

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

Thirty-Third Session
Geneva, February 27 to March 3, 2017

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-Third Session (“IGC 33”) in Geneva, from February 27 to March 3, 2017.
2. The following States were represented: Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Barbados, Bolivia (Plurinational State of), Brazil, Cambodia, Cameroon, Canada, Chile, China, Colombia, Congo, Cuba, Czech Republic, Djibouti, Dominican Republic, Egypt, Ecuador, El Salvador, Estonia, Ethiopia, Finland, France, Gabon, Georgia, Germany, Ghana, Guatemala, Guinea, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kazakhstan, Kenya, Kyrgyzstan, Latvia, Lebanon, Mali, Mauritania, Mexico, Monaco, Morocco, Mozambique, Niger, Nigeria, New Zealand, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Slovakia, South Africa, Spain, Sri Lanka, Syrian Arab Republic, Switzerland, Tajikistan, Thailand, Tunisia, Turkey, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia and Zimbabwe (92). The European Union (“the EU”) and its Member States were also represented as a member of the Committee.
3. The following intergovernmental organizations (“IGOs”) took part as observers: African Regional Intellectual Property Organization (ARIPO), African Union (AU), Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC Patent Office) and South Centre (SC) (4).
4. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: Assembly of Armenians of Western Armenia; Centre for International Governance Innovation (CIGI); Civil Society Coalition (CSC); Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ); CS Consulting; CropLife International (CROPLIFE); European Law Students’ Association (ELSA International); Federation of Environmental and Ecological Diversity for Agricultural Revampment and Human Rights, The (FEEDAR & HR); France Freedoms – Danielle Mitterrand Foundation; Friends World Committee for Consultation (FWCC); Indian Movement – Tupaj Amaru; Indigenous Peoples’ Center for Documentation, Research and Information (DoCip); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Publishers Association (IPA); International Trade Center for Development (CECIDE); International Video Federation (IVF); International Trademark Association (INTA); Instituto Indígena Brasileiro da Propriedade Intelectual (InBraPi); Knowledge Ecology International, Inc. (KEI); MALOCA Internationale; MARQUES – The Association of European Trademark Owners; Massai Experience; Proyecto ETNOMAT, Departamento de Antropología Social, Universidad de Barcelona (España); Tebtebba Foundation – Indigenous Peoples’ International Centre for Policy Research and Education; Third World Network Berhad (TWN); and Université de Lausanne (26).
5. The list of participants is annexed to this report.
6. Document WIPO/GRTKF/IC/33/INF/2 Rev. provided an overview of the documents distributed for IGC 33.
7. 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.
8. Mr. Wend Wendland of WIPO was Secretary to IGC 33.

AGENDA ITEM 1: OPENING OF THE SESSION

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

10. The Director General, Mr. Francis Gurry, extended a warm welcome to all participants. It was wonderful to see such intense engagement in the process. The IGC was approaching the last part of the biennium for which the mandate had been set by the General Assembly in October 2015. Everyone was familiar with that mandate and in particular with the workplan associated with it, which foresaw two sessions on each of the subjects of GRs, TK and TCEs as well as a series of seminars. He thanked the Chair, Mr. Goss, for his instructive and enthusiastic work in the process. He also recognized the extremely valuable contributions of the two Vice-Chairs, Ambassador Robert Matheus Michael Tene of Indonesia and Mr. Jukka Lieder of Finland, who worked in close support of the Chair. He thanked the Regional Coordinators and all the Member States for their engagement in the process thus far. IGC 33 was the first session on TCEs, and it was quite some time since the IGC had addressed TCEs specifically, which had been back in March 2014 at IGC 27. The text that had emerged from the discussions in March 2014 was contained in document WIPO/GRTKF/IC/33/4. He acknowledged the constructive engagement of the representatives of indigenous peoples and local communities (IPLCs). The WIPO Voluntary Fund had run out of money. Since February 2014 at IGC 26 it had not been possible to fund directly the participation of representatives of IPLCs. He urged Member States to look once again at that extremely important facility that enabled the participation of the representatives of IPLCs who were so important to the process. The Indigenous Panel would address the IPLCs' perspectives on the Draft Articles. He welcomed and thanked for their presence the keynote speaker, Professor Rebecca Tsosie, Regent's Professor at the James E. Rogers College of Law at the University of Arizona (USA); Special Advisor to the Provost on Diversity and Inclusion, Tribal Court Judge for the Fort McDowell Yavapai Nation and the San Carlos Apache Tribe. He also welcomed the other two panelists, Dr. Kanyinke Sena, Member of the Maasai Peoples, Lecturer at the Egerton University School of Law, Nakuru, Kenya, Kenya Advocacy Officer at the Minority Rights Group International and Member of the African Commission Working Group on Indigenous Populations, and Ms. Lucia Fernanda Inácio Belfort Sales, Member of the Povo Kaingang Peoples, Brazil, Indigenous Lawyer with a Master of Laws from the University of Brasilia, Founding Member and Executive Director at Instituto Indígena Brasileiro da Propriedade Intelectual (INBRAPI). He wished all well in the deliberations and hoped that the IGC could come up with some constructive results by the end of the meeting.

11. The Chair welcomed all members and observers, particularly indigenous observers, recognizing the important role they played in educating all participants about their interests and concerns and the unique nature of their societies and cultures. He recognized the two Vice-Chairs, with whom he worked as a team and was active during and between meetings in considering the approaches to the meetings and the best mechanisms to assist Member States in making progress in delivering the mandate. He thanked the Regional Coordinators, past and present, which had helped to make the meetings constructive and ensured they were conducted in a fair, open, transparent, respectful and friendly manner. He had prepared two notes. The first was an Information Note to aid Member States' preparations, which represented his views alone, had no status and was without prejudice to any Member State's positions. It reflected previous work on TCEs, which had not been discussed in nearly three years, yet a significant number of core issues had been discussed during the TK sessions. Both subject matters had many cross-cutting issues, but also differences, particularly in the nature of the subject matter, which impacted on a number of the core issues. The annex captured the outcomes of the TK discussions related to TCEs, as it was important not to lose sight of that work. The Note reflected on previous studies, reports and related IP treaty work in the TCE area, such as the gap analysis published in support of IGC 13, and reports on national experiences. Hopefully, the IGC could expand on those national experiences, noting that during the TK discussions

there had been very good presentations on recent national experiences in the informals. The gap analysis had also reflected on the differences between protection in an IP context (preventing misappropriation or unauthorized use) and safeguarding, preserving and promoting cultural heritage, the latter being the purview of such agencies as UNESCO. The context of the negotiations was IP, as reflected in the mandate. The second note dealt with the approach and working methods for Agenda Item 6 “Traditional Cultural Expressions” and would be presented under Agenda Item 6. The focus of the negotiations in accord with the mandate was to narrow existing gaps and reach a common understanding on core issues and consider options for a draft legal instrument. The IGC was directed to develop an indicative list of outstanding/pending issues to be tackled/solved at IGC 34. There was a lot of work to do and significant gaps to fill. Hopefully, members had used their time to carefully review and consider their positions. A portion of IGC 34 would be devoted to stocktaking across all three subject matters and to considering the IGC recommendations for the General Assembly. This week’s work would be key to progressing the mandate in relation to TCEs. The IGC needed to develop a shared understanding of the different positions.

AGENDA ITEM 2: ADOPTION OF THE AGENDA

Decision on Agenda Item 2:

12. *The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/33/1 Prov. 2 for adoption and it was adopted.*

13. The Chair opened the floor for opening statements.

14. [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 Indonesia, speaking on behalf of the Asia-Pacific Group, a dynamic region characterized by its growth, diversity and progress, believed that the IGC could narrow existing gaps and reach a common understanding on the issues at hand. It supported the working methodology and the work program proposed by the Chair. It appreciated the Information Note, which it had studied, in which the Chair had summarized the work undertaken by the IGC on TCEs since the text-based negotiations had begun in 2010. It favored a discussion on the core issues in order to arrive at common landing zones on the issues of objectives, beneficiaries, subject matter, scope of protection, and exceptions and limitations. How TCEs were defined would lay down the foundation of the work. Most of the group’s members believed that the definition of TCEs should be inclusive and capture the unique characteristics of TCEs and that it should not require separate eligibility criteria. Most of its members were in favor of a differential level of protection of TCEs and believed such a tiered approach offered an opportunity to reflect the balance referred to in the mandate and the relationship with the public domain, as well as balance in the rights and interests of owners, users, and the wider public. Yet some group members had a different position. Establishing the level of rights based on the characteristics of TCEs could be a way forward towards narrowing existing gaps, with the ultimate objective of reaching an agreement on international instruments, which would ensure the balanced and effective protection of TCEs, in addition to the protection of GRs and TK. It said that the main beneficiaries of the instrument were indigenous and local communities (ILCs). Some members of the group had a different position. However, most of the members were of the view that it was pertinent to address the role of other beneficiaries in accordance with national law, as there were certain circumstances in which TCEs could not be specifically attributable to a particular ILC. On the issue of scope of protection, most of the group members were in favor of providing maximal possible protection for TCEs, depending on their nature or characteristics. While both

exclusive economic rights- and moral rights-based models - could be appropriate for various TCEs, most of its members believed that some form of economic rights in cases of research and development, including the concepts of prior informed consent (PIC), mutually agreed terms (MAT) and access and benefit sharing (ABS) should be included, while providing protection to widely held TCEs. Yet some members had a different position. It was fundamental to ensure that the provisions on exceptions and limitations be considered in a balanced way depending on the specific situations of each Member State and the substantive interests of TCE holders. Hence, exceptions and limitations should not be extensive so as to compromise the scope of protection. Some members of the group had a different position, however, but most of the members believed there was a need for legally binding instrument(s) on GRs, TK and TCEs. It assured of the Group's full support and cooperation in rendering the session a success. It remained committed to engaging constructively in negotiating a mutually acceptable outcome. It was hopeful that the discussions would lead to visible progress in the work of the IGC.

15. The Delegation of Colombia, speaking on behalf of the Group of Latin America and the Caribbean ("GRULAC"), supported the Chair's proposal on the working methodology and the Information Note. The IGC had last discussed the topic of TCEs in April 2014 and, according to the work program, the IGC would dedicate two sessions to that topic. It recalled the mandate decided by the General Assembly in 2015. During the first session dedicated to TCEs in the biennium, the IGC had to consider essential unresolved core issues and the various options for a draft legal instrument, taking into account the work program for 2016-2017. It highlighted the usefulness of the Chair's Information Note, which set forth the situation and included a table with the draft articles on TK and TCEs that facilitated comparisons and made the work easier with a view to formulating language on TCEs. It was useful to take into account the progress made at the last session on TK. The need to move forward and make progress in revising document WIPO/GRTKF/IC/33/4 should lead, by the end of the week, to a revised version that reflected progress on core issues (policy objectives, definition of misappropriation, subject matter of the instrument and beneficiaries of protection). It recognized the importance of other issues that were part of the negotiating text and considered that the session should allow for achieving the best possible progress. It considered equally valuable the work of the Facilitators and it was very happy to see Ms. Margo Bagley from Mozambique. It proposed Ms. Marcela Paiva, Counselor to the WTO and WIPO, Permanent Mission of Chile to the United Nations Office and other international organizations in Geneva, to act as a Facilitator. It was confident that her professional skills and experience would contribute to the tasks of the IGC. It recognized the importance of ILCs throughout the process and their inputs in the discussions and confirmed the need to make a collective effort to replenish the Voluntary Fund. It was important to build on the existing work carried out by the IGC. The Chair could count on its commitment to make progress in the debates at the session.

16. The Delegation of Tajikistan, speaking on behalf of the Central Asia, Caucasus and Eastern European Countries Group ("CACEEC"), stressed that the work of the IGC was extremely important to ensure the balanced and effective protection of TCEs. It had high expectations and believed that under the Chair's skillful guidance and leadership, Member States would find common ground on core issues by narrowing existing gaps on objectives, subject matter, beneficiaries, scope of protection, exceptions and limitations, relationship with the public domain, and the definition of misappropriation. It hoped the work of the IGC would lead to a diplomatic conference. It stood ready to undertake negotiations on TCEs with a focus on addressing unresolved issues and considering options for a draft legal instrument. It acknowledged that there was a substantive agenda and it remained engaged and would contribute in a constructive manner for a successful completion of the work of the session.

17. The Delegation of China believed that the Chair's and the Secretariat's efforts would play a positive role in helping to reach a common understanding on key issues and in facilitating the introduction of legally binding legal instrument(s). It had been actively engaged in the process of introducing national legislation for the protection of TCEs. In September 2014, it had drafted

the “Regulation on Copyright Protection of Folk Literary and Artistic Works (Draft for Comments)” and released it to the public for comments. Further investigation and research was currently being carried out based on the feedback received. It stood ready to share its legislative experience with WIPO and its Member States on the protection of TCEs. In the spirit of active cooperation, inclusive understanding, and pragmatic flexibility, it would, together with the other delegations, participate in substantive discussions based on the Draft Articles with a view to bridging differences so that consensus may be achieved on key issues and that the meeting may advance in a fruitful direction.

18. The Delegation of Turkey, speaking on behalf of Group B, recalled that this was the first session on TCEs since the adoption of the mandate for 2016-2017. It encouraged the IGC to focus on substantive discussions, with the aim of gaining a common understanding of the core issues. The work should be designed in a manner that achieved meaningful and practical outcomes for beneficiaries, while supporting innovation and creativity, and ensuring legal certainty, while highlighting the unique nature of GRs, TK and TCEs. At the same time, there was some overlap between those subject matters, in particular TK and TCEs. Therefore, best efforts should be made to avoid developing divergent approaches between those two subject matters. It was hopeful that Member States would develop a common understanding on core issues, supported by an evidence-based approach, so that meaningful advancement could be achieved. Sharing Member States’ experiences and approaches contributed to achieving a common understanding on core issues and more particularly how new proposals would be implemented in practice and the relationship with the existing IP system. It took note of document WIPO/GRTKF/IC/33/5 “Traditional Cultural Expressions: A Discussion Paper” submitted by the Delegation of the USA, and document WIPO/GRTKF/IC/33/6 “EU Proposal for a Study” submitted by the Delegation of the EU. It was confident that the IGC would make progress on the subject of TCEs. It thanked the Chair for his efforts to ensure that all member views were accurately reflected. It remained committed to contributing constructively towards achieving a mutually acceptable result.

19. The Delegation of Georgia, speaking on behalf of the Central European and Baltic States Group (“CEBS”), recalled that it was the first time that the IGC was addressing TCEs since the adoption of the mandate for 2016-2017. Since the IGC was restarting discussions on the core issues of the balanced and effective protection of TCEs, which had not been considered for more than two years, it was looking forward to continuing work in order to have a meaningful discussion and find a common understanding of the main objectives and on what was realistically achievable. It favored an evidence-based approach and believed that the IGC could draw lessons from the experiences and discussions held in various Member States and from existing efforts for the protection of TCEs at the international level. Potential consequences should be carefully considered before reaching agreement on any particular outcome. It reaffirmed its commitment to cooperate and actively participate in discussions. It hoped the work of the IGC would be carried out in a pragmatic and efficient manner, which would ultimately ensure the successful accomplishment of its challenging tasks.

20. The Delegation of Senegal, speaking on behalf of the African Group, said the IP protection of TCEs was extremely important in view of its universal nature. Each human society, in its expression of artistic and literary culture, held and developed its own heritage, born out of its creative spirit, spiritual values and cultural heritage. It was the responsibility of the IGC to protect the social, economic and moral rights inherent to that heritage to allow WIPO to play its part in that exercise, as other segments of the United Nations system did in their respective areas of competence. Since IGC 29, the IGC had made great progress, particularly on GRs and TK. It was optimistic as to the outcome of the work and could foresee the convening of a diplomatic conference to adopt an international instrument to effectively protect GRs, TK and TCEs. It could count on the Chair’s leadership and farsightedness, which had produced important results. It was important to focus on the core issues already tackled and not to open discussions on new issues that might undermine the expected results and destroy the

work already done. The Draft Articles were a good basis for the discussions and provided sufficient material. It reiterated its trust and its full and constructive support for the IGC.

21. The Delegation of the EU, speaking on behalf of the EU and its Member States, looked forward to the first session on TCEs under the 2016-17 mandate. The IGC should focus its discussions on the core issues, as identified in the mandate, without prejudging the nature of the outcome. The Information Note usefully recalled that those core issues were objectives, subject matter, beneficiaries, scope of protection, exceptions and limitations, relationship with the public domain, and definition of misappropriation. Progress could only be achieved by discussing the objectives of all sides, which would allow the IGC to reach a common understanding of the objectives and the core issues in relation to TCEs. As it had been nearly three years since the IGC had last discussed TCEs, it welcomed an exchange of views with other delegations about their national experiences on the subject matter. It strongly encouraged delegations to engage in such discussions and to steer the decision-making process based on facts and best practices. In order to enable and inform a substantive debate that furthered mutual understanding of facts and information available and the solutions sought in the WIPO context, it had submitted a working document and requested the WIPO Secretariat to undertake a study of recently adopted legislations and initiatives on TCEs by WIPO Member States. That study should set out in an objective manner the domestic legislation and its key definitions, and should provide concrete examples of subject matter covered. It invited other delegations to study the proposal contained in document WIPO/GRTKF/IC/33/6, as it would welcome the opportunity to consult with all interested parties and collectively address any concern they might have. The content of TCEs might already be protected via copyright and related rights, geographical indications and trademarks. Much work had already been undertaken at the international level on TCEs or expressions of folklore that might be of help. Those existing IP systems were readily available for potential beneficiaries. Member States of WIPO should support awareness-raising activities, encourage the use of existing legal frameworks and improve access to those frameworks. It also welcomed discussions on those topics that week.

22. The Delegation of Indonesia, speaking on behalf of the Like-Minded Group of Countries (LMCs), a coalition that represented more than 60 countries coming from three different groups within the IGC, namely the African Group, the Asia-Pacific Group and GRULAC, was confident that with the Chair's leadership, and with his as well as the Facilitators' expertise and hard work, the IGC could narrow existing gaps and reach common understanding on the issues at hand. It assured of the LMCs' full support and cooperation in rendering that session of the IGC a success. It reaffirmed its commitment to engage constructively in negotiating a mutually acceptable outcome. The issue facing the IGC was important, not only for all Member States, but more importantly for ILCs that had been creating and developing tradition-based knowledge and cultural expressions, as well as innovation, long before the modern IP system had first been established. All communities had the right to maintain, control, protect and develop IP over their cultural heritage. The IGC needed to push for a greater recognition of both economic and moral rights of traditional and cultural heritage, including GRs, TK and TCEs. Substantial progress had been made within the IGC on GRs and associated TK at IGC 29 and 30 and on TK at IGC 31 and 32. It was confident that that session and future sessions would yield progress as well. Regarding the Draft Articles, the IGC needed to focus the discussion on the most important aspects in the text. It needed to minimize distractions and use its valuable time efficiently by not prolonging discussions on issues where positions were already well laid out and understood by all IGC members. On the issue of beneficiaries, there was no dispute that the main beneficiaries of the instrument were ILCs. However, there were certain circumstances in which TCEs could not be specifically attributable to a particular ILC, not specifically confined to an ILC or where it was not possible to identify the community which had generated them. Under those circumstances, the provision on beneficiaries should include other beneficiaries as defined by the national laws of Member States. The discussion on beneficiaries was closely related to the administration of rights, and so to reach a common understanding regarding beneficiaries, the 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 protect the economic and moral rights of the beneficiaries. For that purpose, determining a standard on certain levels of protection that accommodated the rights granted for each TCE would ensure that such protection was achieved. It invited the IGC to take into account the practical value of establishing the level of rights as determined by the character of the TCEs in question and the character of their use. That approach would provide an opportunity to find convergence on core elements, namely, subject matter of protection, beneficiaries, scope of protection and exceptions and limitations. In that regard, it recommended continuing the discussion on that particular issue. It was essential to ensure that the provisions on exceptions and limitations were not too extensive in order not to compromise the scope of protection. Noting the importance of the effective protection of GRs, TK and TCEs, the IGC should move forward, taking the next step for the convening of a diplomatic conference with a view to adopting a legally binding instrument(s). It expressed its confidence to the Chair and Vice-Chairs in guiding the discussion to enable progress on the draft text on TCEs.

23. The representative of Tebtebba, speaking on behalf the Indigenous Caucus, hoped that the three years since the IGC had last discussed TCEs had allowed everyone to reflect and come up with proposals on how to narrow existing gaps, as required by the mandate. The TCEs text was the most mature among the three under negotiation by the IGC and provided a good starting point for the discussions that week. However, there was too much detail that could be better left to national-level implementation. The TCEs text should be streamlined so as to provide necessary guidance for the development of national legal and administrative frameworks, while allowing states the flexibility to adapt the text to their national context, with the full and effective participation of indigenous peoples. The current IGC mandate had called for a focus on reaching a common understanding on core issues. She identified some of the indigenous peoples' core issues at that IGC. Firstly, TCEs were the subject matter of protection and not of "safeguarding," which was not within the mandate of the IGC. It did not make sense to specify a timeframe for how long TCEs had been used, as was presently done in Article 1(d). Secondly, a definition of misappropriation was crucial as that was the very thing that they wished to prevent. For indigenous peoples, misappropriation was the use by others of their TCEs in products or processes, for commercial or noncommercial purposes, without their free, prior and informed consent (FPIC), MAT or without attribution. Beneficiaries of protection were IPLCs. The role of nations as custodians for the beneficiaries could either be dealt with under administrative arrangements or in national law, as appropriate. The definition of "publicly available" needed further work. The current text was extremely prejudicial to indigenous peoples' rights over their TCEs and had the effect of legalizing previous theft of TCEs. She had specific textual proposals on the Use of Terms that she would be presenting during the course of the week. Thirdly, Article 3 on the scope of protection was promising, as it nuanced the different types of TCEs and the levels of protection that should be accorded to each type. While she agreed with the notion that secret and sacred TCEs should be accorded the highest level of protection, more work was needed on the notions of "widely known" and "publicly available." Fourthly, while she agreed with an evidence-based approach, the IGC was entering its seventeenth year of work and should avoid proposals that would further prolong the discussions. She hoped that any proposals for studies and discussions did not have the effect of delaying the work, or worse, trivializing the need for the protection of TCEs. She supported the methodology proposed and looked forward to sharing experiences and actively engaging with all delegations. Under the leadership of the Chair, the Caucus hoped to make significant progress in developing a legally binding instrument for the protection of TCEs. Finally, although she stood ready to constructively engage in discussions on behalf of her peoples, it was extremely difficult to do when very few could make it to the meetings. The negotiations would have no credibility without the full and effective participation of indigenous peoples. Their dwindling participation in IGC meetings was steadily eroding the credibility of the negotiations. Therefore, she appealed once again for states to contribute to the Voluntary Fund or develop other arrangements to enable indigenous participation.

24. [Note from the Secretariat: the following opening statements were submitted to the Secretariat in writing only.] The Delegation of the Philippines attached great importance to the work of the IGC and noted the progress made thus far. As the IGC would revisit the Draft Articles on TCEs, the Delegation remained positive and hopeful that the IGC would be able to move its work forward and achieve more substantial results. It was hopeful to reach a milestone in establishing an international instrument on IP relating to TCEs, particularly in recognizing and confirming the rights of IPLCs and any other agreed beneficiaries, consistent with the collective goal of enhancing and nurturing an IP rights regime that benefited all sectors of society. The Intellectual Property Office of the Philippines and the National Commission on Indigenous Peoples had signed a Joint Administrative Order on October 28, 2016 after more than three years of extensive research and consultations with stakeholders. The Joint Administrative Order provided institutional mechanisms for the two agencies to harmonize their implementing rules and regulations for the protection of IP and the indigenous knowledge systems and practices of the indigenous cultural communities of the Philippines. Key provisions included disclosure requirements for IP rights applications identifying the source or geographical origin and the establishment of a registry of indigenous knowledge systems and practices. As a general comment on the TCE Draft Articles, it noted that the text consistently referred to the terms “prior informed consent”; it was hoping that consideration would also be given to using the terms “free prior and informed consent.” It hoped that the international community, with political will and willingness to constructively engage, would arrive at a legal instrument that would ensure a balanced and effective protection of GRs, TK, and TCEs.

25. The Delegation of El Salvador reiterated the importance it attached to the work of the IGC, in accordance with the efforts of the State of El Salvador to claim and protect the assets of indigenous peoples and ancestral cultural heritage. At IGC 29, it had announced the constitutional reform that elevated the protection of indigenous peoples to the highest legal status in the country, as well as the strategies contained in the 2014-2019 Five-Year Development Plan and the National Intellectual Property Policy. At this session, it was pleased to announce that in 2016 two new laws had been promulgated: the Law on Culture and the Law on the Promotion, Protection and Development of the Craft Sector, thereby deepening its commitments to indigenous peoples. The Law on Culture stated that “the languages of indigenous peoples, whether alive or being salvaged” were part of the “Salvadoran cultural heritage.” It recognized as one of the constitutional rights to culture the “right to ancestral knowledge, celebrations and rituals” and dedicated a specific chapter to the development of the rights and guarantees of indigenous peoples. The Law on the Promotion, Protection and Development of the Craft Sector expressly included “original crafts” as a category of crafts. It defined them as “those that by their form, iconography and meaning or symbolism, as well as their primary modes of production, are rooted in the knowledge and techniques transmitted across generations by indigenous peoples, forming part of the intangible cultural heritage.” It expressed its desire to work constructively with the Chair and all delegations to achieve concrete results in the field of TCEs, given the well-known importance that it attached to that topic for the benefit of indigenous peoples.

26. The Delegation of Morocco supported WIPO’s vision for the ongoing process. The substantive documents would undoubtedly facilitate the deliberations at the session and guide future work. It welcomed the focus of IGC 33 and 34 on TCEs, thereby confirming the timeless importance of those expressions as factors of socio-economic development and cultural diversity and elements of the historical identity of nations and communities. While supporting the statement of the African Group, it was more than ever convinced that effective and efficient protection of TCEs, GRs and TK necessarily involved the development of a binding international legal instrument. It restated its commitment to the ongoing IGC deliberations and called for the consolidation of achievements with a view to establishing such an instrument. That was the best guarantee of effective protection against the misuse and misappropriation of TCEs and even TK, thus preserving the rights of the nations and communities concerned. An inclusive and participatory approach remained the essential condition for making good use of the diversity

of the different proposals in a spirit of complementarity. It reaffirmed its wish to accelerate the work of the IGC, whose current mandate sought to give new impetus to reduce current differences, with a view to holding a diplomatic conference to achieve a legal instrument guaranteeing the protection of TCEs.

27. The representative of Tupaj Amaru said that after over five centuries of resistance to colonial and neocolonial domination, indigenous people succumbed to the inevitability of the market economy and were victims of the effects of globalization, which was a clear and present threat not only to their cultural and intellectual heritage, but also because it entailed the loss of biological diversity, the destruction of their GRs, their TCEs and their ecological values, as a result of the illicit appropriation and unsustainable utilization of those resources by transnational corporations. In contradiction to the falsified version of history, the great civilizations, Maya, Aztec, Inca, Aymara and others that held sway from Alaska to Tierra de Fuego had already invented a considerable volume of TCEs and discovered a series of medicinal plants and animals, microorganisms and pharmaceutical products of natural extraction. Without a doubt, the TK of indigenous peoples, imbued with wisdom and creative imagination, constituted an inestimable contribution to the common heritage of humanity. In colonialist logic, cultural wealth and the GRs belonging to indigenous peoples were considered as the natural booty of colonial warfare and it was “legitimate” for them to be appropriated without the consent of their real creators. Thus, the best of their cultural and biological heritage was lost to plunder and piracy. As concerns the oldest international instruments, which dealt (although in a very restricted fashion) with that subject, it was worth mentioning the Berne Convention for the Protection of Literary and Artistic Works. He quoted Article 15(4) of the Convention. Those provisions mainly referred to works called “folklore”, whose origin was lost with the passage of time, and whose author’s identity was therefore unknown, but it was presumed that they were natives of indigenous origin who were inspired by popular ingenuity. In the area of copyright, the Berne Convention proved to be insufficient to ensure the possession, control, preservation, and restitution of traditional cultural heritage, in particular expressions of folklore, which sprung from the genius of aboriginal civilizations. For perhaps the first time with reference to this issue, the “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation,” jointly drafted by UNESCO and WIPO in 1982, defined the elements and features of the cultural identity of indigenous peoples. He quoted Art. 2 of the WIPO Model Provisions which described “expressions of folklore” for purposes of the Model Provisions. More than 30 years had passed since then. In 2000, the IGC was vested with the mandate to prepare a coherent and binding international instrument capable of protecting TCEs in respect of “the traditional creations of indigenous peoples.” Negotiations for a binding instrument had come to a standstill and were every year voided of their policy content and social scope as a result of the lack of political will of States.

AGENDA ITEM 3: ADOPTION OF THE REPORT OF THE THIRTY-SECOND SESSION

Decision on Agenda Item 3:

28. *The Chair submitted the draft report of the Thirty-Second Session of the Committee (WIPO/GRTKF/IC/32/11 Prov. 2) for adoption and it was adopted.*

AGENDA ITEM 4: ACCREDITATION OF CERTAIN ORGANIZATIONS

Decision on Agenda Item 4:

29. *The Committee unanimously approved the accreditation of the University of Lausanne referred to in the Annex to document WIPO/GRTKF/IC/33/2 as an ad hoc observer.*

AGENDA ITEM 5: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES

30. The Chair recalled that the Voluntary Fund was depleted. He called upon delegations to consult internally and contribute to keep the Fund afloat. The importance of the Fund went directly to the credibility of the IGC's negotiations. The importance of indigenous participation could not be overemphasized. He reminded Member States that they had all made commitments in relation to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and he hoped Member States would carefully consider his request to provide funds. He drew attention to document WIPO/GRTKF/IC/33/INF/4, which provided information on the state of contributions and applications for support, and document WIPO/GRTKF/IC/33/3 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 Michael Tene, one of the Vice-Chairs of the IGC, serve as Chair of the Board. The outcomes of the Board's deliberations would be reported in document WIPO/GRTKF/IC/33/INF/6.

31. [Note from the Secretariat]: The Indigenous Panel at IGC 33 addressed the following topic: "IGC Draft Articles on the Protection of Traditional Cultural Expressions: Indigenous Peoples' and Local Communities' Perspectives." The Chair acknowledged the presence of the keynote speaker and other two panelists for the panel, whom the Director General had introduced. The Chair of the Panel was Ms. Jennifer Tauli Corpuz, of the Kankanaey Igorot People in the Philippines and Program Coordinator of Tebtebba – Indigenous Peoples' International Center for Policy Research and Education. The presentations were made according to the program (WIPO/GRTKF/IC/33/INF/5) and are available on the TK website as received. The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat which is reproduced, as summarized, below:

"Professor Tsosie began her keynote speech by explaining that indigenous peoples have a *sui generis* legal status in international law and that all international instruments developed after the adoption of UNDRIP in 2007 should use the term "indigenous peoples", which was a term of art. She recalled that most of her comments were based on resolution #PHX-16-054 of the National Congress of American Indians (NCAI), a national organization open to membership of all 567 federally-recognized Indian tribes in the United States, calling for the "immediate and direct consultation by the United States with Tribes regarding the On-Going International Negotiations in the World Intellectual Property Organization on Matters that May Affect Tribal Sovereignty Including Protection of Indigenous Traditional Knowledge." Her central message was that the rights of indigenous peoples to their TK, TCEs and GRs could best be protected by a treaty that dealt with all three categories holistically and consistently and did the following three things: first, recognizing the unique legal and political status of indigenous peoples within the nation-states that encompassed them by delinking their rights and status from that of nation-states and from that of "local communities"; second, recognizing that indigenous customary law governed what would constitute protected TCEs and what would be an effective governance mechanism to secure the tribe's FPIC to third party use of protected

TCEs; and, third, by providing for the effective governance of indigenous cultural heritage, both tangible and intangible, using a dialogic process among the indigenous governments, the nation-states that encompassed them, and the international community. She distinguished between the mandate of WIPO, which was the protection of TCEs, and the mandate of UNESCO, which was the safeguarding, promotion and preservation of TCEs, and observed that it would be beyond the mandate of the IGC to include “safeguarding” in the instruments being negotiated. Finally, Professor Tsosie pointed out that indigenous peoples had been greatly impacted by the cultural imperialism of Western European jurists, recalling that during the colonial period, the Doctrine of Discovery delineated indigenous lands as available for European discovery because they were inhabited by non-Christian, “uncivilized” people, who were deemed to lack the capacity to hold “property” on the same terms as civilized European nations. This was exactly the thinking that led some states to consider indigenous peoples’ TCEs as part of the public domain. She emphasized that UNDRIP called upon nation-states to repair past wrongs and also to create fair and collaborative practices and institutions. As such, the work of the IGC could respond to those dual goals by acknowledging that there were vast amounts of indigenous TK and TCEs in archives, libraries, museums and other repositories, and the effort to create digital collections and enabled widespread sharing through electronic databases now put much of that TK and TCEs in jeopardy of misappropriation. Professor Tsosie ended her keynote speech by presenting a challenge for the IGC to create intentional and collaborative processes that enable indigenous nations to share governance authority and condition future use of the TK/TCEs upon consent of the affected community in accordance with their own laws and ethical beliefs.

Dr. Kanyinke Sena agreed with Professor Tsosie that the work of the IGC should be guided by UNDRIP and other international human rights instruments. He recalled that past panelists had already presented on constitutional and legal protections within their national contexts that increasingly recognized indigenous peoples’ rights to their TK and TCEs, observing that this was likewise true for many countries in Africa, including his country, Kenya. He then proceeded to provide some specific comments on key articles of the TCEs text. On objectives, he proposed that the focus should not just be on the harms that needed to be addressed and on the gaps that ought to be filled from a policy perspective, but also on conserving TCEs, as they were being lost at rapid pace due to globalization, and also to ensure that indigenous peoples were able to derive economic benefits from use of their TCEs. He preferred to retain the terms “indigenous peoples” as well as “local communities”, in the identification of beneficiaries, because in the African context, not all indigenous peoples were referred to using the proper terms. Dr. Sena pointed out that prevention of misappropriation of TCEs was at the core of indigenous peoples’ struggles and should, by extension, be the core objective of any TCE instrument agreed by the IGC. Further, the prevention of misappropriation should extend to any adaptations of TCEs undertaken without the FPIC of indigenous peoples. On the scope of the instruments, Dr. Sena acknowledged the wisdom of taking a “tiered approach” and pointed out that examples from cultural property of the Maasai peoples would support that approach. However, as a framework document, the TCEs text should not be overly prescriptive and detailed in defining the “tiers” under that approach. The IGC should just agree on the broad strokes and guidelines for the approach and leave the details to be developed at national level. Finally, Dr. Sena stressed that any measures that would be developed at the national level to flesh out the international instrument being developed by the IGC should be developed with the full and effective participation and the FPIC of indigenous peoples.

Ms. Inacio Belfort began her presentation by providing examples of TCEs of Brazilian indigenous peoples, pointing out that TCEs were dynamic and evolving, reflecting the vibrant cultural life of indigenous peoples’ communities. She stressed that it would be an act of violence not to provide protection for indigenous peoples’ TCEs and called on the

IGC to speed up its work, to slow down or halt this ongoing cultural violence. She expressed appreciation at the inclusion of a non-diminishment clause in the preamble that prevented the extinguishment and reduction of the rights enjoyed by indigenous peoples under relevant international agreements. Citing various examples of misappropriation and misuse of indigenous peoples' TCEs, Ms. Inacio Belfort stressed that this was exactly the harm that the IGC should be seeking to prevent, and that repatriation of these misappropriated TCEs should be included in the IGC discussions. Finally, Ms. Inacio Belfort addressed the matter of indigenous participation in the IGC, stressing that it would be a form of cultural violence if indigenous peoples continued to be poorly represented at the IGC."

32. The Delegation of Australia recognized the indigenous communities present at the meeting. It expressed its respect for their continuing culture and practices. Indigenous participation at IGC meetings provided for ongoing engagement and consultation on issues of central importance to indigenous peoples worldwide, and brought balance and credibility to the discussions. It referred to the event "Future dreaming: A Celebration of Indigenous Culture and Innovation in Australia" featuring indigenous Australian performances and exhibits which had taken place at WIPO on February 28, 2017 and welcomed the announcement at that event by the Australian Minister for International Development and the Pacific, Hon Concetta Fierravanti-Wells that Australia was pleased to provide 50,000 AUD to the IGC Voluntary Fund to allow greater indigenous participation at future meetings. That amount was, however, not enough to sustain the Fund and it strongly encouraged other countries to contribute to the Fund. Australian culture was enriched by the creations and practices of Aboriginal and Torres Strait Islander communities. TCEs were of significant importance to the Australian community as a whole. It was pleased to have had the opportunity to share some manifestations of TCEs in the forms of dance and visual arts at WIPO, and hoped that it served as a timely reminder of the purpose of the IGC's work.

33. [Note from the Secretariat]: The Advisory Board of the WIPO Voluntary Fund met on February 28 and March 1, 2017, 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/33/INF/6, which was issued before the end of the session.

34. The Chair thanked the Vice-Chair, His Excellency Michael Tene of Indonesia, for chairing the meetings of the Board. He also thanked all the members of the Board. He thanked the Government of Australia for its contribution to the Voluntary Fund and called upon delegations to consult internally and contribute to keeping the Fund afloat. The importance of the Fund to the credibility of the IGC, which had repeatedly committed itself to supporting indigenous participation, could not be over emphasized.

35. The representative of Tupaj Amaru had always supported the establishment of a Voluntary Fund at the UN for UNDRIP. He said in 20 years he had received no payment from the UN or from WIPO. His considerations were not taken into account. The indigenous people who came thanks to the Voluntary Fund should be able to participate fully and their statements and proposals should be published as stated in WIPO documents, and not need support from Member States. There was a double standard in the procedure. On the one hand, one talked about assisting indigenous people, and on the other, there was discrimination against indigenous peoples who made proposals at the UN.

36. The representative of CAPAJ said that the Board had worked late on the sensitive issue of selecting the indigenous representatives who could take part in the next IGC meeting. He was extremely grateful for the generous contribution of the Government of Australia. He urged other brothers to do the same to show solidarity.

37. The Delegation of Turkey noted its appreciation for the meaningful and delightful cultural event hosted by Australia. It wanted to support the ILCs in the meetings of the IGC by contributing to the Fund.

Decisions on Agenda Item 5:

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

39. *The Committee welcomed the contribution by the Government of Australia to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities, and strongly encouraged and called upon other members of the Committee and all interested public or private entities to contribute to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities.*

40. *The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Tomas Alarcón, representative, Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ), Peru; Ms. Eselealofa Apinelu, Attorney-General, Legal Service, Office of the Attorney-General, Tuvalu; Ms. Aideen Fitzgerald, Policy Officer, International Policy and Cooperation Section, IP Australia, Australia; Ms. Lucia Fernanda Inacio Belfort, representative, Instituto Indígena Brasileiro da Propriedade Intelectual (InBraPi), Brazil; Ms. Galina Mikheeva, Head, Multilateral Cooperation Division, International Cooperation Department, Federal Service for Intellectual Property (ROSPATENT), Russian Federation; Ms. Daniela Rodriguez Uribe, Advisor, Ministry of Culture, Colombia; Mrs. Jennifer Tauli Corpuz, representative, Tebtebba Foundation-Indigenous Peoples' International Centre for Policy Research and Education, the Philippines; and Mr. George Tebagana, Third*

*Secretary, Permanent Mission of
Uganda, Geneva.*

*41. 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 6: TRADITIONAL CULTURAL EXPRESSIONS

42. The Chair went through the working methodology for the week, which the IGC had been using for some time and refining along the way. After every session, together with the Vice-Chairs and the Secretariat, he would discuss the lessons learned from previous meetings and attempt to make modifications to address them. He had met with Regional Coordinators and interested delegations on the work program and methodology. He was hopeful that all were familiar with it. The minor changes requested during those consultations had been incorporated in the new document on methodology. He said he had not received any other comments, so that implied that members had agreed to the working methodology. Regarding the results of IGC 33, a revised version of document WIPO/GRTKF/IC/33/4 "The Protection of Traditional Cultural Expressions: Draft Articles" would be produced following the same methodology used in previous sessions. A Rev. 1 would be prepared and presented by Wednesday morning and time would be given for comments and further suggestions, including textual proposals. A Rev. 2 would be prepared and presented by Friday morning. Remarks would be included in the report. The plenary would be asked to note Rev. 2 and transmit it to IGC 34. From a process perspective, until the plenary agreed to note a revision, the Chair reiterated that it had no status. The plenary was the decision making body. The documents, as presented by the Facilitators, had no status until such time as the IGC agreed to note them and move them forward. Throughout the week, the Facilitators would listen to interventions in plenary and informals and undertake drafting, incorporating the textual proposals submitted. To enable a more focused and incremental consideration of the Facilitators' work, they might work and present on specific core issue as "work in progress" in order to get some early feedback, as at IGC 32. Discussions would begin in plenary, then move quickly to informals to start the substantive discussions. Members would be invited to provide comments on the core issues, including those identified in the mandate. It was neither a live drafting exercise nor a sequential article-by-article process. In accordance with the mandate, the IGC had a number of core issues to address. The process was flexible and transparent. The informals were designed to establish a less formal setting where participants could discuss the text to reach a common understanding and narrow gaps. There had been very productive discussions during the TK sessions, particularly on domestic experiences. The Chair of the informals would either be the Chair or the Vice-Chair Mr. Jukka Liedes, a technical expert who had been a long-standing Chair of the Standing Committee on Copyright and Related Rights (SCCR) and had been involved in many copyright committees. The Facilitators would be active in the informals and would be allowed to ask questions for clarification. As to composition, each regional group would be represented by a maximum of six delegates, one of whom should preferably be the Regional Coordinator, to ensure that all information was conveyed to all members within that group. Other Member State delegations would be permitted to sit in on the informals without speaking rights. However, if an observer wanted to make a specific comment on a policy area where it had a strong interest, it could ask one of those six delegates to remove themselves from the table and give their speaking rights to the observer. Indigenous representatives could nominate two representatives to participate and two representatives without speaking rights. In recent meetings, the indigenous participants had engaged actively with members. As to methodology, both Member States and indigenous representatives participating in the informals could take the floor and make textual proposals.

Proposals from indigenous representatives could remain in the text only if supported by a Member State. Based on the text in document WIPO/GRTKF/IC/33/4, technical proposals could be put on the screen whenever appropriate to benefit the discussions but there would be no live drafting. Informals would take place in room NB 0.107. Interpretation into and from English, French and Spanish would be available. There would be a live audio feed of the proceedings in English, French and Spanish to Room A. Recognizing that the informals process had a significant degree of informality, all participants were requested to respect that informality and not to communicate to the public, whether live or at any future time, the content or nature of the discussions taking place in the informals, whether in general terms or by way of quoting specific individuals or delegations. There were restrictions on tweeting, blog posts, news stories and e-mail list-serves, in order to preserve trust, frankness and openness. To further progress in plenary and informals, the Chair might establish one or more *ad hoc* contact groups to tackle a particular issue so as to narrow gaps. Such contact groups could be useful with regard to issues thoroughly discussed either in plenary or informals but where divergent views remained. The composition of those groups would depend on the issue to be tackled but would typically comprise a representative from each region, depending on the issue and Member State interest. All the diverging views identified with regard to a specific issue needed to be discussed by such a contact group and those interested needed to be represented. That had been successfully used in previous IGCs and Intersessional Working Groups. The Chair would appoint one of the Vice-Chairs or a Facilitator to coordinate the discussion in such contact groups. They would have short-term mandates within the current session and would need to report results back to the plenary or informals. All efforts would be made to ensure the contact groups did not meet during plenary. Ms. Margo Bagley of Mozambique was available to be a Facilitator for that session. That assured continuity between the TK and TCE themes. GRULAC had proposed Ms. Marcela Paiva from Chile as Facilitator. It appeared to the Chair that the plenary agreed with these proposed Facilitators. Facilitators would assist the plenary and informals by following the discussions closely and keeping track of views, positions and proposals, including drafting proposals. The Facilitators might also take the floor and make proposals. They would review all materials, undertake drafting and prepare revisions of the Draft Articles. If the Facilitators developed any text themselves, it would be identified in italics in the revised document and would need to be supported by a Member State to go forward. At the end of the session, the Chair would take account of all discussions held over the week and propose an indicative list of outstanding/pending issues to be tackled/solved at IGC 34. The plenary would be invited to review the indicative list and agree to transmit it to IGC 34. The Chair listed the working documents for the week. He said that more resources were available on the WIPO website, including a repository of laws, studies and resources. He recalled that the Chair's Information Note had no status but included useful information to assist the discussions. He would invite the proponents of new documents WIPO/GRTKF/IC/33/5 and WIPO/GRTKF/IC/33/6 to introduce them later on. The Chair said that discussions would start in plenary with Member States' comments, suggestions, proposals or questions in relation to the core issues. He would allow other Member States to ask questions for clarification in a flexible manner. The relevant text from the working document would be put on screen.

43. The Chair then opened a discussion regarding the nature of any future instrument. He stated that, as a general rule, most WIPO treaties and instruments provided an international framework of principles and standards, which States ratified and implemented in national laws. These instruments provided flexibility in policy areas, high-level principles and standards, particularly in the policy space such as that which operated in diverse environments in terms of governance, legislation and the circumstances in which the IPLCs lived. He asked, at a high level, how Member States would view an instrument as to its form or nature.

44. The Delegation of the USA, in response to the Chair's call for views on the international dimension, said that it had given it some thought and wanted to share its national context, its own view, and then broaden the discussion. It had come prepared to constructively engage in the discussion on TCEs, as in prior sessions of the IGC that had focused on that subject matter.

As many had noted, the subject matter was somewhat cold, as it had not been discussed for three years. It noted that it did not currently have the authority to negotiate a legally binding instrument. The new administration was still in the process of reviewing its engagement on the protection of TCEs. It invited consideration of the full range of legal instruments available to satisfy the terms of the 2016-2017 IGC mandate. Within that framework, it respectfully requested that due consideration be given to non-binding legal instruments in light of the fact that there was no consensus among delegations with respect to specific legally binding instruments. Towards that end, it drew attention to document WIPO/GRTKF/IC/10/6 "Options for Giving Effect to the International Dimension of the Committee's Work." The document was quite useful and laid out the full range of options that would be available for consideration by the IGC. It invited consideration of that document and interventions by other delegations on the full range of available options.

45. The Chair noted that there was a lot of material available that the IGC had worked on over the years, such as the gap analysis in 2009 [Note from the Secretariat: Document WIPO/GRTKF/IC/13/4 b Rev.], and it was useful to revisit some of those earlier documents. However, there had been a large amount of new domestic experience since their publication.

46. The representative of INBRAPI recalled that there had been text-based negotiations since 2010. Indigenous peoples had the experience of the Convention on Biological Diversity (CBD) and a number of different instruments, which were not legally binding and did not actually provide protection. The mandate of the IGC was to create instruments that could provide effective and balanced protection to TCEs. The Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization had been created on the basis of benefit-sharing, and it had been necessary to have a long process up to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the CBD (the Nagoya Protocol) to make benefit-sharing effective. She hoped that after 17 years the IGC could finally produce one or several legally binding instruments that would effectively protect TCEs.

47. The Chair said he did not intend to move into a discussion on the binding or non-binding nature of a possible future instrument(s).

48. The Delegation of Egypt hoped to be able to complete the work as soon as possible, adopting the three necessary documents on the three topics, after 17 years of the IGC. It wanted a transparent negotiation based on the Draft Articles. It urged the IGC to work in an objective and constructive fashion to attain concrete results and come to the next session with a document in hand that would make it possible to lead to a diplomatic conference. It said that there was a meeting of the minds of the overall majority on the binding nature of the document. The blueprint was already there. The IGC did not need to examine a plethora of new documents. Most of the IGC participants were experts who hoped to arrive to results. The IGC had to fulfill its mandate as decided by the General Assembly.

49. The representative of Tupaj Amaru said that he was sorry that the Delegation of the USA had placed obstructions to the course of the discussion and stood in the way of having a binding instrument. In 2012, he had submitted to the Secretariat a complete, far-reaching text, in Spanish and English. He asked the Secretariat to brush the dust off that document so that all could be made mindful of the proposals therein. [Note from the Secretariat: At the request of the Chair, the Secretariat confirmed that the 2012 submission from Tupaj Amaru had been tabled but had not received Member State support].

50. The Chair introduced the first major core issue: Objectives. Objectives were fundamental to the development of any operative text of any instrument. They gave clear purpose and intent, and as a general rule, they should be short, succinct and operative in form. It was worth looking

at the TK text, which had been significantly simplified. The Chair opened the floor for comments on Objectives.

51. The Delegation of Indonesia, speaking on behalf of the LMCs, pointed out, for consistency, that it would be preferable that the title of that provision be “Policy Objectives” and numbered as Article 1, as in the TK text. The IGC had been discussing policy objectives at great length in previous sessions as one of the crosscutting issues. However, the current text was filled with brackets that made it difficult to identify the different positions. It would be helpful to have the draft text clearly show the alternate positions. It asked for its proposed text to be reflected as an alternative in the draft text: “This instrument should aim to (1) provide beneficiaries with the means to” and would continue with subparagraphs (a) through (d) and then paragraph 2.

52. The Delegation of the Islamic Republic of Iran associated itself with the statement delivered by the Delegation of Indonesia on behalf of the LMCs. It preferred that the objectives be numbered as Article 1, but it did not support any new article being numbered as “BIS” as in the TK text. Also, it did not support the word “nations” in the objectives. As explained by the Delegation of Indonesia, the text could be simplified by modifying paragraph 1.

53. The Delegation of the EU, speaking on behalf of the EU and its Member States, underlined the importance of discussing objectives properly, because it went to the heart of the IGC’s work. At the outset, the TCE discussions needed to focus on what was possible within the IP context, taking into account WIPO’s mandate and the existing IP framework. The use and possibilities of the readily available IP framework should be promoted wherever applicable. It supported targeted awareness-raising activities and making sure there was access to IP rights, such as copyright and geographical indications, which could protect TCEs. In addition, TCEs might also be protected via performers’ and producers’ related rights and the WIPO Performances and Phonograms Treaty (WPPT) and the Beijing Treaty on Audiovisual Performances expressly covered “expressions of folklore.” Much work had already been undertaken at the international level to safeguard TCEs or expressions of folklore under UNESCO instruments. In the draft text, it supported “encourage creation and innovation” in paragraph 1(d), because by promoting the available IP framework, the creativity and innovation in ILCs could be encouraged, and the appropriate use of it by others could be allowed. It was not in a position to support the language integrated from the Nagoya Protocol, such as “prior informed consent” and “access and benefit sharing” as contained in subparagraphs (a) to (c). Those terms had been used in a specific context under the Protocol. It also did not support any references to misappropriation and adaptation. It supported the language contained in Objectives 3 and 4.

54. The Delegation of Senegal, speaking on behalf of the African Group, echoed the statement made by the Delegation of Indonesia, speaking on behalf of the LMCs and asked for a simplified text. On paragraph (d), “encourage tradition-based creation and innovation.” It noted that there were already mechanisms within IPLCs to effectively promote innovation and creation.

55. The Delegation of Canada expressed its appreciation for the information shared by the Indigenous Panel. The perspectives shared were very important. It reiterated its commitment to contribute as constructively as possible to the development of an international instrument for the protection of TCEs. Therefore, during the meeting, it would be speaking on substantive issues and text options, while reserving the possibility to go into greater depth in the future. Empirical studies and information drawn from national experiences, particularly from Member States that had been able to adopt specific measures for the protection of TCEs, would be most beneficial, not only to facilitate a converging of views, but also in order to support the work in Canada on indigenous issues. With regard to the Draft Articles, it sought clarification. On the objectives, the clear and specific implications of how some of the concepts in those objectives

would be implemented, for example those of “tradition based” or “traditional and customary context,” should be thoroughly considered. Moreover, even more so that with TK, it wished to clarify the link between the existing IP system and the proposed new protections and how those would interact. The specificity of the discussions on TCEs as compared to GRs and TK was that existing copyright treaties expressly covered some of the elements of TCEs.

56. The Delegation of Japan reiterated that the objectives were very important and needed to be clear and concise. It was inappropriate to associate the issues of ABS with the IP system such as stated in paragraphs 1(b) and 1(c). Therefore, those subparagraphs should not be included. On the other hand, one should bear in mind that the concept of encouraging creation and innovation, preventing the inappropriate exercise of IP rights, and safeguarding the public domain were essential, so it supported paragraphs 1 (d), 2 and 4. However, the word “tradition-based” should be bracketed because the instrument should aim to encourage and protect creativity and innovation generally and should not be limited to “tradition-based” ones.

57. The Delegation of the USA said that careful consideration of the objectives of any international instrument(s) for the safeguarding of TCEs was an essential first step. The important issue of the objectives had been discussed at a number of prior IGC sessions. Despite those efforts, delegations had been unable to reach consensus on the fundamental objectives of an international instrument(s) for the safeguarding of TCEs or on a list of objectives to frame the provisions of any instrument(s). As a reflection of the lack of agreement, the objectives section was replete with vague formulations and remained heavily bracketed. It would engage constructively to address those concerns with respect to specific objectives, but also looked forward to a robust discussion of the broader issue of the objectives of any international instrument(s) for the safeguarding of TCEs. It pointed to the need to identify specific harms and gaps. The Information Note stated: “in identifying IP-related objectives, Member States could consider and reflect on the type of harm(s) that an IP instrument on TCEs would seek to address and on the gaps that may currently exist and that ought, from a policy perspective, to be filled.” Identifying specific harms supported by evidence and illustrated by examples based on national experiences was a critical first step in advancing the work of the IGC. Then, the IGC would need to address gaps, if any, in the existing international legal framework. As also pointed out in the Information Note, considerable work on the possible gaps (known as the gap analysis) in the international IP framework for TCEs had already been undertaken in prior sessions. The purpose of that work was to inform discussions in the IGC and no conclusions had been drawn. Since a number of years had passed since that work had been undertaken, it requested that the Secretariat deliver a presentation, including slides, during that session of the IGC, to refresh the recollections of Member States and serve as a springboard for an informed discussion of the IP-related objectives. Moreover, national experiences under existing international instruments were important, as the issue of TCEs had already been addressed in international instruments. It was interested to learn more about the experience of other delegations in implementing Article 15.4 of the Berne Convention (1967), the Tunis Model Law on Copyright for Developing Countries (1976), the WIPO-UNESCO Model Provisions (1982), and Article 2 of the WPPT, and Article 2 of the Beijing Treaty on Audiovisual Performances (2012). Sharing experiences under the existing international framework would be hugely beneficial for that session of the IGC, and if not, for continued discussion towards the end of the biennium.

58. The Chair said it was up to Member States to look at the material and refresh their memories. He said copies would be made available. National experiences were very important and hopefully all members could engage on those.

59. The Delegation of Switzerland wished to share a few general observations, which were also relevant in the context of the objectives. First, as summarized in the Information Note, there already existed a number of international agreements outside of WIPO and beyond IP that dealt with certain aspects of TCEs, such as the 2003 UNESCO Convention on the Safeguarding

of the Intangible Cultural Heritage. Therefore, the IGC should not replicate work already covered under other international agreements. Instead, it should ensure mutual supportiveness to those agreements and focus on those issues relevant in an IP context. Second, it recognized the distinctive nature of TCEs, TK and GRs. At the same time, it also recognized that there was some overlap in those subject matters, in particular between TCEs and TK. That fact should also be reflected in the work of the IGC. As far as possible, the IGC should ensure a coherent approach between the protection of TCEs and TK. Therefore, the objectives could be improved by better aligning with the TK text in Rev. 2 after IGC 32. In particular, a so-called “positive” objective, similar to the one referred to in Alt 3 of Article 1 of the TK text, could be included as an objective in the TCE text. That objective would aim to ensure the appropriate use and protection of TCEs within the IP system, in accordance with national law and by recognizing the rights of indigenous peoples and holders of TCEs. That objective would not prejudge the nature of any possible new IP tool or approach for protecting TCEs. At the same time, it would allow taking into consideration existing IP tools relevant for the protection of specific types of TCEs, such as geographical indications for the protection of traditional handicrafts or other products of IPLCs.

60. The representative of Tebtebba, speaking on behalf of the Indigenous Caucus, echoed the request put forth by several delegations for the Facilitators to undertake a simplification of the text on objectives, as it was hard to follow. The objectives should specifically address the harm that the instrument sought to prevent. The Indigenous Panel had provided ample evidence of the harm that needed to be prevented and the gaps in the international IP system with regard to the protection of TCEs. The harm was the misappropriation of the TCEs of IPLCs. She supported the objective to enable IPLCs to control the use of their TCEs beyond the traditional context. There needed to be an objective to ensure benefit sharing and FPIC before TCEs could be used. It was appropriate to use language from the Nagoya Protocol in that instrument, since during the ABS negotiation, matters that dealt with IP had not been discussed, with the understanding that WIPO was the appropriate forum for those discussions.

61. The Chair opened the discussion on Subject Matter and noted that it was relevant to both Article 1 and the Use of Terms section, as in the TK text.

62. The Delegation of Indonesia, speaking on behalf of the LMCs, recognized the distinctive nature of GRs, TK and TCEs but maintained the need for a cohesive approach. It proposed that the article be numbered as Article 3, with Use of Terms as Article 2 and Objectives as Article 1. As in the TK text, the title of the provision should be “Subject Matter of the Instrument” without brackets, as there was no dispute that the subject matter was TCEs. The eligibility criteria were not applicable under that provision, but rather under Scope of Protection.

63. The Delegation of Senegal, speaking on behalf of the African Group, said that the text should read “the subject matter of protection of TCEs is” since there was a definition provided under Use of Terms. It was not necessary to get into eligibility criteria, as those were dealt with under Scope of Protection and Exceptions and Limitations.

64. The representative of INBRAPI, speaking on behalf of the Indigenous Caucus, supported the statement made by the Delegation of Senegal. There was no need to establish criteria, which could exclude things. The IGC also needed to discuss that text in greater depth to clarify expressions such as “directly associated with” or “distinctive” in subparagraph (b) because it would create problems for some indigenous peoples. Under subparagraph (d), she had some concern with the establishment of timeframes. The IGC was talking about the creation of specific protection for TCEs, which were dynamic, evolving, and therefore, could not be subject to timeframes. The instrument should be flexible with regard to the establishment of criteria. They could feature under Exceptions and Limitations and needed to be as inclusive as possible in order to comply with the mandate.

65. The Delegation of the EU, speaking on behalf of the EU and its Member States, said it was of utmost importance to know what one was talking about in relation to the Use of Terms. It supported that a TCE should be artistic and literary, as well as creative, in order to establish a clear link with IP and WIPO's mandate. Further, it did not support including a list of examples. Having said that, it was unclear whether everything mentioned in the list qualified as artistic, literary and creative. It welcomed a fact-based discussion in that regard in the informals, preferably based on national examples. It might come back to the other definitions at a later stage. On the subject matter, it supported "safeguarding" in the title and that the eligibility criteria be cumulative. It was important to establish eligibility criteria based on the connection between the ILC and the TCE, as described in subparagraphs (a) and (b). In relation to subparagraph (c), it was its interest to ensure that TCEs, which had not been practiced since historical times and had entered the public domain, were not reclaimed as subject matter of protection. The wording should consecutively be clarified. It supported "creative intellectual activity" in subparagraph (e) and suggested adding "artistic and literary" in subparagraph (e) as well, as used in the list of terms.

66. The Delegation of Brazil associated itself with the statement made by the Delegation of Indonesia on behalf of the LMCs. As seen during the Indigenous Panel, the issue was very relevant to Brazil. On subparagraph (d), the determination of a term was problematic, considering the oral transmission and intergenerational character of TCEs. Another factor that hindered the limitation of a term had to do with the sharing of information between communities, which could impair measurement of the timeframe.

67. The Chair said that the issue of a timeframe had been discussed at length in relation to TK and should be raised again in informals.

68. The Delegation of Egypt supported the statements made by the Delegation of Indonesia on behalf of the LMCs and of the Delegation of Senegal on behalf of the African Group. A table comparing the structure (not the substance) of the articles on TK and TCEs could facilitate the work. In subparagraph (d) it did not support having a period of 50 years.

69. The Delegation of the USA said that the point of departure for its opening remarks on a number of crosscutting issues would be the bracketed phrase in Article 1(a) "whether they are widely spread or not." The phrase should be deleted. At the very least, the brackets should be maintained. Under Article 1(a), TCEs that were widely spread would be eligible for protection, which was not acceptable. In its TCEs examples paper, which it would be introducing later, it had identified a number of such widely diffused TCEs. Those examples strongly demonstrated the problem associated with safeguarding widely diffused TCEs. It was interested in hearing examples from the national experiences of other Member States that highlighted the challenges presented by protecting widely diffused TCEs. One example of wide diffusion was TCEs in the Diaspora, an issue raised in prior sessions, which had not been resolved and warranted further consideration. Immigrant members of a traditional community could carry TCEs across borders. At a prior session, it had raised the example of a Cambodian dancer located in Seattle, who might be accused of pirating a Cambodian TCE, or similarly, of an Ethiopian group of musicians in Washington, D.C. There was understanding, which was shared by a number of delegations, that TCEs were not static, but dynamic, living cultures. In that sense, TCEs were clearly alive when expressed through people within a political or geographic region that claimed them. It appreciated the dynamic nature, but objected to safeguarding such dynamic, living cultures. It was difficult, if not impossible, to identify the origin of certain TCEs. Even when the origin was discernible, as the TCE moved from country to country, the TCE had changed and absorbed new characteristics unique to the individual cultures, but sharing some core of the original, such as described at greater length in the examples paper.

70. The Delegation of Japan emphasized that wording such as "dynamic and evolving" and "from generation to generation" did not add definitive characteristics to the subject matter of

TCEs. Thus it recalled the question as to whether the subject matter should extend to any cultural expression that would arise in the future and meet the criteria of TCEs. The IGC needed to determine under which circumstances contemporary cultural expressions could become TCEs. The time elements stipulated in paragraph (d) should be included as an objective criterion. Regarding the word “nation,” if the subject matter of protection were defined to include any cultural expressions passed down by a nation, the scope of TCEs would expand unlimitedly and include virtually any type of cultural expression. Such a definition was inappropriate.

71. The Delegation of the Islamic Republic of Iran said that the title “Subject Matter of the Instrument” was the most suitable. Concerning the content of the article, it supported the statement made by the Delegation of Indonesia, speaking on behalf of the LMCs and that of the Delegation of Senegal on behalf of the African Group. One could simply refer to the TCEs as the subject matter of the instrument, and refrain from a lengthy discussion. It did not support the inclusion of criteria of eligibility. In particular, subparagraphs (d), (e) and (f) should be removed.

72. The representative of Tebtebba, speaking on behalf of the Indigenous Caucus, said that the description by the Delegation of the USA was very formalistic. He recalled Professor Tsosie’s presentation at the Indigenous Panel. The issue about TCEs often had to do with the meaning for the original TCE holders. It was not about a design. It was about the meaning to those that had created the design. In solving that issue of TCEs and Diaspora, one needed to ask about the customary laws, the meaning to the holders of the TCEs, how widespread they wanted them to be, their aspirations or desires about their distribution, and one had to recall that many of those were collective in nature. He asked whether one would need to balance individual rights against collective rights, and whether individual rights trumped collective rights. He did not think so. The customary laws of collective rights of indigenous peoples should apply to their TCEs. He did not support the idea of safeguarding, as the mandate was for the protection of TCEs and not for their safeguarding. There were other instruments that dealt with that. He was struggling with the language of paragraph (b). The phrase “unique product of” was highly restrictive. He was struggling with the legal scope of the different phrases in brackets.”

73. The Delegation of Ecuador added its voice to the statement made by the Delegation of Indonesia on behalf of the LMCs. It underscored the difficulties in Article 1(d) of including a determined timeframe as a criterion of eligibility, as that went against the dynamic nature of TCEs.

74. The Delegation of Peru supported the statements made by the Delegation of Indonesia on behalf of the LMCs and by the Delegation of Ecuador. It had some concerns regarding paragraph (d) and the specification of 50 years. That went against the notion of “dynamic and evolving” and the collective context mentioned in other paragraphs. In paragraph (e), the phrase “result of creative intellectual activity” was too vague and lacked a reference to IPLCs and their context.

75. The Delegation of Ghana aligned itself with the statement made by the Delegation of Senegal on behalf of the African Group and that of the Delegation of Indonesia, speaking on behalf of the LMCs, specifically to have a very short and succinct reference in Article 1 to the subject matter being TCEs. With regard to Article 1(f) and the reference to “dynamic and evolving” as a criterion for protecting TCEs, it was concerned by suggestions made by some delegations that it would be difficult to protect TCEs because they were dynamic in nature. That really called into serious question the work of the IGC. The definition of TCEs involved subject matter that would be constantly dynamic and evolving. Those concepts were inherent, fundamental and critical to the definitions of the subject matter. Therefore, the IGC needed to accept that essential characteristic and then work out proposals that would ensure that they benefited ILCs and national interests.

76. The Delegation of Chile had difficulty with regard to the eligibility criterion linked to time. It recalled the proposal made at IGC 32 in the TK text, whereby one of the alternatives omitted the time criterion and referred to UNDRIP. It invited the IGC to look at it, review it and consider it as an alternative in the TCEs text.

77. The Delegation of the USA thanked the Delegation of Chile for its statement. On Article 1(c) and (d), there was broad agreement that one of the characteristics of TCEs was that they were passed from one generation to another. Nonetheless, the question of how many generations were required for a cultural expression to qualify as a TCE remained open. Two and three generations had been proposed, but the question had never been resolved within the IGC. At IGC 32, it had noted that it was not uncommon for TK to be maintained by four generations at a given time, and therefore, it was reasonable to require that TK be maintained over five generations before being eligible for protection. That eligibility criterion had been offered as an alternative to the 50-year requirement discussed in current subparagraph (d). It invited consideration of that criterion by the IGC in the discussion at hand and requested to add it as an alternative in the text. It also objected to the word "Party," which was typically only appropriate where something was binding under international law. It suggested that the phrase "Member State" replace the word "Party" wherever it appeared in the text, so as not to prejudice the outcome of the discussions. As such, it requested that the phrase "Contracting Party" be maintained in brackets, wherever it appeared in the text of the Draft Articles.

78. The Chair said that the process did not allow changing a word throughout the whole text because that would disrupt other members' proposals. Members could offer stand-alone alternative text for the sake of clarity. The Chair was uncomfortable with the proposal by the Delegation of the USA and wished to have the discussion on it in informals.

79. The Delegation of China had concerns with the reference in Article 1(d) to "but not less than 50 years," which was contradictory to "from generation to generation." In paragraph (a), it wished to keep "whether they are widely spread or not" and to delete the square brackets. In paragraph (b) and relating to "distinctively associated," and "unique product of," it wished to avoid narrowing the scope too much. On paragraph (e), it was too generous to mention "creative intellectual activity" and "creative activity of the intellect," and one needed to keep the subject matter to literature and art. On paragraph (f), it wished to see "dynamic and evolving."

80. The Chair opened the discussion on Beneficiaries, which had been discussed as a crosscutting issue during the TK sessions.

81. The Delegation of Indonesia, speaking on behalf of the LMCs, wished to see the significant progress made in the TK text reflected there. There was no dispute that the main beneficiaries of the instrument were ILCs. However, there were certain circumstances in which TCEs could not be specifically attributable to a particular ILC. It suggested that the provision on beneficiaries 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, and so to reach a common understanding on beneficiaries, discussion on administration of rights was of paramount importance. In fact, some wording under the current text in the provision of beneficiaries was actually about administration of rights. It suggested moving it to that section. It proposed the following language for Article 2: "The beneficiaries of this instrument include, where applicable, indigenous peoples, local communities, states and other beneficiaries as may be determined under national law."

82. The Delegation of Brazil supported that protection be granted to IPLCs as defined under national law. The discussion should take into account the administration of rights and interests. It was flexible with regard to the text provided in paragraphs 2.2 and 2.3. It was important to consider cases where the identification of the beneficiaries was not possible. Article 2.3(a)

seemed to conflict with Article 12, which mentioned the situation of communities belonging to more than one country.

83. The Delegation of the Russian Federation shared the position reflected in the Information Note that for some concepts Member States could provide a policy framework and allow more detailed articulation of wording to be determined at the national level. It supported the alternative of Article 2.1 that made reference to national law.

84. The representative of Tebtebba, speaking on behalf of the Indigenous Caucus, supported IPLCs as beneficiaries. He was still working with the idea of nations, which should not be beneficiaries, but might have a role in the administration of rights. However, his support for that was conditional and cautious, because he wanted to make sure that in the administration of rights, they had a narrow role. He was concerned that where TCEs were held by IPLCs, the benefits might not get back to them, and could be shared without their FPIC. But there were cases where it was difficult to identify particular communities. Hence, criteria should be developed under Administration of Rights.

85. The Delegation of Canada said that, in addition to the unresolved question regarding nations, it was still looking at the important implications of using the term “local community.” The work on TCEs, far less than that on GRs and TK, gave rise to some central questions of cultural policy, as pointed out in the Information Note and by some delegations. A number of those questions linked to safeguarding and promotion of TCEs were dealt with in other international fora, such as UNESCO. The IGC’s work had to be coherent with the work carried out in those bodies, and it was very important to underscore the national impact of instruments on TCEs that might be covering that of local communities, so as to provide for an evaluation of coherence with the cultural policies adopted at the national level. That central question should not be simply left in the hands of local governments, especially with countries such as Canada that had adopted and were adapting a panoply of cultural policies, without first being analyzed. It was not proposing to keep or strike out different terms, but said that the IGC should deepen its exploration thereof.

86. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported that ILCs who create, maintain, express, use and develop TCEs were the beneficiaries. It did not support nations or states as beneficiaries nor any language that potentially opened the instruments to nations or states. As a consequence, it did not support “as determined by national law” as included in Articles 2.1 and 2.2. It was unclear how nations/states fulfilled the eligibility criteria contained in Article 1. Article 2 should solely focus on the beneficiaries. Paragraphs 2, 3 and 4 would be better placed under Administration of Interests. In relation to paragraph 2, a competent authority, as appropriate, should solely act as a custodian, with the explicit consent of the beneficiaries, and should not have any rights itself. It did not support paragraph 2.3, as it was not clear how a TCE fulfilling the requirements of that provision could remain within the scope of the instrument, especially the eligibility criteria and Article 1.

87. The Delegation of the USA had a few general comments on key terms, without prejudice to follow on work and more technical suggestions with respect to the text of the article itself. The first overarching comment, as mentioned by other delegations, was the use of the term “nations.” Many national laws for the protection of TCEs vested rights in those expressions in the communities where they originated. However, some national laws vested such rights in a governmental authority, often providing that proceeds from the granting of rights to use the TCEs shall be applied towards, for example, national heritage, social welfare and culture-related programs. The IGC had held discussions of those proposals over the years. It sought clarification of the use of the term “nations” throughout the Draft Articles and looked forward to a robust and sustained discussion thereon. It was interested in hearing about national experiences related to governmental ownership and stewardship of TCEs under national laws, with an emphasis on laws enacted in the past five years, consistent with the EU proposal for a

WIPO study of recent national laws for the protection of TCEs. To a certain extent, one could use that meeting as a down payment on the delivery of that very informative study. Turning to the term “local communities,” it noted, as other delegations had, that it was a vague term with no precise meaning in international law. However, it requested retaining it until clarification of the term became clearer. It looked forward to discussion of the meaning of the phrase “local communities” under national laws for the protection of TCEs enacted in the past five years. It would draw on its examples paper as a vehicle for facilitating a discussion of that important term that to date had not been capable of resolution within the IGC.

88. The Delegation of the Islamic Republic of Iran did not support the inclusion of the word “safeguard” in the title of Article 1. On beneficiaries, the IGC should create a general policy framework and leave enough room and flexibility to states to address national concerns and priorities. Therefore, along with the main beneficiaries of the instrument, which were the IPLCs, it was in favor of giving enough room for states to determine any other beneficiaries. It supported the position expressed by the Delegation of Indonesia on behalf of the LMCs. It did not support including the word “nations” in the Draft Articles, as it was legally ambiguous.

89. The Delegation of China wished to reach consensus on the issue of beneficiaries. It reserved its right to come back to that discussion. It was not against IPLCs being beneficiaries but said one should consider the universal application of that instrument in the future, because, in China and some other countries, the notion of indigenous peoples did not exist or was not applicable. One should take into account other beneficiaries, including nations and/or states. Some countries might consider that including the word “nation” might undermine the rights of IPLCs. An option would be to include the wording: “beneficiaries are IPLCs and when there is no notion of indigenous peoples, other beneficiaries as may be defined by national law, such as nations and/or states.”

90. The representative of INBRAPI stressed that the beneficiaries should be the IPLCs. But for lack of funds, the IPLCs of the entire world were not present at the meeting, unlike in the past. In Brazil, the legislation set forth what “local community” meant, what groups were included under that concept. It was a far greater number than the indigenous peoples. “Indigenous peoples” and “local communities” were two different concepts, two different realities.

91. The Chair opened the discussion Scope of Protection, which contained two options, one with a tiered approach and one which gave states maximum flexibility to determine the scope of protection. In relation to Option 2, paragraph 2 effectively constituted an exception and members might wish to consider whether to move that to Exceptions and Limitations.

92. The Delegation of Indonesia, speaking on behalf of the LMCs, said that the scope of protection was at the heart of the instrument. It invited the IGC to take into account the practical value of establishing the level of rights as determined by the character of the TCEs in question and the character of their use. It was a mechanism to try to come to a balanced agreement of different interests regarding the protection of TCEs. The levels of rights provided an opportunity to find convergence on core elements, namely the subject matter of protection, beneficiaries, scope of protection, as well as exceptions and limitations. In that regard, Option 1 should serve as a good basis for further discussion. It stood ready to engage constructively to make sure that the language in Option 1 could be a mutually acceptable provision for all, preferably during the informals. Regarding the title, as other delegations had already pointed out, the IGC had to have a coherent approach between the TK and TCE texts.

93. The Delegation of Brazil was in full support of clarifying aspects of the moral and economic rights involved in the core of the instrument.

94. The Delegation of the Russian Federation said that article was crucial. One should consider including a reference to national law, as proposed in Option 2.

95. The Delegation of the EU, speaking on behalf of the EU and its Member States, preferred Option 2, which gave flexibility to Member States. Article 3 should not be seen in isolation, as important safeguards were contained in other relevant places such as exceptions and limitations, and the relationship with the public domain. It supported Article 3.2, as it was important to safeguard the public domain. It did not support moving that paragraph to Article 5. In relation to Option 1, it looked forward to a discussion on practical examples and national practices on the different levels of diffusion. It was not convinced by the tiered approach as it stood. It could not accept references to PIC and MAT from the Nagoya Protocol, because their context within TCEs was unclear. Lastly, a principle of attribution should not diminish legal certainty of society at large. At that stage, it was unclear at what level attribution would have to be decided, and when and where it should apply. It welcomed practical examples based on national experiences in the informals.

96. The Delegation of Canada, on the criteria to fulfill for protection, and without any prejudice to determining how to develop adequate protection so as to take into account existing IP norms, was in favor of considering a tiered approach on the basis of common objectives, making possible very clear decisions, taking account of the precise details of the concrete implications of the provisions of the instrument. That work was crucial, so that the evaluation of the usefulness of the tiered approach could be complete. To that end, an exchange of views on the lessons learned by Member States that planned or had recently implemented regimes for the protection of TCEs could reveal a lot. Regarding the Use of Terms section, it underscored the importance of reaching agreement on the term "TCE," "accessible to the public," "sacred," "secret," and "use or utilization," because those were of central importance to arrive at a shared understanding of the proposals on the objective of protection. Some might call for the use of terminology derived from the TK text, but that did not provide a practical guide. For example, if an object was sacred or not, there was a subjective evaluation based on the intentions of the beneficiaries, without looking into whether or not they would be available or publicly available or widespread. Precise examples for the differences between those concepts on the tiered approach would make it possible to understand the very objectives pursued.

97. The Delegation of the Islamic Republic of Iran supported the statement delivered by the Delegation of Indonesia on behalf of the LMCs and supported Option 1, minus the word "protected". It would provide its other comments in informals.

98. The Delegation of Japan preferred Option 2, meaning the measures-based approach, over the rights-based approach. Since TCEs could be protected in various ways, they should be included in order to satisfy each country's needs. At least, Member States should have the option to choose between the two approaches. Paragraph 3.2 in Option 2 should remain in Article 3, because the principle that the protection did not extend to the public domain was fundamental in the existing IP rights system, and did not fit under exceptions and limitations.

99. The Delegation of the USA said that the IGC had looked at the tiered approach for a number of sessions, but without a detailed exploration of it. It included a number of extremely vague and problematic terms, which would need to be clarified. Nonetheless, it looked forward to a robust discussion thereon. Article 3.2 appropriately remained in that section, and it supported those interventions to keep the paragraph referencing the public domain. It would come back with more detailed interventions as the week progressed.

100. The Chair opened the discussion on Exceptions and Limitations.

101. The Delegation of Indonesia, speaking on behalf of the LMCs, said that it was essential to ensure that the provisions on exceptions and limitations were not too extensive so as not to

compromise the scope of protection. The current provisions were too long and complicated. Given that the IGC was trying to negotiate a mutually acceptable international instrument that simply provided a policy framework or minimum standards, it proposed the following language that was much simpler: “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 unreasonably conflict with the interests of the beneficiaries nor unduly prejudice the implementation of the objectives of this instrument.”

102. The Delegation of the Russian Federation supported the first variant of Article 5.1, which was clearer than its alternative.

103. The Delegation of Brazil supported the statement made by the Delegation of Indonesia on behalf of the LMCs. It favored a more general clause that would offer flexibility for national legislation. The proposal circulated by the African Group on exceptions and limitations for TK at IGC 32 was a good basis for reflection and discussion.

104. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported including exceptions and limitations in the instrument, as those were needed to shield artists and creativity in general. In that regard, exceptions and limitations should not depend on PIC, as it would be contrary to the nature of an exception to do so, and the exceptions would become wholly impractical for original creators, libraries, museums, and cultural institutions. It might come back with more detailed interventions during the course of the week.

105. The Delegation of the USA said that the values of intellectual and artistic freedom, research and cultural exchange were extremely important. TCEs had been a source of creative inspiration for countless works, including books, music, films, produced not just in the USA but in countries around the world. As a result, it had serious concerns that providing overly broad safeguards for TCEs could have a chilling effect on intellectual and artistic freedom and could stifle the production of creative works. It also placed great value on fostering preservation, noncommercial and scholarly research and the exchange of TCEs including the activities of libraries, archives, museums, and other educational and cultural institutions. To accommodate those values, and to address specific concerns, any protection of TCEs had to include appropriately crafted exceptions and limitations. On Article 5.1(b) “offensive or derogatory uses,” the prohibition against offensive and derogatory uses of TCEs raised a number of questions. For example, it wondered what the standard would be in that context for determining what was offensive and derogatory. It asked how one would avoid conflicts with freedom of expression. The glossary of terms defined “offensive” as referring to “the causing of displeasure, anger or resentment, repugnant to the prevailing sense of what is decent or moral.” The phrase “the causing of displeasure,” set a worrisome low threshold for triggering a potential liability from a freedom of expression perspective. It also noted the incorporation of concepts from moral rights provisions in copyright law. It sought clarification about the fit between those particular broad concepts and the goals to be accomplished in that area. With respect to Article 5(d) and the phrase “does not conflict with the normal utilization of the TCEs by the beneficiaries,” it wondered whether that particular phrase, which was suited to the patents, GRs and TK arenas, might not necessarily be well adapted in the TCEs area. In addition, it sought clarification of the vague phrase “normal utilization of the TCEs by the beneficiaries.” It asked whether the language meant, for example, that the limitation may not conflict with the customary law of the community. If so, it asked if the limitation would be used to prevent a community member from making a creative use of the TCE, thereby potentially stifling creativity.

106. The Delegation of Senegal, speaking on behalf of the African Group, said that the article was long and that it wished to simplify it. Bearing in mind that it was important to allow states the latitude in specific cases to adopt exceptions and limitations, justified by the need to preserve the public interest, it was important to take into account the fact that those exceptions

and limitations should not be in conflict with the interests of the beneficiaries and should not prejudice the implementation of the instrument.

107. The Delegation of the Islamic Republic of Iran was not in favor of having an extensive article. As stated by the Delegation of Indonesia on behalf of the LMCs, room should be given to Member States to adopt justifiable exceptions and limitations without effect on the rights of the beneficiaries, and without unduly prejudicing the implementation of the instrument.

108. The Delegation of Canada said that, without prejudice to the issue of new protections, exceptions and limitations were a necessary complement for any new protection, particularly, but non exclusively, for research, teaching, archives, libraries and museums.

109. The representative of INBRAPI said that the exceptions and limitations should not be very long. They should be established without prejudice to the rights of IPLCs over their TCEs. She noted that the Delegation of the USA was very concerned with various aspects, and she wished to provide some examples of why certain concepts featured in that text, for example, Article 5.1(b), which covered the offensive or derogatory use to the beneficiaries. For example, a toilet paper brand was registered in Brazil with the name of an Amazon tribe and had been the subject of a court case. She could provide many examples of practical problems that the IGC should seek to resolve.

110. The Chair invited the Delegation of the USA to present document WIPO/GRTKF/IC/33/5.

111. The Delegation of the USA appreciated the opportunity to introduce its discussion paper on TCEs. It provided examples of expressions that may constitute TCEs to assist in pursuing a common understanding of the core issues under the IGC mandate for the 2016-2017 biennium. It offered the paper in response to the directive for the IGC to “use an evidence-based approach including studies and examples of national experiences, including domestic legislation and examples of protectable subject matter and subject matter that is not intended to be protected.” It aimed to stimulate a discussion specifically under that mandate. For convenience, it had organized the paper around the categories identified in the definition of TCEs provided in the Draft Articles, namely, (1) TCEs in action, (2) material TCEs, (3) music and sound TCEs, and (4) verbal and written TCEs. The examples were a brief roadmap to provide an overview. It very much appreciated the impassioned presentation of Professor Tsosie during the Indigenous Panel. With respect to the specific examples chosen, including examples from Native-American experiences, all were encompassed within the Draft Articles. The USA was a country of rich and diverse cultural traditions, including those of the 567 federally recognized tribes, as well as those of later immigrant communities, who together had created a rich and layered American cultural heritage. That heritage included baseball, the Cowboy boot, the hamburger sandwich, and hip-hop music culture, among many others. To the best of its abilities, it had tried to describe the examples as accurately and as respectfully as possible. It had listened carefully to the point that the mere inclusion of paintings of the American southwest in itself in the discussion paper might be considered offensive. Professor Tsosie had made the point that those examples required further in-depth discussion. When referring to the examples, it referred to them as TCEs, but it did not take a position on whether the examples were TCEs or whether they were examples of TCEs that should be safeguarded. It hoped that the paper would help facilitate the broader conversation of what may qualify as TCEs, and within that category, what TCEs should be safeguarded. It welcomed comments from delegations. It would appreciate if other delegations would provide examples from their own national experiences to further the conversation. It thanked other delegations for launching into a sustained discussion that would help advance the IGC’s work.

112. The Chair opened the floor for comments on the document introduced by the Delegation of the USA.

113. 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 the examples.

114. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the Delegation of the USA for the document, which compiled a broad range of examples that may be regarded as TCEs in order to facilitate an informed discussion in the context of reaching a common understanding regarding the treatment of TCEs. It very much welcomed the paper as a tool to enhance the evidence-based approach in line with the mandate, and supported the debate in curt and concrete examples in how those related to the core issues under discussion. It hoped to continue the discussion on the paper during the informals.

115. The representative of Tebtebba told a brief story. In the 1870s, two so-called stone sculptures had been taken from the Sto:lo nation and sold to an old curiosity shop in Seattle, which sold them in turn to what became the Burke Museum. The Burke Museum put those in a research collection—one of the exemptions and limitations within the current text—and they were occasionally put on display, but they spent most of the time in a drawer in darkness. The Sto:lo thought of the sculptures as living embodiments of ancestors. So the museum had taken a living being and put it into a cold, dark storage bin, isolated from the peoples that it had a duty to protect and to look over. So two accounts were in conflict: one overly formalistic and idealistic view of what a TCE was and what the meaning of those TCEs was to their holders. In one worldview, it was just a stone statue with a form that could be copied and things could be derived from it, and wonderful creativity could emanate from that. In another account, it was a human rights violation of a living entity, a being that had been kept in solitary confinement for over 70 years. Those so-called stone sculptures had been returned to the Sto:lo who cared for them properly. That story illustrated some of the core issues to be discussed under exceptions and limitations. It went to the understanding of the proper use of TCEs. In IP law, lawyers were always emphasizing the need for creativity. He had a broad, hopeful view of mankind that humans were infinitely creative. One did not need to create things off the sacred, cultural property of indigenous peoples if that was not what they had intended for their TCEs.

116. The Chair said there would also be opportunity to discuss the USA document and other examples in informals. He said the Facilitators would work that night on the interventions made on Monday, and would come forward with some initial ideas, early drafts and thoughts, which would have no status. It was not a revision, it was just some ideas and concepts that they would develop based on the initial discussions. The Facilitators would present those the following morning for a short discussion to put forward the revision process. After that, the IGC would move to informals to have some focused discussions on the critical core issues, to narrow the gaps and try and reach consensus in those key areas. In relation to the intervention by the Delegation of the USA, it was important not to interfere with the alternatives proposed by other delegations so as not to compromise them.

117. [Note from the Secretariat: the following took place on the next day, Tuesday February 21, 2017.] The Chair said the plenary would review some initial proposals produced by the Facilitators based on discussions held the day before. Those were just a “work-in-progress” directed at obtaining initial feedback from members prior to producing Rev. 1 on Wednesday morning. The material had no status and would be reviewed based on some initial feedback. He thanked the Facilitators for taking on their difficult task of trying to bring clarity to different ideas and positions. He recalled that they were independent and not operating in a national capacity. Their role was to ensure that all Member State views were represented, but at the same time, they would attempt to narrow gaps where opportunities arose, capturing the intent of Member States’ positions rather than verbatim text. However, Member States had the right to request verbatim text if they did not like the way their proposal was represented. In completing their work, they were to ensure clarity in relation to different positions, as reflected in the use of alternative text. Where there was an opportunity to combine

alternative proposals, they would attempt to do so, so long as the integrity of the positions were maintained. The suggested textual changes would be placed on the screen and paper copies had been distributed. He asked the Facilitators to introduce their proposals and would then open up for initial comments to inform deliberations working towards a Rev. 1.

118. Ms. Bagley, speaking on behalf of the Facilitators, said that they had been able to make progress on some of the Draft Articles, hopefully improving the clarity of the text to move discussions forward. Consistent with the GRs and TK texts, they had used alternatives to delineate the different positions of delegations, with a view to closing the gaps that had been clearly identified. In doing so, they had sought to reflect coherence with the TK text, while maintaining the distinct aspects of the TCE context. In Policy Objectives, they had made a formatting change to align the structure of the TCE text with that of the TK text, including the use of clear alternatives, the addition of “policy” before the word “objectives,” and making that the first Article, as requested by the LMCs. They had added a new Alt 1, which included changes requested by the LMCs and that was based on the Alt 1 of the TK text. Additional textual adjustments were made to include some of the wording in the TK provision for consistency and clarity, particularly in relation to paragraph 2 of Alt 1. Next, Alt 2 which previously was the sole provision in that Article, as per the interventions by the Delegations of the EU and Japan, had been created to simplify the structure of that provision. A new Alt 3 had been added, modified from Alt 3 of the TK text, as requested by the Delegation of Switzerland. For each of those alternatives, they had made judgments where appropriate regarding brackets and words that could be deleted, consistent with the positions of those Member States supporting the particular alternative. They appreciated clarification on places where their judgments might not have accurately captured Member State positions. Moving on to Article 2 “Use of Terms” in the new numbering, although the IGC had not covered Use of Terms in plenary, they had made two adjustments, both of which were noted in italics, to the definition of TCEs. One involved moving “other” before “spiritual.” The original placement indicated that all creative expressions were spiritual. The second change was to add “dynamic and evolving” over from the criteria for eligibility as it seemed more of a description, with a better fit in the definitional section than in eligibility criteria, as all TCEs were not dynamic and evolving. That might also address the concern noted by the Delegation of China. Article 3 was previously Article 1, with an adjusted title and three alternative provisions. As per the LMCs request, the title had been revised to “Subject Matter of the Instrument” consistent with the TK text. But “eligibility criteria” had been retained. Because the subject matter provision in the TK text also contained eligibility criteria, she asked Member States to consider eliminating the phrase from the TK text title as well. New Alt 1 had been introduced by the LMCs and simply stated: “This instrument applies to traditional cultural expressions.” It was thus consistent with Alt 1 of the TK text in relying on the definition of TCEs in the Use of Terms section. Alt 2 was based on the original textual provision by the Delegations of the EU and the USA by deleting “nations” and “widely spread” and making the criteria cumulative by deleting “or.” It also included the durational provision of a period of five generations as an alternative to 50 years, as proposed by the Delegation of the USA, and added the artistic and literary language as requested by the Delegation of the EU. Those terms appeared in the definition of TCEs and she asked the Delegation of the EU to reconsider whether the terms needed to appear in that article. Alt 3 reflected the approach suggested by the Delegation of Chile of adopting Alt 4 from the TK text, without the durational limitation of Alt 2.

119. Ms. Paiva, speaking on behalf of the Facilitators, said that they had changed the title of Article 4 in line with the TK text on Beneficiaries. They had also used the work done in the TK text regarding the alternatives. They had removed paragraph 2.1 and its alternative from the original TCE text. They had included Alt 1 from the TK text. In Alt 2, they had used the TK text and built upon that, including the proposal by the Delegation of China. Additionally, they had moved paragraphs 2.2, 2.3 and 2.4 to the new Article 6 on Administration of Rights and Interests, as suggested by the Delegation of the EU, and as others had also supported that idea. She hoped that captured and simplified what was already in the text. In new Article 5,

they had simplified the title in line with the TK text. More work had to be done, particularly within Option 1 that had a lot of alternatives. She encouraged participants in the informals to move on the work on scope of protection. On new Article 6 “Administration of Rights,” the Facilitators had changed some of the numbering and added paragraphs 2.2, 2.3, and 2.4. In Article 7 on Exceptions and Limitations, they had included Alt 1 from the TK text, as suggested by the LMCs and supported by the Delegation of Brazil. In Alt 2, more work was needed to come up with a new version.

120. The Chair said that the Facilitators had tried to reflect the views expressed in the plenary discussions, based on the verbatim transcript. Errors could still happen, occasionally. Member States could engage directly with the Facilitators if they had questions or specific points that they wanted to clarify. The Facilitators were there to move the work forward. The text was simply a work-in-progress. He opened the floor for general comments on the document.

121. [Note from the Secretariat: All speakers thanked the Facilitators for their work.]

122. The Delegation of Senegal, speaking on behalf of the African Group, wished to be able to come back in further detail on some parts of the document. With regard to the objectives, it preferred Option 1. With regard to Use of Terms, given that new terms had been introduced, it reserved the right to come back to that later. A priori, the definition of TCEs appeared to be very good, but it wished to go into greater depth among the group. With regard to Beneficiaries, it favored Option 2, which gave more flexibility and was more able to bring together many delegations because it took account of a broader number of beneficiaries. With regard to Scope of Protection, it was in favor of Option 1 but it needed further consultations and would come back with clearer indications. On Article 6, it favored Alt 2, but suggested adding, after “may establish,” the words “or designate” because there might be cases where structures already existed and simply needed to be designated, rather than established. On Article 7, it was in favor of Alt 1, which was much simpler and better flushed out. Those were just preliminary reactions and it might need to come back with broader comments. It was in favor of discussions to take into account the various different positions.

123. The Delegation of Indonesia, speaking on behalf of the LMCs, said it was aware that the document had no official status but could serve as a good basis for further discussions both in plenary and informals. It was delighted to see that the text looked clearer and one could understand different positions better. It invited others to reflect on the fact that the IGC was trying to negotiate a mutually acceptable international instrument that would simply provide a policy framework or possible minimum standards. On Article 1, its proposal was reflected in Alt 1. On Article 2, it sought clarification of some new terms that were in brackets in the Use of Terms. It welcomed the numbering of both Articles 1 and 2. On Article 3, Subject Matter of Protection, it was delighted to see its language proposal. On Article 4, it was happy to see the reflection of progress made in the TK text and was delighted to see that its proposal was reflected in Alt 2. However, it sought clarification from the Facilitators, who had noted that there was a distinction between TK and TCEs and that they might add something. It did not recall any language about “where there is no notion of IPLCs” and stood ready to discuss that in detail. On Article 5, the Facilitators had noted that there were only general comments. It stood ready to engage and discuss in further detail on the scope of protection, both in plenary and informals. It preferred Option 1. On administration of rights, it had proposed moving paragraph 2.2 and 2.3 from beneficiaries to administration of rights. It was looking forward to having a chance to discuss administration of rights as it had language proposals thereon. On Article 7, it was delighted to see its proposal to move the progress made in the TK text, as reflected in Alt 1 for simpler and more general exceptions and limitations. It reserved the right to come back later but stood ready to engage constructively during the course of the week for a mutually accepted outcome.

124. Ms. Bagley, speaking on behalf of the Facilitators, clarified that the changes that the Facilitators had made in the Use of Terms and Administration of Rights sections were done in provisions that the IGC had not yet dealt with. The changes were without prejudice to the discussions that would take place in informals later on. It was just to have that language there for the IGC to consider. She clarified that the language on beneficiaries that the Delegation of Indonesia had questioned had been suggested by the Delegation of China. That could be revisited later.

125. The Delegation of the Islamic Republic of Iran said the document could provide a very good basis for further discussion. On Article 1, it aligned itself with the position of the LMCs and supported Alt 1. On Use of Terms, it noted that new wording had been proposed by the Facilitators. It indicated that any new wording, which had a broader definition of TCEs could be acceptable. On Article 3, it supported Alt 1. It had some concerns with the other alternatives and wished to touch upon that in the informals. On Article 4, it supported Alt 2, but needed more clarification concerning the wording used. Concerning the scope of protection, that article had not been touched in detail, the Delegation was ready to discuss it during the informals or plenary, along with Article 6 on administration of rights. On Article 7, it supported Alt 1, in line with the positions of the LMCs and the African Group.

126. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported “safeguarding” in the title of Article 1 on subject matter. It asked that “safeguarding” be reinstated in Article 1 as well as elsewhere in the text. Further, within the eligibility criteria, it asked that subparagraph (e) read “artistic, literary and creative.” It reserved its rights to come back in further detail to the changes made and looked forward to continuing the discussions on those core issues.

127. The Delegation of Colombia, with regard to beneficiaries, supported Alt 2, which was broader. It reserved the right to come back on other questions.

128. The Delegation of Peru said the text would enable the resolution of differences and the fulfilment of the mandate by trying to find areas of convergence. Article 3, Alt 2, particularly subparagraph (a), established clearly that IPLCs were beneficiaries of the instrument but also mentioned rights of individuals. It believed that individuals should not be reflected there. With regard to the five generations, it was not sure whether a specific time limit should be mentioned for TCEs.

129. The Delegation of Egypt supported Alt 1 in Article 1. In Article 3, it supported Alt 1. As to Article 4, it supported Alt 2. With regard to Article 6, it supported Alt 2. With regard to Article 7, it supported Alt 1, because that was the simplest language and it was similar to many other international instruments.

130. The Delegation of Brazil supported the statement made by the Delegation of Indonesia on behalf of the LMCs. It had some preliminary remarks and reserved the right to develop them further or even to modify them. On Article 1, it supported Alt 1. On Article 2, it liked the sentence that the Facilitators had added that TCEs may be dynamic and evolving. On Article 3, it had a problem with paragraph (d) and the term and it took note of the Delegation of Peru’s interesting comments. On Article 4, it supported Alt 2, but wished to change it to: “the beneficiaries of this instrument are indigenous peoples, local communities, and other beneficiaries, as may be determined under national law.” That would make a difference, as national law would affect all categories. On Article 5, it supported Option 1. On Article 7, it liked Alt 1.

131. The Delegation of Paraguay concurred with the Delegation of Brazil and wished to take into account that the TCEs might be dynamic and evolving, in Article 2. On Article 3, it also had doubts with regard to paragraphs (a) and (d). On Article 4, it supported Alt 2.

132. The Delegation of the USA said that they were under some pressure to do a very quick review on what amounted to important suggestions. Anything that it had to say was without prejudice to further work on those provisions and indeed a great deal of work needed to be undertaken. It had one overarching comment to make on the pattern of significant cooperation between the TK and TCE texts. To date, it had not had an opportunity in plenary or in informals to discuss in-depth the significant differences between TK and TCEs. Those differences had long separated those texts. They were significant differences bearing on policy space with respect to creativity, which was not necessarily similar to the policy space with respect to innovation. The underlying IP disciplines for TCEs were really quite distinct from the area of TK, where there was a great deal of focus on registered rights, whereas in the area of TCEs, there was a cluster of IP rights including copyright, but also trademark rights, laws on unfair competition, and trade secret rights. It needed to reflect carefully on those distinct differences before signaling a general approval for mapping TK concepts onto distinct TCEs concepts. With respect to the specific articles, it agreed with the Delegation of EU that it wished to see the word "safeguarding" restored appropriately where it appeared in the text. It would have more to say about the new Alt 1 under exceptions and limitations in informals.

133. The Delegation of Ecuador supported the statement made by the Delegation of Indonesia on behalf of the LMCs. Without prejudice, it wished to make some preliminary comments, particularly with regard to Article 3, where it supported Alt 1. Nevertheless, Alt 3, based on a proposal by the Delegation of Chile, was also interesting. It dealt with and contained many of the elements that that article needed to contain and also avoided some of the controversial elements. It also emphasized the element of collective rights, which was very important. With regard to Article 4, it supported Alt 2, with a little adjustment. On Article 7, it supported Alt 1, which was simpler and more specific.

134. The Delegation of Chile was pleased that its proposal had been added. With regard to Article 7, it wished to see Alt 3 from the TK text, which left exceptions and limitations to national legislation. It wanted to see whether delegations would look favorably on that and evaluate that proposal.

135. The representative of Tupaj Amaru questioned the method of work. There had not been a debate on all articles and so he did not know how the Facilitators had come up with that summary text. It seemed they had invented it. The text had not been debated in the room. He could not understand why the term "indigenous peoples" continued to be in square brackets. With regard to protected material, the international instrument aimed to protect TCEs. With regard to beneficiaries, he opposed the inclusion of third parties in Article 2. With regard to Article 4, he proposed the following as title: "The exercise of collective rights and administration of interests." With regard to duration, there could be no time limit for the cultural heritage of indigenous people, because indigenous people would continue to live and their TCEs would continue to exist.

136. The Chair noted that the proposals made by the representative of Tupaj Amaru had no Member State support.

137. The Delegation of Algeria supported the statements made by the Delegation of Indonesia on behalf of the LMCs and the Delegation of Senegal on behalf of the African Group. In Article 3, it preferred Alt 1, and in Article 4, Alt 2. Regarding the Administration of Rights, it was in favor of Alt 2. On Exceptions and Limitations, it preferred Alt 1.

138. The Delegation of China was pleased to see that some of its proposals were reflected in the new text. With regard to Article 4, Beneficiaries, it was happy that Alt 2 included some of its opinions. Its focus was to work for a universally applicable international binding instrument, but

it was flexible as to the specific wording. For the other articles it reserved its right to make further modifications.

139. The Delegation of Argentina said the new text was much clearer and in some cases simpler than before. In the definition of TCEs, it approved the inclusion of the words “dynamic and evolving.” In Article 3.2, it had a number of doubts about subparagraph (b). It was not clear how one could determine the length of time during which TCEs had actually been used.

140. The representative of INBRAPI was very pleased to see that the diversity of gender and regions was so well represented among the Facilitators. She had a number of concerns but was pleased to see that the document was clearer and had better defined proposals. In Article 1, she preferred Alt 1, as it was clearer. In Article 2, Use of Terms, she liked the inclusion of TCEs that might be dynamic and evolving. She was pleased to see that her concerns over the Use of Terms had been covered. In Article 3, Alt 1 was clearer and legally better for an international instrument. In Article 4, the beneficiaries should be the IPLCs. She preferred Alt 1 but could be flexible and wished to get together with the regional groups to include the concerns of states, in the cases where IPLCs could not be identified. She was prepared to go into more detail during the discussions. In Article 7 on Exceptions and Limitations, she supported the statements made by the Delegations of Brazil, Indonesia on behalf of the LMCs and Senegal on behalf of the African Group. She wished to have further consultations to make further comments on that document.

141. The Chair noted the suggestion to meet with those particular Member States who had national interests in relation to limiting the beneficiaries to IPLCs. He invited the Delegation of the EU to introduce document WIPO/GRTKF/IC/33/6.

142. The Delegation of the EU, speaking on behalf of the EU and its Member States, introduced its proposal to request the Secretariat to undertake a study of recently adopted national experiences and domestic legislation and initiatives in relation to the safeguarding of TCEs. The study should, in particular, cover the period of the past five to ten years. Work in the IGC had to be guided by solid evidence on the implications and feasibility in social, economic and legal terms. The study should help to inform discussions on TCEs, following the evidence-based approach in compliance with paragraph (d) of the mandate. The study should build on existing material and other studies already conducted by the Secretariat in relation to TCEs, such as information provided via the WIPO Lex portal which was already available as well as information provided on the recently launched website. The main focus of the study should be to set out, in an objective manner, domestic legislation and specific regimes for the safeguarding of TCEs. In that regard, the variety of measures that could be taken should be taken into account, as some could be measures-based and some rights-based. On the one hand, the study should set out recently adopted national IP regimes such as IP laws, regulations, measures and procedures. The study should look, at the minimum, at existing IP regimes such as copyright, geographical indications, designs, trademarks and trade secrets. It asked how key definitions were defined and if case law was available. On the other hand, recently adopted non-IP or other regimes, laws, measures and procedures should be set out in the study. At a minimum, the study should identify and summarize the specific regimes in force in the WIPO Member States and set out how the policy objectives had been defined, outline definitions, and discuss approaches to subject matter, misappropriation, scope, duration, exceptions and beneficiaries, how the legal certainty for different stakeholders was ensured, and whether case law and administrative practice was available. Taking into account the concerns expressed about the delay of the TCE discussions as well as the aim to stay within the mandate, if the study were agreed, the results of the study should be presented at IGC 34. It stressed the importance of the other questions contained in document WIPO/GRTKF/IC/33/5 and hoped those questions could be addressed as well.

143. The Chair opened the floor for comments on the document.

144. The Delegation of the USA said that such a study would significantly contribute to the IGC's work and provide an informed basis for discussion. It supported the proposal.

145. The Delegation of Canada was interested in discussing specific topics raised by the Delegation of the EU in their proposal for a study. Specifically, it wished to know more about measures for the protection of TCEs developed by certain countries, such as their relationship to protection, redress and contractual obligations under existing IP regimes in their jurisdiction, as well as their social, economic and cultural impact, both on their ILCs and on citizens and users, such as heritage and teaching institutions. That study, among others, would be based on empirical data, and would increase understanding of the proposals.

146. The Delegation of Japan was convinced that concrete examples of national experiences and practices could help better understand the issues. It supported the proposal.

147. The Delegation of Senegal, speaking on behalf of the African Group, said that the study would be one more study among the wealth of studies on TCEs already available, particularly the studies done by WIPO. It wondered whether that was a good proposal, whether it was timely, since Member States already had an outlet for explaining their national experiences, in particular through the IGC.

148. The representative of Tebtebba said he was open to a study, provided it did not hold up the discussions. He had a few concerns, and first of all, on the issue of safeguarding. The IGC's mission, as per the mandate, was to look at protection, not safeguarding. Those were two separate concepts and activities and they seemed to be getting mixed in the negotiating text. Second, IPLCs' views had to be reflected in such a study. Part of the problem was they did not have a lot of national experience on those issues. One needed to understand better how IPLCs had participated in the development of those measures. It was really important to try to get the views of IPLCs themselves of how well they thought those measures were working, whether they were providing sufficient protection, whether there were gaps in the protection and whether there was a mechanism to ensure that they had participated in the development of those measures, because it was really important to understand their point of view as well.

149. The representative of Tupaj Amaru did not support the proposal because it deflected the work of the IGC from drawing up an international instrument to protect and safeguard what remained of the indigenous peoples.

150. The Delegation of Georgia, speaking on behalf of CEBS, thanked the Delegation of the EU for its efforts and comprehensive work regarding the study. It supported the request to undertake a study on national experiences, domestic legislation and initiatives in relation to the safeguarding of TCEs in order to achieve a common understanding to assess where TCEs should be positioned in the international IP framework and to focus on recently adopted legislation among WIPO Member States. Different possibilities for enhanced protection of TCEs could also be secured through existing legal frameworks, including trademarks, geographical indications and copyright. Awareness raising encouraging access to those frameworks was significant to safeguard and preserve TCEs.

151. The representative of CAPAJ said that indigenous peoples should not be scared of any study. So many studies had been made but they were still lacking because an academic study had limitations. A study under the mandate of a WIPO body would have to be drafted from the point of view, not of academia and universities, but of the rightsholders, i.e., indigenous peoples. He asked the Delegation of the EU whether it had considered that the team that would draft the study would include indigenous wise people, because internal regimes and legislation were above all bureaucratic work. That was reflected in the reality of life in Latin American states. A truly useful study would have to ensure the involvement of indigenous wise people who had a

great deal to contribute in that context. He asked whether the word “safeguard” was included only to replace the word “protection” or whether it wanted to reduce protection to a mere safeguarding, bearing in mind that safeguarding was not included in the IGC mandate. All the documents talked about protection. He wondered whether the study would distort the mandate, and if that were the case, he would not agree, as that would not be useful.

152. The Delegation of Peru said that, in general terms, a study could help inform the text-based negotiations, so any proposal would have to be studied in that connection. The IGC had already, since 2009, been conducting studies about domestic legislation and national experiences. Each delegation had been bringing ideas, experiences, and examples. More than going into another study, it preferred something with a particular focus, for example, in mapping how international instruments had arrived to consensus, such as the UNESCO instruments, among others. The study could present a matrix that compared what had already been agreed in other fora to serve in the IGC process. The IGC should not duplicate the work it had already done, but build on what it had to narrow the gaps.

153. The Delegation of Brazil took note of the comments put forward by the Delegation of Peru and other speakers and said it would be helpful for the Delegation of the EU to clarify what the proposed study would add to the work done in the earlier years of the IGC, such as documents WIPO/GRTKF/IC/3/10, WIPO/GRTKF/IC/4/INF/2, WIPO/GRTKF/IC/5/3, as well as the studies done in 2004 on India, Indonesia and the Philippines and in 2006 on the Andean countries. There was a big volume of work already done. Perhaps it was just a matter of updating the work done. It asked for clarification on the need for such a study.

154. The Delegation of Colombia supported the statements by the Delegations of Peru and Brazil with regard to reviewing the reasons behind the study.

155. The Chair agreed that there had been a number of other studies conducted by WIPO, as well as other resources, which the Secretariat could display on the screen.

156. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked those delegations that had expressed an interest in the study. It welcomed the possibility to engage in bilateral discussions during the course of the week. In relation to the studies that had been conducted, the proposal explicitly highlighted that it would be interested in having the study on recently adopted initiatives, i.e. in the last five to ten years.

157. [Note from the Secretariat: This part of the session took place after the informals and the distribution of Rev.1 “The Protection of Traditional Cultural Expressions: Draft Articles” dated March 1, 2017 (“Rev. 1”) prepared by the Facilitators.] The Chair said he would ask the Facilitators to introduce Rev. 1. They would explain the rationale for the changes made. He asked participants to listen carefully rather than rush to look for their particular interventions, as they needed to understand the context behind the Facilitators’ decisions. The Facilitators had attempted to achieve clarity in relation to positions and then looked for opportunities to narrow gaps. That was the practice as applied in the past four meetings on GRs and TK. The text showed alternative positions. Rev. 1 was still very much a work-in-progress. While better clarity had been achieved and in some cases positions had been narrowed, there was still much work to be done, in particular in relation to agreeing to objectives. Although Article 5 provided better clarity in relation to the tiered approach, there was more work needed, to better articulate that framework. The Indigenous Caucus had raised some conceptual ideas in that area. WIPO conventions and treaties provided an international framework of principles and standards that ratifying states implemented in national law. That provided the implementation flexibility required at the national level, reflecting the wide divergence in policy and legal environments. What those treaties also facilitated was enforcement of rights in different jurisdictions in terms of reciprocity. The IGC needed to look to develop a high-level framework document, with a set of principles or standards that provided flexibility for implementation at the domestic level. In that

respect, the IGC had to be careful not to be over prescriptive or look to solve every operational issue prior to reaching an agreement. One size clearly would not fit all. The Chair indicated that omissions were certainly not intentional.

158. Ms. Paiva, speaking on behalf of the Facilitators, said that they had worked on the basis of the work-in-progress document presented the previous day. To improve the clarity of the text, they had used alternatives to delineate the different positions of delegations with a view to closing the gaps that had been clearly identified. She thanked participants for their inputs and comments and for their openness to consider the suggestions they would present. Under Principles/Preamble/Introduction, the Facilitators had replaced the word “preservation” with “protection,” in paragraph 7, which now read: “to recognize the importance of protection and safeguarding.” In Article 1, in Alt 2, they had removed the word “and” at the end of paragraph (a) to make the text neater. In Alt 3, they had removed brackets around “protection.” In Alt 1, paragraph 1(a), in the work-in-progress document, they had removed, at the end “adaptations thereof,” because it was included in the definition. During the informals, there had been a conceptual suggestion that the policy objectives article be based on six bullet points. She hoped to have time to consider it and come back to it in the informals. In Article 2, they had not made any changes beyond the ones that were presented in the work-in-progress, but they looked forward to exchanges in the informals of that issue, particularly on the definition of TCEs. In Article 3, based on the exchange on “protection” and “safeguarding,” they had incorporated “safeguarding” in the title. In Alt 2, they had added “and/or” in the first sentence. In subparagraph (e), they had clarified that TCEs should be the result of creative and literary or artistic intellectual activity. They had also removed some brackets and cleaned up the text throughout Alt 2. In Alt 3, they had added a comma before the last phrase “and which may be dynamic and evolving.” Finally, in Article 4, they had changed the title to “Beneficiaries of Protection and Safeguarding.” They had added a new Alt 3 based on the proposal made by the Delegation of Brazil in plenary, with the hope that delegations could consider both Alt 2 and 3 in order to come back to only two alternatives, as Alt 2 and 3 were very similar.

159. Ms. Bagley, speaking on behalf of the Facilitators, said that Article 5, previously Article 3, had undergone significant changes. First, in the title: “Criteria for Eligibility” had been deleted, leaving “Scope of Protection/Safeguarding,” which they had revised to “Scope of Protection and Safeguarding.” Prior Option 2 was new Alt 1 and was otherwise unchanged. It reflected, in paragraph 5.1, a measures-based approach to protection, imposing no minimum requirements on a Member State but containing a maximum or a ceiling provision in paragraph 5.2, excluding from protection TCEs that were widely known outside of the community of the beneficiaries from protection. Several members had supported that provision. She encouraged further refinements and the removal of brackets. Alt 2 was prior Option 1. That provision was favored by a number of Member States that requested that the Facilitators work to clarify and simplify the text. They had endeavored to do so, by removing a number of brackets, and what they perceived to be non-preferred wording, and in some cases, combining provisions to minimize redundancy and hopefully increase coherence. However, they had been reluctant to stray too far from the original content without explicit comment and so they welcomed comments on future modifications to that text. Alt 2 presented a tiered approach to protection with the most protection, economic and moral, provided in paragraph 5.1 for secret TK. A similar but reduced suite of economic and moral rights was provided in paragraph 5.2 for subject matter that was still held, maintained, used, and/or developed by beneficiaries, and was publicly available but neither widely known, sacred, nor secret. Paragraph 5.3 employed the best endeavors approach to the subject matter not protected under the first two paragraphs. As requested, the alternatives in 5.1(b)(ii) were deleted and the primary text retained and modified in light of all the changes to that alternative. Alt 2, paragraph 5.1 read: “Where the subject matter is secret, whether or not it is sacred, Member States should/shall take administrative, legislative, and/or policy measures, as appropriate, with the aim of granting beneficiaries the exclusive and collective right to: (a) create, maintain, control and develop said subject matter; (b) authorize, based on informed consent, or prohibit access to, use, or disclosure of, said subject matter;

(c) protection of traditional cultural expressions against any false or misleading uses in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries;

(d) prohibit use or modification which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary;

(e) receive a fair and equitable share of benefits arising from its use; and (f) attribution, and to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.” Paragraph 5.2 read: “Where the subject matter is still held, maintained, used and/or developed by beneficiaries, and is publicly available but neither widely known, sacred, nor secret, Member States should/shall provide administrative, legislative, and/or policy measures, as appropriate, with the aim of granting beneficiaries the exclusive and collective right to: (a) protection of traditional cultural expressions against any false or misleading uses, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; (b) prohibit use or modification which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiaries; (c) receive a fair and equitable share of benefits arising from its use; and (d) attribution, and the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.” Paragraph 5.3 read: “Where the subject matter is not protected under 5.1 and 5.2, Member States should/shall use best endeavors to protect the integrity of the subject matter in consultation with beneficiaries where applicable.”

Alt 3 was an amalgamation of elements of prior Options 1 and 2. A Member State had wished to make changes to both options, keeping its options open, as it were. So in their effort to retain the clarity and the distinctness of the different positions, they had combined both options in that new alternative as Option 1 and Option 2. Option 1 had a few changes from prior Option 1, mainly the deletion of “subject matter” and “TCEs,” leaving “protected TCEs” as the relevant focus of protection. They had also deleted the terms “offensive” and “derogatory” and replaced “unauthorized” with “unlawful.” In paragraph 5.1(a)(ii), they had made other deletions to unclutter the text. That text retained the alternative of subparagraph 5.1(b)(ii) and the alternative of subparagraph 5.2(b), with the insertion of “use best efforts to enter into an agreement” and “with prior informed consent and approval.” Option 2 of Alt 3 was very similar to prior Option 2 which was now Alt 1, with the addition of a paragraph 5.3 that excluded from protection TCEs when they were used for certain purposes, including archival purposes, and when they served as inspiration or as basis for other works. All three of those alternative formulations for scope of protection would benefit from further Member State consideration and she encouraged meaningful and concrete discussions on the best formulation to accomplish the desired objective. She said a document had been distributed in informals with six conceptual bullet points for the policy objectives. It might also be useful in revisions to the scope of protection, particularly in Alt 2, paragraphs 5.1 and 5.2, to consider those six conceptual points. New Article 6 was prior Article 4. It had not yet been discussed in plenary or informals but provisions from the articles on beneficiaries had been moved there until such time as they could be considered in the context of that article. Also, during plenary, the African Group had expressed a preference for Alt 2 with the insertion of “or designate” after “establish.” Alt 1 was the first formulation of the prior article, along with Alt 1 as Option 2. New Article 7 was prior Article 5. Although it had not been formally discussed in detail during plenary or informals, a new Alt 1 had been added in plenary by the LMCs and a new Alt 2 had been added during plenary by the Delegation of Chile. The Facilitators had endeavored to simplify and clarify the text while ensuring Member States’ positions were reflected therein. They looked forward to discussion on those revisions and to making further progress and closing gaps.

160. The Chair thanked the Facilitators and reiterated that it was work-in-progress. He invited participants to look at the document in view of discussions in plenary later. He said errors and omissions could be signaled to the Facilitators directly.

161. [Note from the Secretariat: All speakers thanked the Facilitators for their work.] The Delegation of Turkey, speaking on behalf of Group B, noted that there were brackets and alternatives that needed to be further considered. The aim should be to reach a common

understanding and it was looking forward to further discussions on the substantive issues to see how the proposed approaches would work in practice. It said that individual Member States might take the floor later regarding specific topics.

162. The Delegation of Colombia, speaking on behalf of GRULAC, expressed its appreciation to the Government of Australia for its contribution to the Voluntary Fund, which would make it possible to continue the necessary participation of IPLCs in the IGC's discussions. On Rev. 1, the current definition of TCEs was not satisfactory. It called for the removal of any brackets applied to the term "traditional," which was inherent to the object of the instrument. Similarly, it wished to delete the brackets in all references to the word "peoples." It was appropriate to include in the definition of TCEs the elements described in Alt 2(a) and 2(b) of Article 3. It undertook to continue working on the content of Article 4, on the basis of the alternatives put forward. Regarding Article 5, it acknowledged the efforts of the Facilitators in ordering the different alternatives. However, it was not possible at that juncture to indicate its preference for what had been proposed and it remained open to assessing proposals yet to be presented. Those were preliminary considerations; it would continue to express its preferences during the rest of the week.

163. The Delegation of Indonesia, speaking on behalf of the LMCs, said Rev. 1 reflected all the positions in a clear and easy-to-understand manner. It was looking forward to making comments and further proposals on each article.

164. The Delegation of Senegal, speaking on behalf of the African Group, said that the text was clearer and more structured. It welcomed Rev. 1, but reserved its right to make comments as the discussion proceeded.

165. The Delegation of Georgia, speaking on behalf of CEBS, said it would make statements article by article.

166. The Delegation of China said Rev. 1 could help the IGC engage in substantive discussions and narrow gaps. Rev. 1 reflected the general positions of Member States and could help them further express their views. The consultations on TCEs would move forward.

167. The Chair opened Rev. 1 for detailed comments, article by article.

168. Ms. Bagley, speaking on behalf of the Facilitators, said that in paragraph 7 of the Principles/Preamble/Introduction, the Facilitators had replaced the word "preservation" with "protection" at the request of a Member State in informals.

169. The Chair opened the floor for comments on Principles/Preamble/Introduction.

170. The Delegation of the Islamic Republic of Iran said that, generally, the reference to beneficiaries should be consistent throughout the articles. For example, "nations," which no longer figured in the article on beneficiaries, still remained in the Principles/Preamble/Introduction. It requested a cleanup according to the progress made in the articles.

171. The Delegation of the EU, speaking on behalf of the EU and its Member States, asked for the reinstatement of the word "preservation" in addition to the current wording. It reserved its position on the rest of the principles and might make comments in plenary or informals.

172. The Delegation of Indonesia wanted to have a discussion on all articles before coming back to the Principles/Preamble/Introduction section.

173. The Chair opened the discussion on Article 1.

174. Ms. Paiva, speaking on behalf of the facilitators, said that in Alt 2, they had removed the word “and” at the end of paragraph (a). The only “and” that made the four literals inclusive was under paragraph (c). In Alt 3, they had removed the brackets around “appropriate use” and “protection.” In the work-in-progress document, in Alt 1, paragraph 1(a), they had removed “adaptations thereof” at the end of that phrase because it was included in the TCE definition.

175. The Delegation of Canada reserved its right to come back on the details of the proposals made, as more work was needed in order to understand their concrete implications and collect data, drawn notably from national experiences, to understand their practical impact. On the objectives, it still wished to identify the clear and precise implications of the way that the underlying concepts would be implemented in the context of intellectual property rights. Those had only been tackled very briefly. It noted that the informals had been promising on that topic.

176. The Delegation of the Philippines indicated that its comment was relevant to other articles as well. In Rev. 1, the term “prior informed consent” was used in Article 1 but also elsewhere in the text. It proposed that the term “free” be added before the phrase “prior informed consent.” That was consistent with the mandate of the IGC. The phrase “free, prior and informed consent” was consistent with the international principles and standards, recognizing the freedom and the right of indigenous peoples to self-determination, particularly as embodied in UNDRIP. The use of that phrase recognized the primacy of those principles as a vital component of the TCE Draft Articles. In the Philippines, the use of that phrase meant that the consent of indigenous peoples had to be with their full knowledge and that their consent had to be free of any deceit or fraud. The use of that phrase also had historical content, addressing the vulnerabilities of indigenous peoples.

177. The Delegation of the EU, speaking on behalf of the EU and its Member States, did not support Alt 1, and was in favor of Alt 2 as a basis for further work. Alt 3 required some further reflection, and it was looking forward to the informals to hear more about that option. In relation to Alt 2, it wished to bracket subparagraph (a). In subparagraph (c), it wished to include “to promote” at the start of the sentence so that it read, “to promote/facilitate.” In subparagraph (d), it wished to add “to secure” at the start of the sentence, as used in the previous version of the document.

178. The representative of Tupaj Amaru proposed using the definition from the 1982 WIPO-UNESCO Model Provisions. He wished to ensure that throughout the international instrument, the aim of protecting TCEs and expressions of folklore would be attained.

179. The Chair noted there was no Member State support for the proposal made by the representative of Tupaj Amaru.

180. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 1. It noted the statement by the Delegation of Canada and looked forward to more discussions thereon.

181. The Delegation of Georgia, speaking on behalf of CEBS, supported Alt 2 as the basis for the work, but was open to discussions on Alt 3.

182. The Delegation of Switzerland thanked the Facilitators for including Alt 3 into the text of the policy objectives. That alternative had several advantages over the others. Besides being more positive and simpler, it provided more flexibility to elaborate the instrument without prejudging the nature and scope of any provisions. Moreover, Alt 3 would also account for the fact that some IP tools already existed, which could provide a certain degree of protection for certain types of TCEs. Existing tools should be used as far as possible and where appropriate for the protection of TCEs. It took note of the view expressed by many delegations, and in particular by the indigenous representatives, that had stated that an important objective of the

instrument would be to prevent misappropriation of TCEs. While that was a very sensitive issue and there was a need to avoid misappropriation of TCEs, it would be difficult, if not impossible, to reach a common understanding at the international level on that issue. Experiences with the negotiations of the Nagoya Protocol as well as the different terms related to misappropriation that were included in the various alternatives, such as “misuse,” “unlawful appropriation,” “offensive and derogatory uses,” “control of the use beyond the traditional and customary context,” “false or misleading uses,” etc., reflected its concerns. The text in Alt 3 could certainly be further improved, once further progress was made on the other provisions of the instrument. It would also be important to discuss what was considered to be an appropriate use of TCEs within the IP system.

183. The Delegation of Senegal, speaking on behalf of the African Group, was in favor of Alt 1.

184. The Delegation of the USA strongly supported Alt 2. It agreed with the intervention by the Delegation of the EU. The bracketing of paragraph (a) would have the additional benefit of focusing attention on the IP-related elements in paragraphs (b), (c) and (d), which was one of the tasks of the IGC. It supported the other changes recommended by the Delegation of the EU, as they made the text much clearer. It was important to attach a rationale to each particular chosen preference. The important concepts of misappropriation and misuse had been discussed in prior sessions of the IGC, but there was still no consensus on the precise meanings of those terms in the context of international instrument(s) for the safeguarding of TCEs, nor was there a common understanding of the national, regional or international policies that would be served by providing protection against the misappropriation and misuse of TCEs, including national economic, social, cultural policies and information policies, along with the countervailing national, regional and international policies such as the preservation and development of the common heritage of humankind, to foster human innovation and creativity and the fundamental values of freedom of expression, in many countries. Until such a common understanding was reached on those core issues, those terms would continue to present challenges to advancing the IGC’s work.

185. 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 1.

186. Ms. Paiva, speaking on behalf of the Facilitators, said they had numbered the provision as Article 2. There were several changes in the definition of TCEs. They had moved “other” before “creative, spiritual.” So the phrase read: “[Traditional] cultural expression means any form of [artistic and literary], [*other* creative, and spiritual,] expression, tangible or intangible...” The idea behind that change was that the previous version could have meant that all spiritual expressions were creative. The word “other” was in italics because it was a suggestion by the Facilitators that was proposed for consideration by the IGC. They had also included, at the end of that definition, an additional phrase taken from the new Article 3 that read: “Traditional cultural expressions [are/may be] dynamic and evolving.” That addition had been supported by some delegations in plenary.

187. The Chair opened Article 2 for comment. He clarified that the Facilitators’ work was identified in italics where it had not received Member State support. If there was no support, it would be deleted.

188. The Delegation of Indonesia, speaking on behalf of the LMCs, proposed an alternative to polish off the definition of TCEs, which read: “Traditional cultural expressions are comprised of various dynamic forms in which traditional cultures are created, expressed or manifested and are integral to the collective cultural and social identities of indigenous peoples, local communities and other beneficiaries.”

189. The Delegation of Brazil associated itself with the general comments made by the Delegation of Colombia on behalf of GRULAC. It expressed its appreciation to the Delegation of Australia for the initiative of supporting the Voluntary Fund. It hoped it would soon be in a position to follow that example. On Article 2, it was not in favor of adding a definition of “public domain” in the instrument. It was not in the mandate of the IGC to do so and it would not contribute to advancing the discussions on TCEs. Even in the TRIPS Agreement, “public domain” was barely mentioned and was not defined.

190. The Delegation of Colombia supported the definition of TCEs proposed by the Delegation of Indonesia on behalf of the LMCs and supported the suggestion by the Delegation of Brazil not to include a definition of “public domain.”

191. The Delegation of the EU, speaking on behalf of the EU and its Member States, noted the changes made in the definition of TCEs and said there was room for further improvement. The definition of TCEs should be aligned with the language used in Article 3, Alt 2, subparagraph (e) and the reference to “artistic, literary and creative.” It did not support that adaptations be covered in the instrument. It reserved its position on the rest of the terms as, for instance, it had some concerns in relation to “use,” which contained a circular definition. It wished to retain the definition of “public domain.”

192. The Delegation of Senegal, speaking on behalf of the African Group, supported the proposal made by the Delegation of Indonesia on behalf of the LMCs. It was not in favor of having a definition of “public domain.”

193. The Delegation of the Islamic Republic of Iran supported the definition of TCEs proposed by the Delegation of Indonesia on behalf of the LMCs. It did not support the inclusion of the term “public domain,” as there was no internationally agreed definition in any instrument. It did not want to engage in a lengthy and useless discussion on that topic.

194. The Delegation of Thailand supported the new definition of TCEs proposed by the Delegation of Indonesia on behalf of the LMCs. It was concise and better than the definition in Rev. 1. It could not accept a definition of “public domain,” as it did not appear in any IP instrument.

195. The Delegation of South Africa supported the statements made by the Delegations of Indonesia on behalf of the LMCs and Senegal on behalf of the African Group regarding the new definition. It also supported the comments in relation to the public domain. It wondered why the term “traditional” was in brackets, when historically there had been no questioning of that term as part of the title or the subject matter, or even in the IGC mandate. It wondered if it was a mistake in transcription.

196. The Delegation of Egypt was surprised by the addition of a definition of the “public domain.” The matter should be left to national legislation and practice. As for the definition of TCEs, the word “traditional” should not be in brackets. It supported the position expressed by the Delegation of Indonesia on behalf of the LMCs.

197. The Delegation of Chile supported the position expressed by the Delegation of Colombia on behalf of GRULAC and was interested in the new proposal by the LMCs, which contained all the characteristics of TCEs. The concepts of “artistic,” “literary,” “creative” and “spiritual” needed to be removed from the definition, just like the concept of public domain.

198. The Delegation of the USA noted that, even after all those years and at that late stage in the discussion, there was no consensus on the important definition of TCEs. It had been lost in the memory of the institution why even an essential element of that definition remained in brackets. It was always hopeful and would study new submissions very closely. Within that

contested definition, in agreement with the Delegation of the EU, it noted that the phrase “adaptations” was inappropriate, because they were outside of the scope of the treaty. It wished retaining the definition of public domain in the text.

199. The Chair said that at some stage a Member State had requested the brackets around “traditional” and they could not be removed.

200. The representative of CISA was in agreement with “creative” and “spiritual” being removed because indigenous peoples had other options around cultural expressions.

201. The representative of Tebtebba, speaking on behalf of the Indigenous Caucus, thanked the Delegation of Indonesia on behalf of the LMCs for the definition of TCEs. It was interesting and very concise and he looked forward to further discussions on that. He had no idea that the public domain was in danger and needed protection. He said the IGC only defined terms that would be found repeatedly throughout the text, and “public domain” was not found in other parts of the text. On “publicly available,” he said that a lot of TCEs, which had become publicly available, had become so without the consent of their holders. So it did not necessarily follow that when a TCE was publicly available, it was free to be used by everyone.

202. The Delegation of Ghana supported the definition proposed by the Delegation of Indonesia on behalf of the LMCs, which was concise, flexible and indeed pertinent.

203. The Delegation of Malaysia supported of the definition proposed by the Delegation of Indonesia on behalf of the LMCs, which was clear, concise and comprehensively caught all TCEs.

204. The Delegation of Nigeria supported the statements by the Delegations of Senegal on behalf of the African Group and Indonesia on behalf of the LMCs on the definition of TCEs. It was simpler, clearer and more in consonance with the meaning and character of TCEs. It supported the call to delete “public domain” from the text.

205. The Delegation of Peru supported the definition proposed by the Delegation of Indonesia on behalf of the LMCs and suggested an alternative on the issue of the public domain, which would be, instead of defining it, to simply state: “as defined by national law.”

206. The representative of Tupaj Amaru said that TCEs were not products or merchandise. He asked for those terms to be removed.

207. The Chair noted that there was no support for the proposal by the representative of Tupaj Amaru.

208. The Delegation of Paraguay supported the clarifications by the Delegation of Colombia on behalf of GRULAC. It was concerned that the word “traditional” was in brackets. The Member State that had requested those brackets should justify that request. The brackets could be removed if no Member State wanted to keep them.

209. Ms. Paiva, speaking on behalf of the Facilitators, said that new Article 3 was previously Article 1. The first important change was on the title, which had two options: “Eligibility Criteria for Protection and Safeguarding” and “Subject Matter of the Instrument.” They had added a new Alt 1, as requested by the Delegation of Indonesia on behalf of the LMCs, in line with the TK text. In Alt 2, they had removed paragraph (f) from the initial version (that was the phrase that characterized TCEs as dynamic and evolving) and added that to the definition of TCEs. They had made the five elements cumulative, getting rid of “and/or” at the end of the different literals and retained “and” at the end of paragraph (d). They had added in paragraph (d) the reference to a period of five generations. In paragraph (e), they had clarified that TCEs should

be the result of creative and literary or artistic activity, as requested by one proponent. They had also clarified the paragraph to make it more legible. Finally, they had added Alt 3 at the request of the Delegation of Chile based on the TK text and added the reference to “dynamic and evolving.”

210. The Delegation of Indonesia, speaking on behalf of LMCs, preferred Alt 1.

211. The Delegation of Ghana had objections to the use of the word “safeguarding” in the context of the instrument. On further research, it had emerged that the IGC had previously taken a position on that matter, in the draft gap analysis, document WIPO/GRTKF/IC/13/4(B) Rev., specifically paragraphs 22 and 23. Based on the decision taken in the context of the IGC’s work, one should use the term “protection” and not “safeguarding,” “preservation” or “promotion.” Paragraph 22 read: “In line with previous discussions within the Committee, the word “protection” in the decision of the Committee taken at its twelfth session in February 2008 is understood to mean protection in an IP sense (sometimes referred to as “legal protection”), i.e., protection of human intellectual creativity and innovation against unauthorized use.” Paragraph 23 read: “IP “protection” in this sense is distinguishable from the “safeguarding”, “preservation” and “promotion” of cultural heritage, which refer generally to the identification, documentation, transmission and revitalization of tangible and intangible cultural heritage in order to ensure its maintenance or viability. While instruments and programs for the preservation and promotion of TCEs as such are valuable and complement the protection of TCEs, consistent with the February 2008 decision of the Committee the focus of this analysis is on the legal protection of TCEs.” It rested its case with that paragraph. On the basis of that decision taken by the IGC in 2008, the IGC should be talking about protection of TCEs rather than safeguarding.

212. The Delegation of Senegal, speaking on behalf of the African Group, expressed its preference for Alt 1, as well as the definition proposed by the LMCs. It preferred the title that did not refer to the criteria for protection and preferred “protection” over “safeguarding.”

213. The Delegation of Georgia, speaking on behalf of CEBS, supported Alt 2 as the basis for further work, as eligibility criteria provided legal certainty.

214. The Delegation of the Islamic Republic of Iran supported Alt 1. Concerning the title, “Subject Matter of the Instrument” was most suitable and appropriate.

215. The Delegation of Ecuador said that those alternatives were closely connected with the definition of TCEs. It did not agree with paragraph (b) and the criteria in Alt 2. Those alternatives should be drafted according to the new definition of TCEs submitted by the LMCs.

216. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that during plenary and informals, discussions had been held in relation to the concepts of safeguarding and protection, with no agreement. Therefore, it proposed that throughout the document, the terminology “protection/safeguarding” be used consistently in order to encompass all views expressed. It supported Alt 2 as a basis for further work. It also supported to have the eligibility criteria in Alt 2, as it should be clear which TCEs could potentially be covered. In Alt 2 subparagraph (b), it supported “cultural and social identity.”

217. The Delegation of Egypt said that when discussing a legal instrument, one should use legal terms. In connection to TK, TCEs and IP, “protection” was used throughout all IP instruments and guaranteed, therefore, the protection of everything to do with IP, whereas safeguarding and preservation were used for archives of TCEs. It supported the statement made by the Delegation of Indonesia on behalf of the LMCs. It preferred Alt 1.

218. The Delegation of Peru said there were at least two ways of drafting that article. The first, as proposed by the Delegation of Colombia on behalf of GRULAC, was for paragraphs (a), (b) and (c) of Alt 2 to go to Article 2. The second was the suggestion by the Delegation of Indonesia on behalf of the LMCs. In any case, it was inconsistent in Alt 2 to maintain paragraph (e) on protecting individual rights when the instrument should, in fact, be protecting the collective rights of IPLCs. In paragraph (d) the expression “not less than 50 years” should be in brackets, as there was no agreement thereon.

219. The representative of Tebtebba, speaking on behalf of the Indigenous Caucus, objected to the use of “safeguarding” in the whole text, as it was not within the mandate of the IGC, but dealt with in the 2003 UNESCO Convention, which had 172 parties, i.e. almost all IGC members. He knew what was behind the proposal to use “safeguarding.” He could not see any other result from the use of that term than further, more widespread misappropriation of TCEs. He could work with Alt 1, provided that a robust definition of TCEs be worked out. He wished to keep Alt 3 in the text in case he was not able to agree on an appropriate and robust definition of TCEs.

220. The representative of INBRAPI echoed the statement of the representative of Tebtebba on behalf of the Indigenous Caucus and stressed the importance of being clear about the concept of TCEs. She said the Delegation of Paraguay had requested that the plenary be consulted on deleting the brackets around “traditional” to be clear and consistent throughout the text. She wondered who was insisting on maintaining those brackets. Since “traditional” was part of the mandate and name of the IGC, she could not understand how it could be in brackets. She supported the statement by the Delegation of Peru about the protection of IPLC’s collective rights, in Alt 2 paragraph (e). In paragraph (d), she stressed the danger of protecting TCEs in terms of time limits. She would be flexible on supporting Alt 1 or Alt 3, with a view to helping the discussions progress. As regards protection or safeguarding, the term “protection” was part of the IP system and provided better legal certainty.

221. The Chair noted that there was no Member State support for the proposals by the representatives of Tebtebba and INBRAPI.

222. The Delegation of Colombia supported the statement by the Delegation of the Islamic Republic of Iran regarding the title, which should read “Subject Matter of the Instrument.” It also supported the statement by the Delegation of Ecuador about paragraphs (d) and (e) of Alt 2. It supported Alt 1 and 3.

223. The Delegation of the USA supported the recommendation by the Delegation of the EU to change the title of the article for the reasons stated in its intervention. It supported Alt 2. In a prior intervention, it had inadvertently used the term “treaty” rather than “instrument.” It was simply a slip of tongue.

224. The representative Tupaj Amaru said there was some sabotage going on. In the UNESCO, WIPO and other UN instruments, the word “protection” had always been used. The IGC was discussing legal protection within an international instrument. He proposed a heading that would read: “Legal Protection of TCEs against any Misuse or Illicit Use as described in this Article.” The words “the unique product of,” in Alt 2 paragraph (b) should be deleted, as it had not been proposed in plenary. The collective wisdom of indigenous peoples was not something that could be bought and sold. He wanted to delete the reference to the 50 years, because indigenous knowledge and wisdom should remain forever, with no limits in time and space. He proposed deleting the term “eligibility” criteria because he wondered who would be choosing those criteria for TCEs. He preferred criteria for admissibility, not eligibility.

225. The Chair noted that there was no Member State support for the proposal by the representative of Tupaj Amaru.

226. The Delegation of Malaysia supported “Subject Matter of Protection” for the title, but, to be flexible, it would be open to the title “Subject Matter of the Instrument.” It supported Alt 1 with the proposal be the Delegation of Indonesia on behalf of the LMCs on the new definition of TCEs.

227. The Delegation of Paraguay supported the intervention by the representative of INBRAPI about deleting the brackets around “traditional.” It recalled that in the opening statement of the Delegation of Colombia on behalf of GRULAC, the request had already been made to delete that set of brackets.

228. The Delegation of Brazil supported Alt 1, depending on the approval of the definition put forward by the Delegation of Indonesia on behalf of the LMCs. Otherwise, it would work with Alt 3. It reiterated its concern with paragraphs (d) and (e) of Alt 2, as mentioned notably by the Delegation of Ecuador.

229. Ms. Paiva, speaking on behalf of the Facilitators, said that new Article 4 was old Article 2 and had been titled “Beneficiaries of Protection and Safeguarding,” based on the discussions. In general terms, they had adopted crosscutting elements from the TK text, as requested in plenary. They had included Alt 1, which was very neat, directly from the TK text, with the necessary changes to be consistent with the TCE context. They had added Alt 2, as suggested by the Delegation of China, with some alterations, specifically, having a special reference to other beneficiaries considered under national law. Alt 3 had been proposed by the Delegation of Brazil and was broader in the sense that one could define other beneficiaries. Paragraphs, 2.2, 2.3 and 2.4, relating to the role of states or entities to administer the rights, had been moved to Article 6, which would be revised later.

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

231. The Delegation of China referred to its earlier statement being reflected in Alt 2 and clarified that its national position concerned a lack on indigenous peoples only, and not a lack of local communities. It asked to remove “and local communities” from Alt 2 to clearly reflect its situation. The instrument should have universal application and reflect the concerns of indigenous people. It had proposed that version so as to include other notions, such as nations. That was very important. It noted Alt 3 as proposed by the Delegation Brazil, which it could support, because it had the same objective to reach the universal application of the instrument. Considering there was a rather big difference between the Chinese and English versions, it reserved its rights to make other modifications on the text. Although TCEs and TK had some common elements, there were also some differences, so one should not necessarily apply the TK text into the TCE text.

232. The Delegation of Senegal, speaking on behalf of the African Group, was in favor of Alt 3.

233. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 3. With regard to Alt 2, it was looking forward to discussing it in a constructive spirit to see whether one could merge all the ideas and concerns with Alt 3.

234. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that throughout the document, one should consistently use the terminology “protection/safeguarding.” It did not support nations/states as beneficiaries or any language that potentially opened the instrument to nations or states, such as the language contained in Alt 2 and Alt 3. It supported that ILCs who created, expressed, maintained, used and developed TCEs were the beneficiaries, and that the eligibility criteria be included in Article 3. It recalled its position in relation to the terminology, and requested that “peoples” be kept in brackets for constitutional reasons in EU Member States.

235. The Delegation of the Islamic Republic of Iran did not support the use of the word “safeguarding” in the title. It supported Alt 3, although Alt 2 and 3 could be merged together to deal with the concerns of all members.

236. The Delegation of South Africa supported the inputs by the Delegations of Indonesia on behalf of the LMCs and of Senegal of behalf of the African Group. It referred to the plea made by the Delegation of Ghana concerning the use of historical records of WIPO that captured the proceedings and agreements deliberated on. It requested the Chair to refer that matter to the Legal Counsel of WIPO, because it was of significant importance, otherwise the precedent that it would set would go literally against the decision that had been taken in the past. It requested legal advice on the standing of that decision and the way forward on the use of the words “protection” and “safeguarding.”

237. The Chair explained that the paragraphs quoted from the draft gap analysis by the Delegation of Ghana had been in the gap analysis for purposes of discussion by the IGC. The whole document had been a draft for discussion by the IGC, as requested by the IGC at its 12th session in 2008. The gap analysis tabled for discussion at the 13th session of the IGC in 2009 had simply been noted by the IGC, and no decision had been taken thereon. As far as the Chair was aware, the IGC had not asked for the document to be re-tabled or discussed again at a future session.

238. The Delegation of Brazil was grateful for the expressions of support for Alt 3. Originally, it had intended for a comma to be before “as may be determined under national law.” It was aware of some delegations’ concern about the open-ended nature of the definition of beneficiaries and it was flexible and open to using some sort of qualifier, like “tradition-carrying.”

239. The Delegation of Peru said that the conversation was moving from three to two alternatives, Alt 1 and 3. It asked the Delegation of China whether it could go with Alt 3.

240. The Delegation of China said it was flexible and could see a merge between Alt 2 and 3.

241. The Delegation of Georgia, speaking on behalf of CEBS, reiterated its position that beneficiaries were ILCs.

242. The Delegation of Egypt wished to delete the reference to “safeguarding” everywhere in the text, based on the considerations expressed by the Delegations of Ghana and South Africa. It was possible to merge Alt 2 and Alt 3 into one alternative.

243. The representative of Tupaj Amaru understood perfectly the concern of the Delegation of China. It was an ancient civilization that had given a lot to the world: spiritual values, cultural values and traditions. China was a greatly respected country, and therefore their claims about IPLCs were just and valid. There were countries that did not have indigenous peoples but had local communities. He said that a number of delegations had asked for the suppression of the word “safeguarding.” “Protection” was a legal word valid in all instruments. He presented the following proposal: “For the purposes of the current international instrument, the beneficiaries shall be the holders, rightsholders and creators, guardians, possessors of TCEs who are the indigenous peoples and local communities and their descendants.”

244. The Chair noted that there was no Member State support for the proposal by the representative of Tupaj Amaru.

245. The Delegation of Nigeria supported Alt 3 and was open to reconciling Alt 3 and 2. With regard to the issue of “protection” and “safeguarding,” it took cognizance of the interventions by

the Delegations of Ghana and South Africa and the Chair's response. It called attention to the mandate of the IGC with regard to the protection of TCEs and the work of UNESCO on safeguarding intangible cultural heritage. The idea of bringing in safeguarding at that very stage in the negotiation was diversionary and worrisome to a significant number of IGC members. It asked the Chair to take steps to confirm, after conferring with the Secretariat, why the IGC should proceed with adding "safeguarding" when it was supposed to be closing the gaps. With regard to the gap analysis, it recognized it was a draft document, but it pointed to some sense of history in the IGC negotiations.

246. The Chair recalled that he discussed that particular issue in his Information Note. He had also raised it in informals and in plenary. He was in the hands of Member States about how they interpreted the IGC's mandate. Every Member State had a right to its position.

247. The Delegation of the USA supported the intervention of the Delegation of the EU with respect to the title of Article 4. It preferred Alt 1. There remained many unresolved issues with respect to beneficiaries and it looked forward to the discussion under Article 4 or as it might come up in other articles as well.

248. The Vice-Chair invited the Facilitators to introduce Article 5.

249. Ms. Bagley, speaking on behalf of the Facilitators, said Article 5 had several significant changes. In the title, "criteria for eligibility" had been deleted, leaving "Scope of Protection/Safeguarding" which was revised to "Scope of Protection and Safeguarding." Prior Option 2 was new Alt 1 and was otherwise unchanged. It had two subparagraphs, 5.1 and 5.2. Paragraph 5.2 provided a measures-based approach to protection with no minimum standards but contained a ceiling provision excluding TCEs that were widely known outside of the community from beneficiaries of protection. She encouraged members supporting that proposal to provide further refinements to remove some brackets. Alt 2 was prior Option 1. During informals, a group of demanders had provided some text for Facilitators to work on to clarify and simplify. They had endeavored to do so by removing a number of brackets and what seemed to be rewording and hopefully increased coherence. It was not an ideal formulation yet. The Facilitators were pleased that that group of demanders might be putting forward a revised text to address that provision. Alt 2 presented a tiered approach to protection with most protections, economic and moral, in paragraph 5.1 for secret TCEs and a similar but reduced suite of economic and moral rights in paragraph 5.2 for subject matter that was held, maintained, used and/or developed by beneficiaries and was publically available but not widely known, sacred or secret. In paragraph 5.3, language had been introduced that employed a best endeavors approach to the protection of subject matter not protected under the first two paragraphs and, as requested in informals, the alternatives in 5.1(b)(ii) and 5.2(b) were deleted and primary text was retained and modified. Alt 3 was a combination of prior Options 1 and 2, as some Member State had indicated in informals the possibility of exploring both options. Both of those options were in Alt 3 as alternative positions. Option 1 had a few changes from prior Option 1, mainly the deletion of "subject matter" and "TCEs" leaving "protected TCEs" as a relevant focus of protection. They had also deleted from that option the terms "offensive" and "derogatory" and replaced "unauthorized" with "unlawful" in 5.1(a)(ii). That option also retained the alternatives to subparagraph 5.1(b)(ii) and the alternative to subparagraph (b) of 5.2 with the insertion of "use best efforts to" before "enter into an agreement" and deleting from the same alternatives "with prior informed consent or approval and involvement." Option 2 of Alt 3 was very similar to prior Option 2, which was now Alt 1, but it had the addition of paragraph 5.3 that excluded from protection TCEs when they were used for certain purposes, including archival purposes, and when they served as the inspiration or basis for other works.

250. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 2. It had been trying to listen and to keep everyone's concerns in mind and, showing its constructive spirit and flexibility to facilitate the discussion within the IGC on the protection of the TCEs, it proposed

new language under Scope of Protection. It had simplified further its proposal and come up with a new formulation to replace Alt 2: “5.1. Member States should seek to protect the economic and moral rights and interest of beneficiaries in secret and/or sacred traditional cultural expressions as defined in this instrument as appropriate and in accordance with national laws and where applicable customary laws and in consultation with the beneficiaries.

5.2. Beneficiaries shall enjoy the exclusive rights of authorizing the use of their traditional cultural expressions to third parties on such terms as maybe under national laws and, where applicable, customer laws. 5.3. Independently of the economic rights and even the transfer of those rights, beneficiaries shall, as regard their traditional cultural expressions, have the right to be identified as the owners of those rights and object to any distortion, mutilation or other modification of their traditional cultural expressions that would be prejudicial to the integrity of their traditional cultural expressions.” It proposed that the non-derogation provision should read: “Nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples or local communities have now or acquire in the future.” In a spirit of constructiveness and flexibility to reach a common understanding, it invited all other Member States to show their constructiveness and flexibility.

251. The Delegation of Senegal, speaking on behalf of the African Group, said the initial draft text was too long. It supported the proposal made by the Delegation of Indonesia on behalf of the LMCs. It was simpler but more inclusive and took into account all of the parameters and the concerns expressed during the informals.

252. The Delegation of the Islamic Republic of Iran reiterated its concern about the inclusion of “safeguarding” in the title, which it did not support in the title of any article. It supported the language proposed by the Delegation of Indonesia on behalf of the LMCs on Scope of Protection, as it could deal with the concerns of all Member States. The current text was too long. It hoped that Rev. 2 would be cleaner and shorter.

253. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that throughout the document the terminology “protection/safeguarding” should be consistently used. It supported Alt 1 and was interested in exploring the newly inserted Alt 3, Option 2. It had concerns in relation to the option proposed in Alt 2 that inserted a new concept of exclusive rights for each tier, which had not been discussed yet. The wide range of alternatives and options within that article reminded of the wide range of views on the table.

254. The Delegation of Colombia supported the new proposal by the Delegation of Indonesia on behalf of the LMCs, although with reservation that some comments might be required, and its replacement of Alt 2.

255. The representative Tebtebba, speaking on behalf of the Indigenous Caucus, said he had listened very carefully to the LMCs’ proposal and found that it was consistent with his views on the instrument. It was concise and simple, and it addressed his concerns in relation to the previous text, which was very wordy. It streamlined the provision very well and allowed the details to be developed at the national level with the full and effective participation of indigenous peoples. It strongly supported the text and believed that it was a good starting point for further discussions in the informals.

256. The Delegation of Thailand said that the article was still very long and not very clear. It supported the new language proposed by the Delegation of Indonesia on behalf of the LMCs. It was happy that the Indigenous Caucus was supporting that. It supported the article on non-derogation to be added, as proposed by the Delegation of Indonesia on behalf of the LMCs.

257. The representative of INBRAPI said the scope was the heart of the future instrument. She strongly supported the proposal made by the Delegation of Indonesia on behalf of the LMCs, which was seeking to take into account the various concerns and alternatives. She reserved

the right, in the next IGC or in the informals, to add some ideas to ensure that the rights and concerns of indigenous peoples were covered.

258. The Delegation of Georgia, speaking on behalf of CEBS, supported Alt 1 but noted with interest the ongoing discussions on the tiered approach. It would be interested in having an evidence-based discussion and hearing more national and local experiences.

259. The Delegation of Canada, in relation to Articles 2 and 5, stressed the importance of agreeing on the terms relating to the tiered approach to see whether it would be the most appropriate one. The definitions and provisions proposed were not a very practical guide regarding the objectives. A discussion based on precise examples drawn from reality underlining those basic concepts could lead to a community of views of what could be pursued by the instrument. Discussion on the meaning to be given to such concepts as “sacred, secret, publicly available, widely available,” or “disclosure, false, misleading, distort, mutilate, offensive, derogatory, diminishes cultural significance, integrity” would be useful.

260. The Delegation of Indonesia seconded the statement made by the Delegation of Indonesia on behalf of the LMCs. It supported the new proposal to replace Alt 2 in order to simplify the text and make it easier to understand the essence of the scope of protection as the heart of the instrument. The proposal provided legal certainty in the protection of TCEs and reflected its position that the instrument should provide minimum, international standards of protection on TCEs and put a legal obligation to the Member States of WIPO, while also providing national flexibility to implement the instrument. The discussion on protection and safeguarding was not appropriate because it was clear that many WIPO Member States stated that geographical indications could also protect TCEs. “Safeguarding” was not an appropriate term. It was clear the right term was “protection.”

261. The Delegation of South Africa thanked the Delegation of Indonesia on behalf of the LMCs for its proposal and thanked the Delegation of Senegal on behalf of the African Group for providing leadership and endorsing that, and the many groups that had offered support, from Asia to Africa to Latin America, across the globe. It hoped to get some support from the north. It was most pleasing that the indigenous peoples were also subscribing to that. The LMC proposal was actually based on the treaties signed at WIPO. So it could be argued that that fell outside the mandate and scope of the work of the IGC. For instance, some aspects were based on the Berne Convention, Article 6*bis*, the Beijing Treaty, Articles 5 and 6, and the WPPT as a basis of some of the principles and rationales. Keeping within the tradition of WIPO, it was an IP-based process and it was not about safeguarding. Regarding the issue of safeguarding, to further enhance clarity around that issue, it proposed creating separate alternatives with “protection” and “safeguarding” clearly distinguished throughout the text. That way, the two-track process became clearer as to those who chose the “safeguard” and those who chose the “protection” approach. One needed to create clarity around the positions. A majority of countries supported “protection” and a smaller group of countries preferred “safeguarding.”

262. The Delegation of Egypt said it had been requesting the removal of the term “safeguarding” because it did not pertain to the operation of WIPO. It was rather under the purview of UNESCO, whose conventions used the term “safeguarding,” because it was more about archiving. In keeping with the mandate, the text had to use “protection” not “safeguarding.” It was not a matter of being pro or con, but a matter of being legally viable and legally justified. If one was to apply the legal text appropriately, one needed to do away with “safeguarding.” The main focus was on rights, not interests, so it requested replacing the term “interests” with “rights.” It fully seconded the proposal by the Delegation of Indonesia on behalf of the LMCs.

263. The Delegation of Peru said there was consensus that the instrument was being designed for the protection of IPLCs. The merit of the proposal by the Delegation of Indonesia, on behalf of the LMCs, which it supported, was to precisely interpret that.

264. The representative of CAPAJ said it was a great honor to be able to speak with the Indigenous Caucus and the LMCs. That strengthened his initiative of getting together with all the other groups. He stressed the dynamic nature of TCEs, which were in a constant state of dynamism, as the Delegation of Peru had said. Indigenous peoples were in a constant state of creation, and therefore needed legal protection. He was satisfied that many of the ideas discussed informally had been taken on by Member States. He committed himself to continuing to work in an open way to achieve a consensus so that very soon an instrument could be put to the consideration of the General Assembly.

265. The Delegation of the USA supported the intervention by the Delegation of the EU with respect to the title of Article 5. It also agreed with the statement made by the Delegation of Georgia on behalf of CEBS, that more discussion would be useful with respect to the tiered approach, which contained many valuable concepts. It took note of the new proposal put forward by the Delegation of Indonesia on behalf of the LMCs and looked forward to studying the language closely. It agreed with the Delegation of Canada that more discussion and clarification of the vague terms in the article, particularly those that related to the tiered approach, including “widely diffused” and “widely known” among others, needed to be undertaken to reach clarity on those terms.

266. The Delegation of Malaysia said that Article 5 was the core of the instrument aimed at protecting TCEs. The Article could be better shaped to give more clarity and correctly capture the essence of the instrument. The simple, concise and precise language of the proposal by the Delegation of Indonesia on behalf of the LMCs endeavored to do just that. It saw value in adding the non-derogation provision.

267. The Delegation of Nigeria joined the African Group and other delegations that supported the proposal by the Delegation of Indonesia on behalf of the LMCs. It appreciated the concise nature of the proposed text, its inclusiveness and inherent flexibility as a progressive step. The proposed text did not abandon the tiered approach but had nuanced it in the context of TCEs. It called on other members to seriously take a look at the proposed text. Part of the mandate was to take into consideration what had been done in other fora relevant to TCEs and, as the Delegation of South Africa had eloquently pointed out, the proposed text was taken partly from the WPPT, the Beijing Treaty and other relevant international treaties. It enjoined every Member State to take serious consideration of that proposed text because it gave significant space for forging a degree of correlation that had already been endorsed across regional blocks.

268. The Delegation of Indonesia, speaking on behalf of the LMCs, extended its appreciation for the broad support for its proposal. It clarified that Alt 2 should be retracted and it indicated that it would appreciate it if the informals could focus on discussing the new proposal that had less vague terms and actually spoke the language of WIPO.

269. The Delegation of Paraguay welcomed the proposal and wished to study it with great interest. In principle, it would be a good alternative to work on that basis.

270. The Delegation of Australia thanked the Delegation of Indonesia on behalf of the LMCs for its interesting proposal. It highlighted some general principles, which were valuable to the discussion, in particular, that where indigenous peoples’ expressions were directly linked to their culture, they would be acknowledged and used in a respectful manner. It also agreed that indigenous peoples who held expressions in their culture with a high level of secrecy should

possess some interests in excluding uses by outside parties. It looked forward to exploring that proposal in further detail.

271. The Vice-Chair opened the discussions on Article 7. He asked whether the proponents of Alt 3 would consider simplifying and shortening it by simply referring to general exceptions, which, in principle, already covered the specific exceptions.

272. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 1, which proposed a simple and encompassing exception. On Article 6, it preferred to have Option 2 read: "Member States/Contracting Parties may ask or designate a competent authority or authorities, in accordance with national law, to administer the rights provided for by this instrument."

273. The Delegation of Brazil supported Alt 1, as it provided leeway for national legislation and used both terms "safeguard" and "protect" with regard to the interests and rights of the beneficiaries.

274. The representative of Tebtebba, speaking on behalf of the Indigenous Caucus, supported Alt 1. In Alt 2, he was interested in the reference to customary law and wished to see if there was a way to build in that reference in Alt 1. However Alt 2 was not sufficient to protect all relevant rights and interests. On Alt 3, he had a general objection. One of the justifications for those categorical exceptions promoted by some of the members had been freedom of expression. He urged members to look at Article 19.3 of the International Covenant on Civil and Political rights, which stated that there were permissible situations in which freedom of expression could be limited. He said some members had tried to use that argument as a universal asset to cut through all rights and interests and provide a full exemption from any form of prohibition of use for any reason. That was not right. One could review Article 9.2 of the Berne Convention, which provided for a three-step test. One of those steps was to not unreasonably prejudice the legitimate interests of the author. There was a fundamental flaw in the way that the argument was constructed. It actually went against fundamental human rights and principles in established international IP law.

275. The Delegation of Senegal, speaking on behalf of the African Group, preferred Alt 1, which was simpler and easier to read. Alt 3 was very long and confused and might increase the difficulty of understanding the terms.

276. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported Alt 3 as a basis. It supported including specific exceptions and limitations in the instrument, as those were needed to shield artists and creativity in general. Exceptions should not depend on prior informed consent, as it would be contrary to the nature of an exception to do so, and the exceptions would become wholly impractical for original creators, libraries, museums and cultural institutions.

277. The representative of CAPAJ said that Alt 3 was quite long and confusing. He had been able to interact with a large group of LMCs and, in line with the statement made by the representative of Tebtebba, speaking on behalf of the Indigenous Caucus, he supported Alt 1, with a view to ensuring that the instrument complied with its objective in a timely manner. Alt 1 was much more specific and consensus had been built on it.

278. The Delegation of Malaysia supported Alt 1. Lengthy exceptions and limitations would be contradictory to the instrument.

279. The Delegation of Georgia, speaking on behalf of CEBS, supported Alt 3 as a basis for further work.

280. The Delegation of Colombia preferred Alt 1 and reserved its right to propose certain revisions in the language on customary law. It disagreed with Alt 3, which was too long and too complicated a text.

281. The Delegation of the USA said the language of Alt 1 bore a striking resemblance to a similar provision introduced in the TK text. It was modeled along the lines of the Berne Convention, Article 9.2, and TRIPS, Article 13, the famous international standard for exceptions and limitations. However, upon a closer reading, it noted significant differences. For example, the phrase “unreasonably conflict”, as used in the Berne Convention and TRIPS, was much narrower than “unduly prejudice”. The phrase “unduly prejudice the implementation of this instrument” was an entirely novel element in international law and could be read in relation with Article 10 “Relationship to Other Instruments.” That would appear to limit the discretion of sovereign Member States to implement a treaty in a manner of its choosing and consistent with national policies. It submitted those observations and questions for further discussion and welcomed any proposal and looked forward to the opportunity to discuss further. With respect to the Vice-Chair’s question on the possible need for a general exception and specific exceptions, both were important. There were differing legal traditions around the world: some countries had open-textured approaches, and other countries followed a different approach, where exceptions and limitations were specifically enumerated. In the copyright law of the USA, both were there, because clarity sometimes could be accomplished through an open-textured or general exception, but in many cases (and it would be particularly true in that treaty) specificity was required. With the view of advancing the work of that session, based on consolidating and streamlining the text, it made a proposal for a new Alt 4 in Article 7, which read: “In complying with the obligations set forth in this instrument, Member States may adopt exceptions and limitations as may be determined under national legislation, including incorporated customary law. (1) To the extent that any act would be permitted under national law for works protected by copyright, signs and symbols protected by trademark law, for subject matter otherwise protected by intellectual property law, such acts shall not be prohibited by the protection of TCEs. (2) Regardless of whether such acts are already permitted under paragraph 1, Member States shall have exceptions for (a) learning teaching and research; (b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions and; (c) the creation of literary, artistic, or creative works inspired by, based on, or borrowed from TCEs.” Its hope was to capture both general and specific exceptions and to consolidate existing provisions. The umbrella provision was inspired by new Alt 2. Paragraph 1 was based on some drafting suggestions made in the Intersessional Working Groups. Throughout the session, emphasis was put on the importance of drawing on prior discussions and not losing the important background work. Paragraph 2 brought forth the specifics already present in the text. Its goal was to consolidate, to be comprehensive, but also to provide a provision that was generally appropriate with respect to the instrument. It was happy to discuss that in the informals.

282. The Delegation of the Islamic Republic of Iran preferred Alt 1, which was drafted according to the agreed international language of the Berne Convention and of TRIPS.

283. The Delegation of Egypt said that the three-step test on exceptions and limitations was well known in the majority of international agreements, such as the Berne Convention or TRIPS. To date, there had been no conflicts with regard to the implementation of the test in those treaties. Alt 1 was the best option and it could address most of the problems.

284. The Delegation of Ghana supported Alt 1 because it had become a standard provision in international IP instruments, beginning with the Berne Convention. It had been found to be an effective means of preventing the excessive application of limitations and exceptions in treaties. Alt 3 was the reason why the three-step test had been adopted in international instruments. It did not support Alt 3. It referred to a concern that the wording in Alt 1 did not mirror the Berne Convention. That was not unusual. Indeed, if one compared the language in TRIPS to that in the Berne Convention, there were some noticeable differences. One could modify language

depending on the particular circumstances of each treaty. The phrase “unduly prejudice the implementation of this instrument” reflected a very basic obligation. Article 26 of the Vienna Convention on the Law of Treaties incorporated a principle referred to as *pacta sunt servanda*, meaning that every treaty was binding on states that had signed it and were supposed to comply with their obligations in good faith. No state would sign a treaty with a deliberate intention of flouting it. That phrase simply stated the obvious and should not cause any complications.

285. The Delegation of Indonesia supported the statements made by the Delegations of Indonesia on behalf of the LMCs, of Ghana and of the Islamic Republic of Iran regarding TRIPS and the three-step test. Regarding the new proposal by the Delegation of the USA, as well as the proposal by the Delegation of the EU, supported by the Delegation of the USA, it wished to engage further and to get clarification in the informals. The discussion on exceptions and limitations led to the discussion of libraries, archives and museums and of database systems. According to the Indonesian copyright law, the Indonesian database system would be developed by the governments, both central and regional, by research institutions, universities, civil society, including local communities and rightsholders. Any information in libraries, archives, or museums obtained during the process of developing the database system could not change the nature of the protection of moral and economic rights of the rightsholders of TCEs. It did not place TCEs in the public domain. Any utilization of secrets closely held in Indonesian TCEs could only be used after obtaining the prior informed consent of the rightsholders.

286. The representative of INBRAPI supported Alt 1. She reserved the right to cover her concerns in the informals. She referred to the proposal by the Delegation of the USA on Alt 4 and said many exceptions and limitations might give rise to a situation in which no TCE would be protected by the instrument, except perhaps secret TCEs. She referred to the statement by the Delegation of the EU on PIC and appreciated the statement by the Delegation of Indonesia. It was not acceptable for PIC to be ignored when it was the PIC of the creators. If the instrument had the mandate of protecting TCEs, there was a need to protect the rights of creators to express their consent or not. She was concerned and sought additional clarifications from the Delegation of the EU.

287. [Noted from the Secretariat: this part of the session took place on the last day of the session, Friday March 3, 2017, and after the distribution of Rev. 2.] The Chair said that Rev. 2 was a demanding task, particularly to make sure to capture Member States’ positions without omission or error. The Facilitators had listened to and considered all interventions to capture all positions, though they might not always be verbatim. If a member wanted its verbatim positions retained, it could request that. The IGC needed to attain clarity around different positions before starting to narrow. The Facilitators had the license to propose text themselves, in italics, which would require Member State support for it to stay in the text. One example was in the scope of protection, Alt 3. Their aim was to work for Member States to try and move the deliberations forward and narrow gaps. In their capacity, they were assisted by Vice-Chair Mr. Jukka Liedes, and hopefully they had appropriately captured all interventions. He hoped there were no omissions or errors. They were assisted by a very long verbatim transcript of the plenary and informals. Any error or omission identified would be checked against the verbatim transcript and corrected. He handed over to the Facilitators to present Rev. 2.

288. Ms. Paiva, speaking on behalf of the Facilitators, said they had worked on the basis of Rev. 1 to elaborate Rev 2., with the aim of improving the clarity of the text to move the discussions forward, using alternatives to delineate the different positions of delegations, with a view to closing the clearly identified gaps. She thanked participants for their inputs and comments and for their openness to consider their suggestions. In Principles/Preamble/Introduction, in paragraph 6, they had deleted the brackets around the first reference to “traditional.” In paragraph 7, the Facilitators had suggested exchanging the word “preservation” for “protection” yet the Delegation of the EU had requested to reinsert the word

“preservation.” It had thus been reinserted. In Article 1, in Alt 1 paragraph (c), one delegation had highlighted the importance of PIC, requesting that it should also be “free,” so they had added the concept of FPIC. In Alt 1 paragraph (d), after some interesting exchanges in the informals regarding the specific objectives related to tradition-based creation and innovation, a request had been made to also capture the option that encouraged and protected all creation and innovation. They had added an additional option for paragraph (d), as it was also included in the TK text. In Alt 2, there had been a request by the proponents, the Delegation of the EU in particular, to bracket paragraph (a) in order to focus the attention on paragraphs (b), (c) and (d), as those were identified as IP-related objectives. Those delegations had also requested that, in paragraph (c), “promote” be added at the beginning: “...should aim to promote/facilitate the intellectual and artistic freedom, research or other fair practices and cultural exchange.” In paragraph (d), the same delegation had requested to include “secure” at the beginning: “secure/recognize rights already acquired by third parties” and “secure/provide for legal certainty and a rich an accessible public domain.” Those requests had been supported by other delegations. In Alt 3, some delegations had suggested to exchange the concept of beneficiaries at the end of the paragraph with the concept of IPLCs. That proposal had been well received during the discussions and different delegations, although expressing preference for either Alt 1 or Alt 2, had said that they were analyzing it and highlighted the fact that the positive approach could get the same objectives and could be a possible way forward. As Facilitators, they preferred retaining the concept of beneficiaries but adding IPLCs as an alternative, to give space for delegations to analyze Alt 3, as “beneficiaries” was still under negotiation. In Article 2, they had cleaned some brackets and deleted the closing bracket just for drafting purposes. In the TCEs definition, as requested by the Delegation of Colombia on behalf of GRULAC, and supported by other delegations, they had eliminated the brackets around “traditional.” At the same time, as requested by the same regional group, they had added the elements from Article 3, Alt 2 in paragraphs (a), (b) and (c). Those were included after “or other forms” and started at “that are [created]/[generated], expressed and maintained, in a collective context.” The three elements were copy/paste in that portion of the text. She noted that provision required more work. Additionally, the characteristic of “dynamic and evolving” could be present in some TCEs but not necessarily in all TCEs and so they had opted to keep “may be dynamic and evolving,” erasing the word “are.” As requested by the Delegation of Indonesia on behalf of the LMCs, an alternative definition had been added without brackets around “traditional.” It was the same definition as that presented to the IGC for consideration. As to the public domain definition, there had been some debate both in plenary and informals about the need to have such a definition. The Delegation of Peru had made an interesting suggestion to include an alternative definition that would direct to national law. Having that alternative could help move forward the debate, so it was included. In Article 3, the title, as requested by some delegations read: “Eligibility Criteria for Protection/Safeguarding/Subject Matter of the Instrument” as alternative titles. Alt 1 remained the same. In Alt 2 they had improved the bracketing, as there were two lonely brackets in paragraph (a) and paragraph (b) before “directly linked,” as per the conversations with the proponents. In paragraph (b), as requested by the proponents they had removed the “or” that was in the initial “and/or” formula. To improve the drafting, as Facilitators, they had replaced the “and” that was before “the cultural or social identity” with a comma. It read as follows: “The subject matter of [protection]/[this instrument] is traditional cultural expressions: [...] (b) that are the unique product of, and directly linked with, the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities.” She hoped that that captured the suggestion by the proponents. In Article 4, in the title, as requested, they had used the formulation “protection/safeguarding.” After some discussion both in plenary and informals, various delegations had pointed out that there was space to merge Alt 2 and 3. Although they had tried to explore that idea, as Facilitators they saw value in having those two alternatives for consideration. In both Alt 2 and Alt 3, and as requested by the Delegation of Colombia on behalf of GRULAC and supported by other delegations, they had removed the brackets around “peoples” and in Alt 2, and as requested by the Delegation of China, they had removed the concept of “local communities” in the phrase that conditioned

when other beneficiaries might be determined, being now only for cases when there was no notion of indigenous peoples.

289. Ms. Bagley, speaking on behalf of the Facilitators, said that Article 5 contained several changes from Rev. 1. First, the title had been changed back to “Scope of Protection/Safeguarding” as requested by the Delegation of the EU. Alt 1 was unchanged. Alt 2 was a new provision introduced by the Delegation of Indonesia on behalf of the LMCs in plenary. There was an inadvertent omission in paragraph 5.3 of Alt 2. After the word “those” in line 3 should be the words “traditional cultural expressions.” The term “rights” which was the term originally presented in that spot was ambiguous and, after consultation with the proponents, it was ascertained that “traditional cultural expressions” was intended to be inserted there. That would be corrected in the final published Rev. 2 document. Alt 2 was a departure from the tiered approach, providing economic and moral rights for all TCEs through paragraphs 5.2 and 5.3. They understood that the LMCs were seeking to streamline the text and may not have intended it to have quite this breadth. Therefore the Facilitators were encouraged to include and had included in italics in Alt 3 a Facilitators’ option that retained the tiered approach, streamlined the text and seemed to capture the concerns of the beneficiaries mentioned by the representative of Tebtebba on behalf of the Indigenous Caucus and other delegations. It read as follows: “5.1 Member States should/shall protect the economic and moral rights and interests of beneficiaries in secret and/or sacred traditional cultural expressions as defined in this instrument, as appropriate and in accordance with national law, and where applicable, customary laws. In particular, beneficiaries shall enjoy the exclusive rights of authorizing the use of such traditional cultural expressions.” That paragraph 5.1 provided the highest level of protection, specifically pointing out the provision of exclusive use of rights in accordance with national law and, where applicable customary law. Paragraph 5.2 read: “5.2 Where the subject matter is still held, maintained, and used in a collective context, but made publicly accessible without the authorization of the beneficiaries, Member States should/shall provide administrative, legislative, and/or policy measures, as appropriate, to protect against false, misleading, or offensive uses of such traditional cultural expressions, to provide a right to attribution, and to provide for appropriate usages of their traditional cultural expressions. In addition, where such traditional cultural expressions have been made available to the public without the authorization of the beneficiaries and are commercially exploited, Member States should/shall use best endeavors to facilitate remuneration, as appropriate.” Paragraph 5.2 represented a second lowered tier and was directed to TCEs that were still held, maintained and used in a collective context by beneficiaries but might have been made publicly accessible without the authorization of the beneficiaries. That was intended to get at the notion of the intent of the beneficiaries regarding the public accessibility or availability of the TCEs. In such cases Member States should/shall provide these measures to protect against various types of uses, which would comprise moral kinds of rights and where the TCEs had been made available without authorization and were commercially exploited, Member States should use best efforts to facilitate remunerations intended to address the legitimate concerns of beneficiaries as regards TCEs still retained in a collective context, while recognizing that an international agreement would require Member States to provide protections not only for beneficiaries within their own borders but beneficiaries of all other Member States as well. Paragraph 5.3 read: “Where the subject matter is not protected under 5.1 or 5.2 Member States should/shall use best endeavors to protect the integrity of the subject matter in consultation with beneficiaries where applicable.” That final tier in paragraph 5.3 related to all other TCEs not protected under paragraphs 5.1 and 5.2 and previously introduced by the Delegation of Indonesia on behalf of the LMCs in plenary. The Facilitators had a very limited time within which to craft Alt 3 and it certainly could benefit from additional reflection but it captured key elements that could serve as a basis for further discussion and refinement by Member States at IGC 34. Alt 4 had only minor changes relative to Rev. 1. In keeping with the position of the Member State that supported that provision, the phrases “contracting party” and “ensure that” when bracketed as an alternative to “encourage,” had been deleted. Other minor edits were made to improve clarity and consistency. Article 6 had been simplified and clarified in several respects. The paragraphs 2.2

through 2.4 that had been moved to that article from the article on beneficiaries had been deleted as redundant and unnecessary, as requested by a Member State. The prior Alt 1 had also been deleted, as not supported by any Member State. And prior Alt 2 had served as a basis for the current two alternatives. New Alt 1 was prior Alt 2 paragraph 6.1, with the deletion of “interest” and the insertion of “or authorities.” Alt 2 was also a variation of prior Alt 2, however it included both paragraphs 6.1 and 6.2 from that alternative and included the phrase “with the explicit consent of the beneficiaries” in paragraph 6.1, it retained “interest” and had brackets around “instrument” as requested by the proponent. Paragraph 6.2 of that alternative was unchanged. Article 7 had several changes relative to Rev. 1. Alt 1 now included in brackets the phrase “and the customary law of IPLCs” as requested by the representative of Tebtebba on behalf of the Indigenous Caucus and supported by the Delegation of Colombia. They had used brackets instead of a new alternative because it was consistent with the intent of the provision as the Delegation of Indonesia on behalf of the LMCs had explained, that customary law was mentioned in the preferred LMC alternative in Article 5, which that provision should be read in conjunction with. She encouraged the supporters of that provision to discuss how best to address that concern in IGC 34. Prior Alt 2 had been deleted at the request of the Delegation of Chile who had initially introduced it. New Alt 2 was introduced by the Delegation of the USA and contained general and specific broad exceptions. It was introduced in plenary and was the subject of considerable discussion during the informals. Alt 3 was the same as in Rev. 1 with the exception of the deletion of the phrase “and with the prior informed consent or approval and involvement of the beneficiaries” throughout the provision. The numbering of the remaining articles had been adjusted, even where the article had not been discussed. Article 16, a new Article proposed by the Delegation of Indonesia on behalf of the LMCs in plenary had been introduced. It contained a non-derogation provision. It read: “Nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples or local communities have now or may acquire in the future.”

290. The Chair noted that the draft “Indicative List of Outstanding/Pending Issues to be Tackled/Solved” had been distributed. It was an indicative list and was there to provide guidance. While there appeared to be a lot of items on it, some of those issues might be small in nature. Some were significant, such as the scope of protection. In relation to beneficiaries, the IGC was nearing a solution in that area, yet still not finalized.

291. The Chair invited the Secretariat to make a presentation on the resources available on the WIPO website, and the Secretariat did so. [Note from the Secretariat: The resources are available on the Traditional Knowledge Division’s web pages at <http://www.wipo.int/tk/en/>, specifically at the link “Repository of resources”.]

292. The Chair said that, as per the agreed methodology and work program, the plenary would be invited to identify obvious errors and omissions in Rev. 2. The Facilitators would make the revisions after the session. Any new proposals, drafting improvements and any other substantive comments would be recorded in the report. 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. The Chair opened the floor for general comments on Rev. 2.

293. [Note from the Secretariat: all speakers thanked the Facilitators for producing Rev. 2.] The Delegation of Turkey, speaking on behalf of Group B, noted that there were brackets and alternative proposals to be considered and discussed. It thanked the Chair for the preparation of the List of Outstanding/Pending Issues, which showed that the matter still needed to be discussed further. It hoped the IGC would have a fruitful discussion on that matter.

294. The Delegation of Indonesia, speaking on behalf of the LMCs, said that there were still alternatives and terms in brackets in Rev. 2, but the document was clearly an improvement from the original document. It was clear where members stood, because the positions were well reflected in the document, which was a good basis for further discussion.

295. The Delegation of Senegal, speaking on behalf of the African Group, said the language was much better designed and reflected most of the observations made. It thanked the Secretariat and the Chair for having established the working system, which had allowed delegations to exchange views and refine their positions over time.

296. The representative of Tebtebba, speaking on behalf of the Indigenous Caucus, said the IGC had made significant steps in the clarification of the text. He thanked the members for their very hard work. The revised text was a basis for moving forward and he urged its transmission to the next IGC. Where there were standing unresolved issues such as the protect/safeguard issue, the IGC had adopted the practice of parking the terms into brackets for future consideration. He asked to have the standard formulation “indigenous peoples and local communities” used throughout the text wherever “indigenous and local communities” appeared. Currently there were several parts in the draft text that had “IPLCs” and others that had “ILCs.”

297. The Delegation of Georgia, speaking on behalf of CEBS, saw great improvement in Rev. 2 and would share its positions on the outstanding articles in due course.

298. The Delegation of Colombia, speaking on behalf of GRULAC, said that Rev. 2 was clear and very accurate. It welcomed the fact that the proposals of its group had been duly reflected and acknowledged the work done throughout the text, both to order the content and to include the proposals in different alternatives. It considered Rev. 2 as a working document for continuing the negotiations at the next IGC session. On Article 5, it acknowledged the contributions made by the Facilitators in including a new Alt 3, which it considered to be of great importance in those negotiations. All should consider that alternative. The contribution made by the LMCs was valuable and, in particular, the proposal that appeared under Alt 2. It showed its constructive nature, demonstrating the interest in seeking convergence, and it also called for its consideration. It thanked the Chair and Vice-Chairs for their commitment and dedication to the work of the IGC. It also thanked the Secretariat for being constantly available and for its hard work.

299. The representative of CAPAJ thanked the Delegation of Colombia on behalf of GRULAC for its endorsement of a number of the proposals by the Indigenous Caucus, which had been incorporated in the text. That was encouraging because he would continue to participate in confidence and in the hope that, little by little, states would understand indigenous peoples. He agreed with Rev. 2 and hoped to continue on that basis. He said his sacrifice has borne fruit and it was worthwhile coming to this session. He said the IGC had a revived Voluntary Fund and that renewed his trust in the fact that the process would be successful in the end.

300. The Delegation of China said the text was clearer and better reflected the positions of the delegations. Progress had been achieved on many themes. It would continue to participate actively to further the discussions.

301. The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, remained committed to working constructively for a mutually acceptable document. Rev. 2 was an improvement from the starting document, and it looked forward to discussing it further.

302. The Chair opened the discussion on Rev. 2, article by article.

303. The Delegation of the EU, speaking on behalf of the EU and its Member States, wished to continue discussions on the principles. It was key that the IGC focus on those principles that related to IP, in lines 9, 10, 11 and 12, which should not have any brackets. The IGC needed to continue its discussions on the word “traditional” within the context of the instrument. That was the reason why there used to be brackets around “traditional” and it requested that “traditional” be bracketed in principle 6 and to continue discussions thereon.

304. The Chair opened the discussion on Article 1.

305. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 1. It looked forward for more discussion on Policy Objectives to find a landing zone that was mutually acceptable for all members of the IGC. It also saw great merit in discussing the positive approach reflected in Alt 3.

306. The Delegation of Brazil thanked the Secretariat for presenting the resources available on the WIPO website. On Article 1, it preferred Alt 1, but preferred the first paragraph (d), “encourage and protect tradition-based creation and innovation.” The wording of the alternative was too open-ended and beyond the scope of the instrument. It was not entirely clear where “free” in subparagraph (c) came from.

307. The Chair said that the Delegation of the Philippines had proposed it in plenary.

308. The Delegation of the EU, speaking on behalf of the EU and its Member States, did not support Alt 1. It favored Alt 2 as the basis to work from. It was interested in studying Alt 3 at the next session. It wished to bracket “peoples” for constitutional reasons of some Member States, throughout the document.

309. The Delegation of Senegal, speaking on behalf of the African Group, preferred Alt 1. On paragraph (d), it preferred the text as it was in Rev. 1. It asked to remove the brackets around “peoples.”

310. The Delegation of the Islamic Republic of Iran supported Alt 1. As regards the two options in subparagraph (d), it supported the original one.

311. The Delegation of Georgia, speaking on behalf of CEBS, reiterated its support for Alt 2 as the basis for further work. It preferred using the term ILCs instead of IPLCs.

312. The Delegation of China supported Alt 1. It did not support the second option of subparagraph (d).

313. The representative of CAPAJ proposed that the brackets be deleted around “indigenous peoples” because it was a category in public international law. They were new actors under that denomination in the legal language of the UN.

314. The representative of Tupaj Amaru said that the main objective of the article “Protected Subject Matter” should be: (1) Phonetic and musical expressions such as songs, indigenous rhythms; (2) Corporal expressions such as dance, traditional games and presentations and other performances such as theater and dramatic works based on popular traditions of indigenous peoples; (3) Tangible expressions such as works of art, in particular drawings, paintings, sculptures, pottery, masks and painting. That should apply to all TCEs that constituted the living memory of an IPLC, as far as it was an intrinsic part of its identity and its social and cultural and historical identity. The instrument should protect all those TCEs, because otherwise the instrument would be void of any protected matter.

315. The Delegation of the USA preferred Alt 2 and said that Alt 3 was worthy of further consideration.

316. The Delegation of Nigeria expressed its appreciation to the Secretariat for the presentation on the webpage and to the Chair, Vice-Chairs and in particular the Facilitators for their hard work in preparing Rev. 2, which was a good basis for continued discussion. It supported the statement of the Delegation of Senegal on behalf of the Africa Group, and

reiterated its support for Alt 1. However, the two options in subparagraph (d) in Alt 1 should be brought closer together.

317. The Chair opened the discussion on Article 2, Use of Terms.

318. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred the alternative definition of TCEs that had been proposed by the LMCs. It was looking forward to discussing it further with other Member States. On the definition of “public domain,” it recognized that it was now an alternative. However, that definition was wide reaching and went beyond the scope of the IGC. There was no international instrument that defined the public domain. Even within the scope of the instrument, it did not see the merits of trying to define it.

319. The Delegation of Senegal, speaking on behalf of the African Group, agreed with the Delegation of Indonesia, on behalf of the LMCs, about the public domain. It was very much opposed to a definition of public domain. Regarding the definition of TCEs, it was in favor of the definition proposed by the Delegation of Indonesia on behalf of the LMCs.

320. The representative of Tebtebba, speaking on behalf of the Indigenous Caucus, said the public domain did not need to be defined in the text. He strongly supported not having it dealt with in the instrument. He supported the alternative to the definition of TCEs. He asked that ILCs be changed to IPLCs, it being a crosscutting issue.

321. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that the definition had to be aligned with the language in Article 3, Alt 2, subparagraph (e) which read: “creative and literary or artistic.” Further, the first option of the definition of the public domain should not be bracketed. Discussions needed to continue on the definition of “use” as the current definition was circular. Therefore, it requested to include brackets around the words “use” and “using.”

322. The Delegation of Egypt was against any definition of the public domain. As regards the definition of TCEs, it supported the definition proposed by the Delegation of Indonesia, on behalf of the LMCs.

323. The Delegation of the Islamic Republic of Iran preferred the definition proposed by the Delegation of Indonesia on behalf of the LMCs. It noted that it was not necessary to include a definition of the public domain in the text.

324. The Delegation of Brazil viewed with interest the suggested new definition for TCEs, but it needed to make some consultations before confirming its views. It joined other delegations in suggesting that the definition of public domain had no place in the instrument.

325. The Delegation of Algeria said there was no point in defining the public domain. As regards the definition of TCEs, it was in favor of the proposal made by the Delegation of Indonesia on behalf of the LMCs.

326. The Delegation of Colombia associated itself with the position of the Delegation of Indonesia on behalf of the LMCs on the public domain.

327. The Delegation of Ecuador associated itself with the statement by the Delegation of Indonesia on behalf of the LMCs and expressed support for the definition of TCEs proposed by the LMCs. It saw no use in defining public domain because of the implications that might have.

328. The representative of Tupaj Amaru supported deleting the definition of the public domain.

329. The Delegation of Nigeria associated itself with the statement of the Delegations of Senegal on behalf of the African Group and of Indonesia on behalf of the LMCs on the definition of TCEs. The IGC should not try to define “public domain” in the text, as there was no precedent for that in international IP instruments.

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

331. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 1, which was the section it had tabled in addition to its definition of the TCEs.

332. The Delegation of Senegal, speaking on behalf of the African Group, restated its preference for Alt 1, in connection with the definition of Article 2.

333. The Delegation of the EU, speaking on behalf of the EU and its Member States, was glad to see the wording “safeguarding” in the title of Article 3, encompassing all the views expressed. However, it should be treated in the same way as “protection” as there was no consensus. As a result, either both terms should be in brackets or both should be without brackets. That should be reflected throughout the document as well as in the title. The text read “cultural and social identity” and the word “and” had been taken out. One should reinstate the previously used language, which read: “[unique product] [directly linked].” More discussion would be useful.

334. The Delegation of Georgia, speaking on behalf of CEBS, supported the statement expressed by the Delegation of the EU and favored Alt 2 as a basis for further work.

335. The Delegation of Egypt was systematically opposed to the use of the word “safeguarding.” Others had also expressed the same position. It preferred Alt 1 because it was simple and comprehensive yet clearly identified the purpose of the instrument.

336. The representative of CAPAJ said that the word “safeguarding” should be withdrawn. Since the concept of protection had been approved by the General Assembly in the mandate, one had to be coherent and not add “safeguarding” in the title. He preferred Alt 1.

337. The Delegation of the Islamic Republic of Iran said that “Subject Matter of the Instrument” was the most appropriate title. The word “safeguarding” should remain in brackets. It favored Alt 1.

338. The Delegation of Ghana did not support the reference to “safeguarding,” as it was inappropriate. The mandate referred to “legal protection” and it was what had been used throughout the key documents produced by the IGC. The document that was developed for IGC 13 stated that the preference should be “legal protection” because that was consistent with IP rights and not “safeguarding,” which was the term used in human rights instruments and some of the UNESCO instruments, in particular the 2003 Convention. Safeguarding occupied just a minor part of protection, which was a broader term. The word protection was far more comprehensive and should be the term used.

339. The Delegation of the USA preferred Alt 2. It noted that the complex and difficult but critical issue of the linkage between TCEs and the beneficiary community that gave rise to them was unresolved. Considerable discussion needed to take place at the next session on that topic.

340. The Delegation of Colombia supported the statements made by the Delegation of the Islamic Republic of Iran as to the title.

341. The Chair opened the discussion on Article 4.

342. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 3. It was looking forward to further discussion to find a common landing zone between Alt 2 and 3 in the upcoming IGC.
343. The Delegation of the Russian Federation preferred Alt 2 because it referred to national law.
344. The representative of Tupaj Amaru said that eligibility criteria should be deleted from Article 3. He asked who would decide what was eligible. He also asked to delete “safeguarding” as that really referred to protecting the collections of museums.
345. The Delegation of Senegal, speaking on behalf of the African Group, preferred “Beneficiaries of Protection” for the title and preferred Alt 3.
346. The Delegation of Ecuador preferred “Beneficiaries of Protection” for the title and preferred Alt 3. Yet Alt 2 contained useful elements that deserved consideration.
347. The Delegation of the Islamic Republic of Iran did not support the use of the word “safeguarding” in the title. It supported Alt 3, which provided the landing zone to reach agreement on the beneficiaries, as adequate flexibility and policy space was given to the Member States.
348. The Delegation of Colombia said that the title should be “Beneficiaries of Protection.” It preferred Alt 2 and 3.
349. The Chair said that the positions were clear on the discussion over “protection” versus “safeguarding” so one could take it that the issue would go through the whole document.
350. The Delegation of India preferred “Beneficiaries of Protection” for the title. It preferred Alt 3 but was flexible in taking into consideration the merits of Alt 2.
351. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported Alt 1 as a basis for further work. It had, however, proposed to include “create, express, maintain, use and develop” and wished to see that language reflected. It supported that only ILCs were the beneficiaries and noted that Alt 2 and 3 seemed to introduce a new concept, which needed to be discussed further in order to understand its scope and implications. For consistency, “peoples” should be bracketed throughout the text. The comment made under the previous article in relation to the title also applied there.
352. The Delegation of Egypt requested the deletion of “safeguarding” everywhere in the instrument and especially in the title. It preferred Alt 3, which met all interests.
353. The Delegation of Brazil expressed its appreciation for including its language in Alt 3, which it supported.
354. The representative of Tupaj Amaru wished to see the word “safeguarding” deleted from the title. He supported Alt 2. Under the instrument it was to be understood that beneficiaries were those who were creators, guardians, rights holders of TCEs, which were the IPLCs, their heirs and assignees.
355. The Delegation of China had put forward Alt 2, which truly reflected the interests of the various parties and also demonstrated the sincere efforts of the Facilitators. But on the question of beneficiaries, for the moment it could not make it applicable to all Member States and so at the same time it supported Alt 3 and it wished to continue the discussions on Alt 2 and 3 to move forward.

356. The Delegation of Senegal, speaking on behalf of the African Group, asked for clarification about a closed bracket at the end of Alt 3 that should be eliminated.

357. The Chair said that the whole article was bracketed because it was not agreed. The other articles were also like that. Rather than putting brackets on each paragraph because they were not agreed, the whole article was in brackets. He opened the floor on Article 5.

358. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred "Scope of Protection," as that was the heart of the instrument. It was delighted to see the LMCs proposal reflected in Alt 2. It took note of the Facilitators' efforts on Alt 3. That actually captured all the intentions of the LMCs. It supported the Facilitators' text and the definition tabled by the LMCs.

359. The Delegation of Senegal, speaking on behalf of the African Group, preferred Alt 2, but said Alt 3 could be a new basis for discussion and could be used to consolidate the text.

360. The Delegation of Thailand supported the remarks by the Delegation of Indonesia on behalf of the LMCs and preferred Alt 3 to capture the gist of the discussions. Although it supported Alt 3, it preferred to have it changed to an option within Alt 2 and kept within the text.

361. The Delegation of Nigeria associated itself with the statements by the Delegations of Senegal on behalf of the African Group and of Indonesia on behalf of the LMCs on their preferences in Article 5. Alt 3 spoke very well to the LMCs proposal in Alt 2. It looked forward to working with Member States to fine tune both proposals at the next session.

362. The Delegation of the Islamic Republic of Iran aligned itself with the statements by the Delegations of Senegal on behalf of the African Group and of Indonesia on behalf of the LMCs in supporting Alt 2. It welcomed Alt 3 and was ready to discuss in detail the proposed new alternatives at the next meeting.

363. The Delegation of Brazil preferred "Scope of Protection" only in the title. There was much to like in Alt 3. It had a very deep appreciation for the terrific work that the Facilitators had been doing. It would study and reflect on Alt 3, but for the next session it wished to see a mention of "misappropriation" in the text, which was so far missing, maybe in paragraph 5.2.

364. The Delegation of the EU, speaking on behalf of EU and its Member States, supported Alt 1. The whole article was bracketed and, therefore, Alt 1 should be un-bracketed, as none of the other alternatives were bracketed. It was interested in exploring the newly inserted Alt 4.

365. The Delegation of Georgia, speaking on behalf of CEBS, preferred Alt 1 and was interested in further exploring the new wording of Alt 4 at IGC 34.

366. The Delegation of Egypt preferred "Scope of Protection" as a title without the reference to safeguarding. It thanked the Facilitators for their efforts in preparing Alt 3, but preferred Alt 2. However, it had no objections to examining Alt 3 carefully and in fact might take some of the elements in the text.

367. The representative of Tupaj Amaru said the economic and moral rights and interests had not been discussed. That was not a goal because indigenous knowledge was both tangible and intangible, secret. Consequently, the Facilitators had included moral rights. It was one of the rights under copyright that allowed the copyright holder to receive remuneration for the use of the work by third parties, but that was not what it was doing there. It was not talking about copyright. Consequently, it would present a new text for that article.

368. The Delegation of India preferred “Scope of Protection” for the title. Regarding the alternatives, it supported the statement by the Delegation of Indonesia on behalf of the LMCs, but indicated that there was scope for discussion regarding Alt 3.

369. The Delegation of Malaysia said Alt 3 would benefit discussions at the next session, but it supported Alt 2 as per the proposal by the Delegation of Indonesia on behalf of the LMCs. Nonetheless it would look at Alt 3 and pick out elements to strengthen Alt 2, which was the heart of the instrument.

370. The representative of Tebtebba, speaking on behalf of the Indigenous Caucus, supported Alt 2. He appreciated the work of the LMCs with the Indigenous Caucus on developing that section, which was a good way forward. He encouraged more delegations to work with them. He was trying to find some balanced outcomes. All he was looking for was protection of their rights in the instrument. He thanked the Facilitators for working on Alt 3. It was very interesting and needed to be kept in the text and compared to Alt 2 in more detail.

371. The Delegation of Colombia supported the statement by the Delegation of Thailand, to include Alt 3 as an option to Alt 2, which should be discussed. It thanked the Facilitators for proposing Alt 3.

372. The Delegation of Chile said that Alt 3 deserved careful analysis. It would continue to study it in detail in preparation for the next session. On an initial reading of the alternative in paragraph 5.3, one could consider adding the question of attribution, after “best endeavors to provide... a right to attribution.”

373. The Delegation of the USA supported Alt 4. It looked forward to a discussion of both Options 1 and 2 at IGC 34. It had taken note of Alt 3, which was worthy of consideration. It would study it closely and looked forward to discussing it.

374. The Chair moved to Article 6.

375. The Delegation of Indonesia, speaking on behalf of the LMCs, restated its preference for Alt 2. It thanked the Facilitators for adding “or designate” in Alt 1.

376. The Delegation of Senegal, speaking on behalf of the African Group, preferred Alt 1. However, it remained flexible as to consideration of Alt 2.

377. The Delegation of India preferred the title “Administration of Rights” and supported the Delegation of Indonesia, on behalf of the LMCs.

378. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported Alt 2 as a basis for further work and wanted to focus on interests, deleting “rights.”

379. The Delegation of Egypt preferred the title “Administration of Rights” and supported Alt 1.

380. The Delegation of Brazil supported the title “Administration of Rights” and supported Alt 1. However it had nothing against notifying the identity of any authority to the International Bureau as stated in Alt 2 and could consider including in Alt 1 in the future “in close consultation with the beneficiaries.”

381. The Delegation of the Islamic Republic of Iran supported the title “Administration of Rights” and favored Alt 1, as expressed by the Delegation of Indonesia on behalf of the LMCs.

382. The Delegation of Nigeria associated itself with the Delegations of Senegal on behalf of the African Group and of Indonesia on behalf of the LMCs in supporting Alt 1.

383. The representative of Tupaj Amaru wished to replace “Administration of Rights” by “Exercise and Application of Collective Rights.” “Administration” was not a legal word. Things could be administered, but not rights, not the law. The law was applied. If it was interpreted, then it was applied. He said he would submit another version because Alt 1 and 2 had been deleted from the previous document. They no longer reflected many of the aspects, for example “adopt measures to guarantee and protect TCEs.”

384. The Delegation of Ecuador preferred “Administration of Rights” for the title and was in favor of Alt 1, as expressed by the Delegation of Indonesia on behalf of the LMCs. However, it was open to Alt 2 as well.

385. The Delegation of Georgia, speaking on behalf of CEBS, supported the statement by the Delegation of the EU. It restated its preference in favor of deleting “rights.”

386. The Chair moved to Article 7.

387. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 1. It noticed the addition as a result of the fruitful discussion in informals, which should be placed in brackets. It was ready to discuss in further detail at the next session.

388. The Delegation of Ghana expressed its preference for Alt 1. It reflected the three-step test, which was quite standard and helped to avoid listing numerous exceptions and limitations in a particular article and it was also lightly modified from other provisions to take into account the interests of the beneficiaries, the customary law of IPLCs, and the principle of states acting in good faith and not violating the terms of their legal instruments that they had agreed to be bound by. It did not support Alt 3. When read closely, Alt 2, paragraph 1 appeared to say that when there was already a right that was protected under copyright or trademark law, that should not be challenged under the proposed instrument on TCEs. Part of the reason why it was there was to ensure that some of those rights were adequately protected under IP law. The same problem would occur if one were to adopt Alt 2.1. It required that if one acquired a copyright or trademark, there was nothing one could do about it and there were numerous examples of those problems, including the Washington Redskins case, where they had taken that term and given it to a football club. There were also examples of people using the names of tribal groups, for example the Ashanti in Ghana, and registering those trademarks. It was not appropriate to acquire rights to do such matters. It did not support Alt 2, because paragraph 2(a) was too broad. It was proper to qualify it by reference to a term such as fair use. In paragraph 2(b), museums would be allowed to retain property that would have been improperly obtained in the first place. Paragraph 2(c) was problematic because it would allow individuals who acquired rights to derivatives in TCEs to maintain such property.

389. The Delegation of Senegal, speaking on behalf of the African Group, preferred Alt 1, but without the inclusion of the new portion in the text.

390. The Delegation of the EU, speaking on behalf of the EU and its Member States, preferred Alt 3. It was, however, also interested in discussing Alt 2. It was looking forward to the next session to further work on exceptions. For consistency reasons the phrasing “prior informed consent” and “with the involvement of the beneficiaries” should also be deleted from the general exception in Alt 3.

391. The Delegation of Brazil was comfortable with the text of Alt 1, including with the modification introduced in Rev. 2. The qualifier “unreasonably conflict” made it comfortable enough.

392. The Delegation of India aligned itself with the stand taken by the Delegation of Indonesia on behalf of the LMCs. It preferred Alt 1.
393. The Delegation of Egypt supported Alt 1, whose wording was more familiar from international treaties that dealt with the three-step test.
394. The Delegation of Nigeria supported the Delegation of Senegal on behalf of the African Group in expressing a preference for Alt 1 in Rev. 1. It was concerned about the new Alt 1 in Rev. 2, where the exceptions and limitations should not unreasonably conflict with the interests of beneficiaries, which would include indigenous peoples, local communities, and, in some cases states. The reference to the customary law of indigenous and local communities appeared to exclude other beneficiaries.
395. The Delegation of Colombia supported Alt 1.
396. The Delegation of the USA said it had studied all three alternatives closely and come to the conclusion that it supported Alt 2.
397. The Delegation of Georgia, speaking on behalf of CEBS, was in favor of Alt 3 as the basis for future work.
398. The Delegation of Ecuador supported Alt 1. It was looking at the implications of the text inserted.
399. The Delegation of Indonesia aligned itself with the Delegation of Indonesia on behalf of the LMCs and preferred Alt 1. It could support neither Alt 3 nor the new Alt 2.
400. The representative of CAPAJ preferred Alt 1. The other alternatives were long and wordy, and implied that many of the concepts in the other articles were neutralized.
401. The Delegation of the Islamic Republic of Iran aligned itself with the statement made by the Delegation of Indonesia on behalf of the LMCs. It supported Alt 1, minus the new expression inserted into the text.
402. The Delegation of Malaysia supported Alt 1 without the addition. Lengthy exceptions and limitations would be contradictory to the instrument.
403. The Chair opened the floor on Article 16.
404. The Delegation of Indonesia, speaking on behalf of the LMCs, was delighted to see its proposal in the text. There was a separate provision on non-derogation but it wished to go on record that it had proposed a stand-alone article. Article 12.2 was actually the same language that was there under non-derogation and had to be deleted. It asked to separate the provision in two and to have a separate non-derogation clause.
405. The Delegation of the EU, speaking on behalf of the EU and its Member States, made a reservation on the new text proposed and, in general, on the whole text under discussion. There was no agreement on the nature of the instrument. It asked that brackets be used consistently throughout the text including around article titles and the options and alternatives therein.
406. The Delegation of Senegal, speaking on behalf of the African Group, supported the statement by the Delegation of Indonesia on behalf of the LMCs. It was in favor of Article 16 on non-derogation.

407. The Delegation of Georgia, speaking on behalf of CEBS, wanted to look closely into Article 16 and asked to bracket it.

408. The Delegation of Brazil supported the statement by the Delegation of Indonesia on behalf of the LMCs. It also preferred a separate non-derogation clause.

409. The Chair closed the discussion of Rev. 2. He said he had prepared an “Indicative List of Outstanding/Pending Issues to be Tackled/Solved,” which was just a guide. The list was not exhaustive. He opened the floor for comments.

410. The Delegation of the EU, speaking on behalf of the EU and its Member States, mentioned the longstanding practice not to make any modifications to the list. It reiterated that the second policy objective should also be understood to cover the securing of IP rights in general as well as encouraging creation and innovation.

411. The Delegation of Canada raised the issue of local communities. Under “use and meanings of certain terms and concepts,” mention was made of “such as indigenous peoples” but it suggested that “local communities” also be mentioned. The term was not in brackets but one should not take that as an indicator that it had a clear and common understanding, especially in the context of TCEs. It would warrant a specific discussion. That term might have been used in other international contexts, but it was important to understand what it meant in that context both in terms of the draft instrument on TCEs and practically speaking.

412. The representative of Tebtebba, speaking on behalf of the Indigenous Caucus, said a lot more discussion was needed at the next session on what “secure and recognize rights acquired by third-parties” meant. It was an outstanding issue. There might be conflicts of the rights of IPLCs with third-party rights and the IGC needed to understand those in more detail. He did not want the instrument to legitimize historical theft.

413. The Delegation of Indonesia, speaking on behalf of the LMCs, said that most of the outstanding issues indicated in the list could be tackled. It encouraged all Member States to carefully study and utilize all resources available (the “the wealth of knowledge”) on the TK website, as presented by the Secretariat. It was looking forward to the intersessional work around TCEs before IGC 34. Most of those issues would be solved or clarified then.

414. The Delegation of Senegal, speaking on behalf of the African Group, took note of the pending issues. It expressed its thanks for the document, which would be very useful for future discussions.

415. The representative of CAPAJ said that the Indigenous Caucus had drawn up a list of possible topics that might be dealt with in the future. They would make a joint proposal on that.

416. The Chair took note of the interventions to be considered in view of the next session.

417. The representative of Tebtebba, speaking on behalf of the Indigenous Caucus, said he had made a recommendation to add a consideration on protecting third party rights. He was unclear of the procedure and asked whether he should ask for Member State support.

418. The Chair explained that the discussion was on the indicative list only, which was not exhaustive and new items could be discussed at the next session. He closed the discussion.

Decision on Agenda Item 6:

419. *The Committee developed, on the basis of document WIPO/GRTKF/IC/33/4, a further text, “The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2”. The Committee decided that this text, as at the close of this agenda item on March 3, 2017, 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.*

420. *The Committee also decided to transmit to the next session of the Committee an “Indicative List of Outstanding/Pending Issues to be Tackled/Solved at the Next Session”, copy annexed.*

421. *The Committee took note of and held discussions on documents WIPO/GRTKF/IC/33/5, WIPO/GRTKF/IC/33/6, WIPO/GRTKF/IC/33/INF/7, WIPO/GRTKF/IC/33/INF/8 and WIPO/GRTKF/IC/33/INF/9.*

AGENDA ITEM 7: ANY OTHER BUSINESS

Decision on Agenda Item 7:

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

AGENDA ITEM 8: CLOSING OF THE SESSION

423. The Chair thanked his team of Vice-Chairs. He very much appreciated their guidance and assistance throughout the meetings and in between meetings. During IGC 34 and probably prior to it, he would need a lot of help from them, moving into the significant issue of dealing not only with TCEs but also with stocktaking and considering recommendations to the General Assembly. He sincerely thanked the Facilitators, Ms. Margo Bagley and Ms. Marcela Paiva, for their work. It was a difficult, demanding job trying to balance the interests of all Member States. He thanked the Secretariat, which was also a key component of his team. He thanked Ms. Fei Jiao in particular who was going off on maternity leave. He said Ms. Margreet Groenenboom from the Delegation of the EU was leaving. She had been involved in the process for a very long time and he always appreciated her open and frank advice. She had been a friend to the IGC for a long time and she would be missed. He thanked the Regional Coordinators, past and present. They kept him informed and told him if he was too firm or too friendly. He indicated his strong support for the Indigenous Caucus and the work they did. Those representatives were critical in contributing to the discussions. It was very important that they were represented. He

pleaded for additional donations to the Voluntary Fund. He thanked the Member States. That had been one of the more enjoyable meetings, with a very good spirit, very efficient, and in a respectful and friendly tone. Member States were there to deliver the outcome. It was all about them in the end. He really appreciated their contribution and their efforts. He thanked the interpreters. IGC 34 was going to be very demanding. He would be writing a Chair's note to reflect on the stocktaking and the recommendations for the General Assembly. He would come to WIPO a week prior to IGC 34 and commence some further discussions on the stocktaking and the recommendations.

424. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked everybody involved in the session of the IGC, starting with the Chair, Vice-Chairs, Facilitators, Secretariat, interpreters, and Member States who had contributed all the thinking behind the discussions. It bid farewell to a colleague and friend Ms. Groenenboom, who was almost as big a part of the IGC process as one of the articles in the drafts. She had been with the Delegation for eight years and had attended twenty-four sessions of the IGC. Ms. Groenenboom said it had been twenty-four sessions and three Intersessional Working Groups. It had started in 2008 for the Dutch Delegation and then for the European Commission. Over the years she had made many friends among several delegations. The IGC was an interesting topic because it gathered so many different people from all over the world. She bid farewell to all the capital experts who attended the IGC and wished all the best in future sessions.

425. The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, said that it would contribute to the discussion of the draft text at the next IGC. It thanked the Director General and the Secretariat, especially Ms. Jiao and Ms. Daphne Zografos Johnsson for their assistance during the meeting. It thanked the interpreters. It thanked all Member States and the representative of the Indigenous Caucus for their participation in the negotiations. It looked forward to working with them again. It greeted Ms. Groenenboom and thanked her for her work and cooperation.

426. The Delegation of Senegal, speaking on behalf of the African Group, thanked the Chair and Vice-Chairs for all their work toward progress. It thanked the Facilitators who had done a tremendous job and set down in a clear way the proposals made by the delegations. It thanked the Australian Government for contributing to the Voluntary Fund. IGC 33 had allowed making considerable progress and the language of the text had been improved substantively. It had heard enriching observations of the highest quality from delegations and the Indigenous Caucus. It supported the spirit of consensus and respect, which informed the work of the IGC and it was sure that IGC 34 would allow resolving the pending issues, in order to call a diplomatic conference to adopt an effective international instrument(s).

427. The Delegation of Indonesia, speaking on behalf of the LMCs, thanked the Chair, the Vice-Chairs, the Facilitators and the interpreters for another successful session of the IGC. It extended its appreciation to the Secretariat, including the conference and interpretation sections for a smooth meeting. It thanked the Secretariat for the useful presentation on resources available on the TK website. It encouraged all Member States to carefully study and utilize all available resources. It hoped that that would enhance knowledge in the IGC. Most of the questions put forward and discussed in the meeting could be answered and clarified with the available wealth of knowledge within the TK website. It commended all Member States, especially the representatives of the ILCs, for their active participation in the session. It commended and recognized the constructive spirit and the commitments as well as the flexibility shown by all delegations throughout the meeting. The discussions, both in plenary and informals, had been very useful, enjoyable and productive in building common understanding and narrowing gaps on core issues. It was great to have productive dialogues instead of two-way monologues. It welcomed the documents for further discussion and remained committed to developing a mutually acceptable outcome. It thanked all delegations and wished

them safe travels and a good week for all Geneva-based delegations. It said goodbye to Ms. Groenenboom. It wished her all the best in her future endeavors.

428. The Delegation of China thanked the Chair, the Vice-Chairs, the Facilitators and the interpreters for their efforts. It thanked the Member States for their participation in the discussion and negotiations on text. Although certain gaps still existed among different parties on some issues, all regional groups and delegations had shown a flexible and practical attitude on the work with efforts to narrow the gaps. The protection of TCEs was an important topic for the IGC, and it was important to continue exchanging views and have discussions to reach a more mature text. It was willing, in a flexible and constructive attitude, to work with all delegations towards substantive results in the work of the IGC.

429. The representative of CAPAJ, speaking on behalf of the Indigenous Caucus, thanked all participants, Member States and indigenous peoples, for their hard work on the document, which was already mature. He appreciated the focus on the legal framework adopted, which would become an international instrument to protect TCEs at the level of each Member State, with the support of the indigenous peoples living in those states. He thanked the Chair for having heard and taken into account their concerns and language proposals. He thanked the Government of Australia for its generous donation. He was delighted that the Voluntary Fund was able once again to support the participation of five indigenous persons at IGC 34. He hoped that other Member States would also contribute so participation could be assured. The IGC had worked for many years to develop an instrument that would protect TK and TCEs from misappropriation. As the debate continued, TK and TCEs were publicly available without consent. The IGC needed a precise schedule in order to conclude the work and to make everyone aware of that emergency situation. He called for a diplomatic conference to be convened within two years. Article 19 of UNDRIP stated: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Decisions had to be based upon FPIC. Customary law should be the basis to determine TCEs exceptions and limitations. He could not accept that Member States had the right to determine access to TCEs and TK against their will and without their FPIC. That would be promoting theft and misuse of cultures by others. TK and TCEs were owned by indigenous peoples and that had to be taken into account. He rejected a focus on the safeguarding of TCEs. Protection was what was needed in the area of IP.

430. The Delegation of Georgia, speaking on behalf of CEBS, thanked the Chair, Vice-Chairs and Member States for their constructive deliberations to advance that challenging exercise. It thanked the Secretariat for its contributions and expressed its appreciation for the excellent cultural event hosted by the Government of Australia in the course of the IGC. It thanked Ms. Groenenboom from the Delegation of the EU for her hard work and dedication to the IGC. It wished her success in all her endeavors. It was looking forward to further discussions on the outstanding and pending issues at IGC 34.

431. The Delegation of Turkey, speaking on behalf of Group B, thanked the Chair, the Vice-Chairs and the Facilitators for their tireless efforts over the week. It looked forward to the forthcoming Seminar on Intellectual Property and Traditional Cultural Expressions and discussions at IGC 34. It appreciated the meaningful and delightful cultural event hosted by the Government of Australia. It also welcomed its contribution to the Voluntary Fund to support the participation of ILCs in the meetings. It thanked the Secretariat for its contribution to the meeting, especially Ms. Fei Jiao for her devoted efforts. It appreciated the efforts of the skilled interpreters. It also thanked Ms. Groenenboom.

432. The Delegation of Colombia, speaking on behalf of GRULAC, thanked the Chair, the Vice-Chairs, the Secretariat, the Facilitators, and the interpreters. The Chair could count on its

constructive participation. It thanked all the Regional Coordinators. It undertook to continue working on that issue that was so important for all.

433. The representative of CISA expressed his thanks to everyone involved in the constructive work. He wished that other peoples could be invited by WIPO, for example, Quechuas, Aymaras or indigenous peoples from Argentina or Colombia.

434. The representative of Tupaj Amaru made accusations against the representative of another organization representing IPLCs.

435. The Chair stated that the matter raised in plenary by the previous speaker was not an issue for the Member States but for the indigenous representatives themselves, and it was, therefore, not appropriate for the issue to have been raised in the way it was. The Chair closed the session.

Decision on Agenda Item 8:

436. The Committee adopted its decisions on agenda items 2, 3, 4, 5 and 6 on March 3, 2017. 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 April 21, 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/
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