recorded in the full report of the session. At the end of the discussion, the text, as corrected, if necessary, for obvious errors and omissions, would be noted and transmitted to IGC 34. He opened the floor for any errors and omissions in Rev. 2.

309. [Note from the Secretariat: all speakers thanked the facilitators for their work]. The Delegation of Nigeria, speaking on behalf of the African Group, mentioned an omission, which it hoped the facilitators would reflect. In Article 7, Alt 1, there was an omission of “the disclosure of” in the second line. The full proposal read: “Where required by national law, the users of traditional knowledge shall comply with requirements concerning the disclosure of source and/or origin of traditional knowledge.”

310. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that brackets around newly introduced text were missing and that those brackets should be introduced for consistency reasons. For example, in Article 6, Alt 1, Article 6, paragraph 7, Article 7, Alt 1 and Alt 2, and Article 9, Alt 1. Further, the word “peoples” should be bracketed in Article 13.

311. The Chair opened the floor for general comments on Rev. 2.

312. The Delegation of Nigeria, speaking on behalf of the African Group, said that on Article 1, it would have preferred not to have paragraph 2 reintroduced in Alt 1. It took note that it was a request of a number of Member States. However, paragraph 2 of Alt 1 found better home in Alt 4. On Article 3, it supported Alt 1 in conjunction with Alt 1 of the definition of TK in Article 2. On Article 4, it supported Alt 2, and on Article 5, it was not pleased to see the inclusion of positive protection. It had requested for a deletion of conditions, and, it was not sure who had requested the addition of “positive protection” in the text. It sought clarification from the Chair or the facilitators on that request. In the same vein, it did not support the change of former Article 6 to Article 5 BIS. There was an international precedent for adding a “bis” to a document, and that was not the case there. It asked for clarity from the demanders of making a “bis” to Article 5, which seemed to suggest a continuation that did not exist, at least in the minds of a significant number of Member States. On Article 6, it supported Alt 1, which was a proposal made by the African Group, and had been supported by a large number of Member States. It did not see the need to bracket a proposal that was supported by a significant number of Member States. On Article 8, it supported Alt 2, and on Article 9, it supported Alt 1, which was an African Group proposal. It would come back to comments on the other articles. It could express support for the non-derogation clause in Article 14 and for the change been made in Article 16.

313. The Delegation of Turkey, speaking on behalf of Group B, noticed that the text still contained alternatives and brackets, which reflected that a common understanding on the core issues was yet to be reached.

314. The Delegation of Indonesia, speaking on behalf of the LMCs, said that Rev. 2 could be passed on and used as a basis for future discussions on TK. On Article 1, it supported Alt 1. For the subject matter of protection, it supported Alt 1 in conjunction with Alt 1 of the definition of TK in the "Use of Terms". For the beneficiaries, it supported Alt 2. Regarding Article 5, it supported Alt 2 as it appeared in the text; however, it could not recall any intervention for the addition of the word "positive" in the title of Article 5. It requested the deletion of that word and sought further clarification from the Chair or the facilitators on that. Article 5 BIS should be numbered as Article 6, using sequential numbers, as was the practice established in WIPO and a custom in international law. It was not against the idea of databases and was open to further discussion regarding that matter; however, the numbering was misleading. On the sanctions and remedies, it supported Alt 1. On the administration of rights, it supported Alt 2. It would come back with comments on other articles.

315. The Delegation of Chile, speaking on behalf of GRULAC, supported Alt 1 of Article 1 without prejudice. It noted that in Alt 4, the reference to "directly based on" should not be included in an instrument of that nature. In Article 4, it asked for the removal of the brackets around "peoples", as per the request made by the representative of the Indigenous Caucus. The concept of IPLCs was part of international instruments, which had already been ratified by many Member States. After all those years, that word should no longer be in brackets. It understood that the brackets were there because their maintenance had been asked for. There was no bracket for "States" and "nations", although it had not supported that proposal. The beneficiaries were IPLCs. On Article 5, it had a number of similar questions as to the reason why the word "positive" had been added to the title. It requested that the phrase "and condition" be removed, and it did not feel that the article should have that phrase in the title and should simply be "scope of protection" and no more. It supported the statement made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Nigeria, on behalf of the African Group, on that point. In Article 5 BIS, as currently numbered, it shared the views of the LMCs and the African Group. That was not the practice that had traditionally been followed by WIPO. It was rather a practical tool when one revised an agreement. So from a formal point of view, it should not be numbered Article 5 BIS but should remain as Article 6, as it was in Rev. 1. There was a feeling within GRULAC that the scope of protection in Article 5 was diminished by what was contained in Article 5 BIS, and that was one of the reasons why it would rather see that article standing alone and not linked to Article 5. There was a practice of clearly establishing alternatives, and that was why that text contained new alternatives.

316. The Delegation of the Plurinational State of Bolivia supported the statements by the Delegation of Chile, on behalf of GRULAC, and the Delegation of Indonesia, on behalf of the LMCs. It would continue to analyze the document in detail in the Plurinational State of Bolivia but had some initial comments to make. The quantity of options and alternatives had increased. That was not necessarily a bad thing, and might actually be useful for achieving the desired result. On Article 3, it supported Alt 1. It did not need the criteria for eligibility if the text had definitions. On Article 5, it was not necessary to qualify the protection as either positive or defensive. With regard to the renumbering of Article 5 BIS, it supported the statements made by other delegations that it should be correctly numbered as Article 6. As regards databases, its preference was for simple, short and flexible wording. There should not be too much detail on databases. It would be better for each country to decide how to include material in the databases and on what basis. It would make constructive contributions at IGC 33.

317. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that the discussions made clear that significant gaps still remained and that differences on core issues had not been resolved. It had proposed a study that would have helped to shed light on existing national and regional legislation in relation to the protection of TK, and it looked to all delegations in the IGC for their support in organizing such a study. In relation to Rev. 2, it would focus its comments on the core issues, considered as a matter of priority, in line with the mandate. It reserved its position in relation to the other articles. On the policy objectives, it supported Alt 2. Two new proposals had been introduced as Alt 3 and Alt 4, both of which required further detailed consideration. In relation to subject matter, it supported the inclusion of eligibility criteria in the article. In relation to beneficiaries, it supported ILCs as beneficiaries, and, therefore, the language contained in Alt 1. It was not in a position to support Alt 2, which included a reference to nations and States as potential beneficiaries. On the scope and conditions of positive protection, it supported Alt 1 as a stand-alone option. It noted the insertion of a new Article 5 BIS on defensive protection. That approach could constitute a realistic common objective for the IGC's work. It looked forward to having detailed discussions on possible modalities. On administration of rights, it supported Alt 1 as a basis for future discussions. It reserved its position in relation to other changes and newly introduced text, for instance, those changes introduced in the articles on sanctions, disclosure requirement, exceptions and limitations, and the relationship with other international agreements. There was no common understanding yet of the objectives, and, therefore, the focus should remain on core issues. In line with the mandate, the IGC should not prejudge the nature of the instrument.

318. The Delegation of Ghana supported the request made by the Delegation of Nigeria, on behalf of the African Group, and the Delegation of Indonesia, on behalf of the LMCs, that Article 5 BIS be renumbered. International convention was to use the "bis" reference only in connection with the amendment of a provision of an existing international instrument. That was not the case for the text currently being developed. To that extent, the use of the "bis" reference was premature and unwarranted.

319. The Delegation of India noted that in the new text the IGC had been able to narrow the existing gaps and have consensus on some of the issues on the key articles on policy objectives, subject matter of protection, scope of protection, and exceptions and limitations. It aligned itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs. In Article 1, it supported Alt 1 along with paragraph 2. It did not support alternative (d) in paragraph 1 of Alt 1. It supported Alt 1 in Article 3, with the understanding that under the "Use of Terms" Alt 1 was retained for defining TK. It did not support the criteria of eligibility. It supported Alt 2 in Article 4, as it was important to take care of different situations prevailing among Member States. In Alt 2 of Article 5, it supported the chapeau along with paragraphs (a), (b) and (c). On Article 5 BIS, it supported the statement made by other delegations. It was better to reflect it as a separate article instead of being linked to Article 5. In Article 6, it supported Alt 1. It supported Alt 2 in Article 7. It also reserved its right to come back on that article. In Article 8, it supported Alt 2. In Article 9, it supported Alt 1. It reserved its position to come back on the rest of the articles. It would continue to engage constructively in the forthcoming meeting to reach a consensus on having a legally binding international instrument(s).

320. The Delegation of Indonesia aligned itself with the statement it had made on behalf of the LMCs. Rev. 2 could be the basis for future discussions; however, it did not support Article 13.3. It reserved its right to provide comments on other articles in future discussions.

321. The Delegation of Canada noted and welcomed the new alternative to paragraph 1(d) under Alt 1 in Article 1. That was a good way of reflecting the various views of Member States

on issues related to the term “tradition-based”. Moving to Article 4, in Alt 2, it reiterated its ongoing concerns regarding the term “other beneficiaries”. It would be looking to bracket that term at some other point, pending further domestic consideration of what that term meant, and that was an issue that the IGC also had to consider alongside the issues of “nations” and “States” as potential beneficiaries. On Article 5 BIS, it thanked the facilitators for taking its suggestion onboard regarding the numbering. Having Articles 5 and 5 BIS respectively referring, in their titles, to “positive” and “defensive” protection provided an enhanced characterization of those provisions, reflected its view that the various approaches outlined in those two articles were part of the same spectrum of protection and facilitated its domestic consideration of all relevant options. Regarding Articles 6 and 9 respectively, it appreciated the efforts to find text inspired by existing international instruments and that reflected the fact that Member States and ILCs had different legal and customary conditions that necessitated flexibility for implementation at the national level. That was an objective it shared for an instrument. It sought flexibility. However, in seeking flexibility, it could not sacrifice the need for a common understanding about what the language might mean practically speaking when Member States implemented the provisions. The way to achieve that common understanding was by embedding, in the IGC’s work, an ongoing discussion of Member States’ practices and national contexts. That discussion could not be an afterthought, or separate from the work. It had to be an integral part. It seemed counterintuitive to be discussing those issues in the abstract when some Member States had concrete, relevant and useful experience to share. The Delegation was open to considering all proposals, including on Articles 6 and 9, but just discussing the language of the proposals themselves in isolation was not contributing to advancing the common understanding of what the proposals might mean in practice. That understanding was another key to achieving progress. It recognized that discussions had been going on for a number of years, which was not unusual given the breadth and implications of the issues, but the efforts were now more focused on textual proposals that the IGC needed to discuss from the perspective of experiences to confirm a shared understanding of what the words meant in actual context. On Article 7, it had concerns, without prejudice, regarding the potential applicability of that provision to applications for all types of IP rights. It would be looking to reflect that by bracketing the term “IP applications” and suggesting other consequential adjustments. It reserved the right to return to that issue in future sessions.

322. The Delegation of the Islamic Republic of Iran associated itself with the statement delivered by the Delegation of Indonesia, on behalf of the LMCs. The IGC had made good progress in narrowing the gaps on core issues. On Article 1, it supported Alt 1. With regard to Article 3, it was in favor of Alt 1. It did not support including the criteria of eligibility in the text. On the beneficiaries, it supported Alt 2, without the word “nations”. That alternative included the main beneficiaries of the instrument, namely IPLCs, while preserving policy space for States at the national level to determine other beneficiaries under national law. On Article 5, along with the LMCs, it preferred Alt 2. It had the same concern regarding the new numbering of Article 5 BIS as mentioned by other delegations. On Article 8, it supported Alt 2. On Article 9, it was in favor of Alt 1, as proposed by the Delegation of Nigeria, on behalf of the African Group.

323. The Delegation of Brazil said that Rev. 2 was a good basis to progress towards reaching consensus. It aligned itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs, regarding the preferences on different alternatives. It joined other delegations in saying that numbering Article 5 BIS as a “bis” was misleading. Additionally, it would not be in conformity with the practice in WIPO, as provided in the Paris Convention for the Protection of Industrial Property (“the Paris Convention”) and the Berne Convention, among other instruments. International customary law was one of the sources of international law itself, and the customary practice in WIPO was to number articles sequentially and only in cases of revision was it warranted to number them using a Latin expression such as “bis.” The correct numbering was

Article 6. It was ready to continue to work towards reaching agreement on that very important instrument.

324. The Delegation of Chile aligned itself with the statement it had delivered on behalf of GRULAC. With regard to Alt 1 of Article 1, it welcomed the return of the text of paragraph 2. It reflected its interest to work based on the definitions, and excluding the time criterion. With regard to Alt 2 of Article 5 and Alt 2, it welcomed the modifications that clarified the functioning of the chapeau with paragraphs (a), (b) and (c).

325. The Delegation of Paraguay associated itself with the statement made by the Delegation of Chile, on behalf of GRULAC. The IGC needed to progress, but in order to do that, it should not question things that were already set forth in international instruments, such as the concept of IPLCs, who should be the beneficiaries of the instrument. It was flexible in the cases where the holders could not be identified, where States could be considered as beneficiaries. It supported a protection-based approach. Alt 3 of Article 3 included criteria for eligibility and went against that approach. It welcomed the inclusion of paragraph 2 in Alt 1 of Article 1. It expressed its complete support for the process.

326. The Delegation of Thailand appreciated the spirit of cooperation by Member States, which had helped bridge differences and advance the work in developing the text. It aligned itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs. It supported Alt 1 of Article 1. On the beneficiaries, it supported Alt 2. On the subject matter, it favored Alt 1. It did not want criteria for eligibility. On the scope of protection, it supported Alt 1 and joined other delegations in requesting to renumber Article 5 BIS to Article 6, as it was a stand-alone article. On the exceptions and limitations, it welcomed the formulation proposed by the Delegation of Nigeria, on behalf of the African Group.

327. The Delegation of Sri Lanka aligned itself with the views expressed by the Delegation of Indonesia, on behalf of the LMCs. Even though Member States had not reached agreement on the text, they all agreed in one respect at least, and that was the excellent work of the facilitators and the Chair.

328. The Delegation of the USA supported the comments made by the Delegation of Canada regarding Article 5 BIS. The text of Article 5 BIS had been originally located in Article 3 BIS. The removal of the “bis” designation in Article 3 had not been discussed, as no Member State had raised concerns about its inclusion in prior Article 3 BIS. In creating Rev. 1, the facilitators had renumbered the articles for convenience, but those articles were previously numbered Article 3 and Article 3 BIS. Thus, to keep with international norms within WIPO, that text should have been renumbered to Article 5 and Article 5 BIS. It appreciated the comments of those who had supported the co-sponsored joint recommendations. It saw value in advancing the concepts contained in those proposals. It expressed its appreciation to those who had supported the co-sponsored study on disclosure requirements and related ABS systems at the national level. The study would help gain a better understanding of one of the mechanisms in the consolidated document. Finally, it expressed its appreciation for the brief discussion on its new proposal on TK examples. Those examples would help gain a better understanding of the text as the IGC considered which TK should be protected and which should not. It acknowledged the constructive spirit of the discussions. It recognized the demandeurs’ efforts to reconcile positions among themselves; however, significant gaps still remained. A common understanding on core issues had yet to be reached on a number of issues, which included the following: the objectives of the instrument, the definition of “misappropriation,” the effectiveness of a prescriptive, rights-based approach vs. a measures-based approach, whether a right of integrity would inherently conflict with the dynamic and evolving nature of TK, and whether the

IGC's work should aim for a less prescriptive approach where all provisions were simply based on national or customary law or instead an approach that promoted legal certainty within the international IP framework. With regard to the last point, it cautioned that a higher level of generality in the text did not reflect a shared understanding on fundamental issues. Any international legal instrument that emerged from the process would need to have sufficient clarity and certainty in order to address issues of IP and TK that arose at the national level. That was not to mention the many outstanding issues not discussed at the meeting, especially those definitions arising within the scope of TK, such as local communities, tradition-based innovation, public domain, publicly available, secret, sacred, and narrowly and widely diffused. While it recognized the benefit of alternatives to illustrate varying positions, the best way to narrow gaps might be to engage in the same positions, instead of restricting comments on alternative positions, through an evidence-based approach, analyzing those alternative positions, especially using real-world examples, such as those included in its submission on TK examples and those it hoped others would formally introduce. It hoped to engage on all positions and truly develop a common understanding on core issues.

329. The Delegation of Peru supported the statement made by the Delegation of Chile, on behalf of GRULAC. On Article 5 BIS, it joined other delegations on the numbering issue. The proposal by the Delegation of the USA was on databases and the main article was about TK protection. The article on exceptions and limitations was not in line with Article 4 on beneficiaries. IPLCs were the beneficiaries. Alt 2 was the simplest for an international instrument. Looking to the next session on TCEs, there were lessons to be learned from that process. It was very complex to follow the discussions when the proposals were circulated on the spot. The best way to contribute effectively was to have information available beforehand to bring together positions and really to be able to come up with a shorter text.

330. The Delegation of the Republic of Korea supported Alt 4 in Article 1, which went in the right direction in an appropriate and balanced way. On Article 3, it supported both Alt 3 and Alt 4 because the definition of TK should be expressed in a definite and clear manner. On Article 4, it supported Alt 1 because the beneficiaries of TK should be IPLCs who created, preserved, and handed down TK. On Article 5, it supported Alt 3 with the tiered approach. Concerning Article 5 BIS, it supported that the article should remain because databases were very important to prevent the erroneous grant of patents. On Article 6, it reserved its position because more consideration should be given to that article. On Article 7, it did not support the disclosure requirement because it could place an unnecessary burden on applicants. On Articles 8 and 9, it reserved its position because more consideration was needed.

331. The Delegation of Malaysia supported the statement made by the Delegation of Indonesia, on behalf of the LMCs, especially on articles related to core issues. Rev. 2 could be put forward as a draft text of the instrument for the protection of TK to the GA in 2017. Article 5 BIS should be renumbered as Article 6, as per the common practice in WIPO and other international fora.

332. The Delegation of Ghana wished to revisit the issue of the "bis", in view of the dismissive manner in which some delegations wanted to treat the manifest error introduced by the reference to Article 5 BIS. Where there was a fundamental legal error, it had to be corrected, regardless of when the error had been made, whether two years ago, the past week, or that morning. As to the legal conventions being developed, the word "bis" after an article meant the second revision. "Ter" meant the third revision. That was a convention that was followed uniformly in international law, and the IGC could not be seeking to commit fatal and serious errors by insisting on keeping whether Article 3 BIS or Article 5 BIS, because that was wrong.



333. The Delegation of France commented on its position on indigenous peoples. That was a very sensitive issue because of France's reservation on the UNDRIP based on the constitutional concept of the indivisibility of the French people, where collective rights could not be granted to a community, yet there were always individual rights. IPLCs had already been used in the Nagoya Protocol and in the CBD, but it would be happy to send the seven pages of France's legal arguments to the Secretariat. That was an issue of general policy that should not be dealt with at WIPO. It also drew attention to Article 13, where it did not understand the inclusion of paragraphs 13.2 and 13.3.

334. The Delegation of Algeria supported the statement made by the Delegation of Nigeria, on behalf of the African Group. It supported Alt 1 in Articles 1 and 3. As to Article 5 BIS, one could not attach a database article to an article on scope of protection. It had to be a separate article. Rev. 2 was a very useful basis for continuing the negotiations.

335. The Delegation of Jamaica said that significant progress had been made with Rev. 2. It looked forward to concluding the process. It supported the positions articulated by the Delegation of Chile, on behalf of GRULAC, and the Delegation of Indonesia, on behalf of the LMCs. Though it recognized the importance of databases, it questioned the placement of Article 5 BIS.

336. The Delegation of China needed more time to study Rev. 2, due to a language issue. It reserved its general position. On Article 1, it supported Alt 1. On Article 3, it supported Alt 1. On the criteria of eligibility, because there was already a definition of TK in the "Use of Terms", it was worth considering whether it was necessary to put it in Article 3 as well. On Article 4, it supported Alt 2. In China, the notion of IPLCs did not exist, so the expression "States and/or nations" should be outside the square brackets because it represented the old Alt 2 that was there to balance the concerns of all countries. In order to show flexibility, it could leave them there. On Article 5, it supported Alt 2. Article 5 BIS should be an independent article, because it was a new instrument. Databases should be done through national laws and needed to improve with practice. There should not be those long provisions in an international instrument that was still being discussed. That would reduce the importance of other articles. It noted that Article 13 mentioned the UNDRIP. At WIPO, the IGC was discussing the protection of TK and GRs related to IP, so it wondered whether the UNDRIP should be specified and asked whether the Berne Convention or the Paris Convention should also be mentioned.

337. The Delegation of Nigeria said that the facilitators' Rev. 2, notwithstanding the differences with regard to numbering, demonstrated a narrowing of gaps and a steadily increasing common understanding on the issues on how to protect TK. It welcomed that document as the basis of future discussion on TK. Bearing in mind that the next time TK would be discussed would be at the stock-taking session in June 2017, to facilitate the understanding of Member States where gaps might still exist, it drew attention to the various studies and vast body of work that existed on TK, including WIPO studies. It requested the WIPO Secretariat to update the list of studies that it had undertaken on the IGC website for the next session. There were sufficient answers in those documents for Member States that still had questions regarding TK.

338. The Delegation of Ecuador supported the statements made by the Delegation of Chile, on behalf of GRULAC, and the Delegation of Indonesia, on behalf of the LMCs, without prejudice to any observations that might be made later. It supported Alt 1 of Article 1 and was grateful for the inclusion of paragraph 2. In Article 3, it preferred Alt 1 and was concerned by the inclusion of the criteria of eligibility. IPLCs were the legitimate holders of the rights over TK. It would support Alt 1, provided that the brackets around "peoples" be removed. It would continue to contribute in a cooperative manner in order to achieve an instrument that would reinforce the protection of the TK of IPLCs.

339. The Delegation of Kenya supported the comments and sentiments expressed by the Delegation of Nigeria, on behalf of the African Group. Member states needed to identify a strategy based on a broader, holistic approach with the intent of narrowing gaps. It was important that national TK regimes take into account the needs of IPLCs as well as how the rights established in such a national system could be enforced by rights holders within an international instrument. It hoped that harmonization between national and international systems would enable moving forward in an expeditious and effective manner within the process.

340. The Chair said that the facilitators had introduced the term “positive” in the title of Article 5. It had never been discussed and would be removed, as it was not consistent with the methodology. If a Member State wanted to include it, it could be mentioned in the report.

341. The Chair closed the agenda item.

*Decision on Agenda Item 7:*

*342. The Committee developed, on the basis of document WIPO/GRTKF/IC/32/4, a further text, “The Protection of Traditional Knowledge: Draft Articles Rev. 2”. The Committee decided that this text, as at the close of this agenda item on December 2, 2016, be transmitted to the Thirty Fourth session of the Committee, in accordance with the Committee’s mandate for 2016-2017 and the work program for 2017, as contained in document WO/GA/47/19.*

*343. The Committee took note of and held discussions on documents WIPO/GRTKF/IC/32/5, WIPO/GRTKF/IC/32/6, WIPO/GRTKF/IC/32/7, WIPO/GRTKF/IC/32/8, WIPO/GRTKF/IC/32/9, WIPO/GRTKF/IC/32/10, WIPO/GRTKF/IC/32/INF/7 and WIPO/GRTKF/IC/32/INF/8.*

**AGENDA ITEM 8: ANY OTHER BUSINESS**

*Decision on Agenda Item 8:*

*344. There was no discussion under this item.*

**AGENDA ITEM 9: CLOSING OF THE SESSION**

345. The Chair thanked the Vice-Chairs who, together with the Secretariat and the facilitators, had worked together as a team. He thanked the Secretariat for its efforts in organizing the

Seminar, preparing the documents, and particularly looking after the team. It was very demanding, recognizing that the Traditional Knowledge Division also had other responsibilities, not just the work of the IGC. He thanked the facilitators, Ms. Bagley and Ms. Hao'uli. He thanked the Regional Coordinators who played a critical role in keeping him informed and working between himself and Member States to ensure that the IGC could move forward and make the meeting successful. He thanked the LMCs for organizing the Roundtable before the session, which proved to be very helpful. He thanked the moderators and participants in the Seminar, and the rapporteurs for their contributions. He indicated his strong support for the Indigenous Caucus and the work they did. The industry representatives and civil society were also key stakeholders. The IGC needed to listen to all sides and understand all positions. He reminded members that the Voluntary Fund had to be replenished. He thanked Member States themselves as the most important group. He said he was there just to assist the process, but Member States were actually the ones that had to do the work and come up with an outcome that took into account of all interests. The IGC had had very productive meetings in a very good atmosphere. All participants had always conducted themselves in a respectful and friendly way. It had been a long few days with the Seminar and the formal meeting. While there were still clear divergences on some core issues, a significant group of countries had started to narrow the gaps, particularly in the key area of scope of protection. There had been some good suggestions in relation to formulating the language that might be more acceptable to Member States relating to sanctions and remedies, disclosure, administration of rights, and exceptions and limitations. He hoped that Member States would study them before IGC 33 on TCEs. As many of those issues were cross-cutting, the IGC would need to consider them again. The IGC was still some way away to finalizing the objectives, which was critical in relation to core elements. The Delegation of Switzerland had provided new language that might help to bridge gaps. He believed that, at a higher conceptual level, there was a common understanding of the objectives, even though the IGC was not able to formulate a text yet. There were still some differences to reach consensus on some key areas such as subject matter, beneficiaries in terms of the role of nations. The IGC would come back to those issues at IGC 33, since they were cross-cutting issues. There was also the issue of the rights versus measures approach. Those were some of the issues that the IGC would revisit at IGC 33. In relation to databases, there was consensus that they had a role to play and he asked Member States to carefully consider information in the joint recommendations and in Rev. 2. The proponents might want to work on Rev. 2 and their recommendations to ensure more consistency. He noted the studies that some Member States had requested and he asked Member States to further consider before IGC 33. In relation to IGC 33, he intended to prepare a Chair's Note to assist Member States in their preparation. He would review the lessons learned with the Vice-Chairs and the Secretariat, and consider how to improve the process. The Chair thanked again Member States for the respectful and positive way they had contributed. Finally, he thanked the interpreters.

346. The Delegation of India, speaking on behalf of the Asia-Pacific Group, expressed its sincere appreciation for the hard work, dedication and sincerity of the facilitators, and the guidance and methodology provided by the Chair and the Vice-Chairs. The groups played an important role, especially the LMCs. Rev. 2 would form a good basis for the work at the stocktaking session in June 2017. It was hopeful to be able to bridge gaps even more and reach an agreement on a legally binding instrument(s). It thanked the WIPO Secretariat for helping in conducting the meeting, including the very hard-working interpreters.

347. The Delegation of Chile, speaking on behalf of GRULAC, thanked the Chair for his dedicated efforts, and his Vice-Chairs. It also thanked the facilitators for their arduous task in seeking a path acceptable to all members. It thanked the Secretariat for organizing the Seminar, which was very important and useful, and had contributed to the negotiations. It thanked the Indigenous Caucus who always contributed as the most interested party in the Indigenous Panel and at the negotiations. It thanked the LMCs for organizing the LMCs Roundtable. It appreciated all delegations' efforts during the session, which had allowed the IGC to find new positions and move towards consensus. There were a number of alternatives in the text but

they were there for greater clarity. That did not mean that there were not many common elements between the various alternatives and that had allowed making progress. There had been a great deal of discussion in informals and that was something that could be pursued through *ad hoc* contact groups at the next session in order to have more open debates in smaller groups. Trust was what allowed members to understand each other, to make a commitment and to move towards a concrete result. It thanked the interpreters who allowed members to understand each other.

348. The Delegation of Indonesia, speaking on behalf of the LMCs, thanked the facilitators for the hard work and for capturing the positions of all Member States. It thanked the Chair for his guidance and leadership during the course of the meeting. It thanked the Secretariat, including interpreters, for their work and making sure the meeting ran smoothly. It commended Member States for the constructive spirit shown during the meeting and for getting closer to reach a common understanding on the protection of TK.

349. The Delegation of Turkey, speaking on behalf of Group B, thanked the Chair and the Vice-Chairs. It appreciated the work of the facilitators during the whole week. It thanked the Secretariat and interpreters for the hard work.

350. The Delegation of Nigeria, speaking on behalf of the African Group, thanked the Chair for his leadership and the Vice-Chairs, and the facilitators for their continued expertise and hard work. It thanked the Secretariat for the hard work and commitment to facilitate the process. It welcomed Rev. 2 as the basis for further discussion on TK and thanked all participants for their contribution to the text, which reflected a narrowing of gaps and an increasing common understanding. The fundamental struggle was on how to acknowledge, promote and protect TK, which was the oldest form of knowledge known to humankind, in the modern IP system. It hoped that the time up to the next session of IGC would be used for reflection and to appreciate the imperative to accord legal rights in the IP system in a manner that took into account the interests of TK holders. It looked forward to engaging constructively at IGC 33. It thanked the interpreters.

351. The Delegation of China thanked the Chair, the Vice-Chairs, the Secretariat, the facilitators and all Member States for their hard work to bridge differences and for their understanding of different concerns. It would continue to actively participate in the discussions towards a legally binding international instrument(s).

352. The Chair closed the session.

*Decision on Agenda Item 9:*

*353. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6 and 7 on December 2, 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 January 27, 2017. 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.*

[Annex follows]

**LISTE DES PARTICIPANTS/  
LIST OF PARTICIPANTS**

**I. ÉTATS/STATES**

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

**AFRIQUE DU SUD/SOUTH AFRICA**

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**ALLEMAGNE/GERMANY**

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