

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

Thirty-Sixth Session
Geneva, June 25 to 29, 2018

DRAFT REPORT

Document prepared by the Secretariat

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-Sixth Session (“IGC 36”) in Geneva, from June 25 to 29, 2018.
2. The following States were represented: Albania, Algeria, Argentina, Australia, Austria, Azerbaijan, Belarus, Bolivia (Plurinational State of), Brazil, Brunei Darussalam, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Côte d’Ivoire, Croatia, Czech Republic, Denmark, Djibouti, Democratic People’s Republic of Korea, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, the Former Yugoslav Republic of Macedonia, Gabon, Georgia, Germany, Ghana, Guatemala, Holy See, Honduras, India, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Kuwait, Latvia, Lebanon, Lithuania, Malaysia, Malawi, Mauritius, Mexico, Morocco, Mozambique, Nepal, Netherland, Niger, Nigeria, Oman, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Senegal, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States of America, Venezuela (Bolivarian Republic of), Yemen, Zambia and Zimbabwe (96). The European Union (“the EU”) and its Member States were also represented as a member of the Committee.
3. The Permanent Observer Mission of Palestine participated in the meeting in an observer capacity.
4. The following intergovernmental organizations (“IGOs”) took part as observers: African Regional Intellectual Property Organization (ARIPO); Food and Agriculture Organization of the United Nations (FAO); General Secretariat of the Andean Community; Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC Patent Office); South Centre (SC); United Nations; United Nations Conference on Trade and Development (UNCTAD) and World Trade Organization (WTO) (8).
5. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: Al-Zain Organization for Intellectual Property (ZIPO); American Intellectual Property Law Association (AIPLA); Assembly of Armenians of Western Armenia; Civil Society Coalition (CSC); CropLife International (CROPLIFE); European Law Students’ Association (ELSA International); Health and Environment Program (HEP); Indian Council of South America (CISA); Indian Movement - Tupaj Amaru; Indigenous Peoples’ Center for Documentation, Research and Information (Docip); International Center for Trade and Sustainable Development (ICTSD); *Instituto Indígena Brasileiro da Propriedade Intelectual* (InBraPi); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Law Association (ILA); Native American Rights Fund (NARF); Tebtebba Foundation - Indigenous Peoples’ International Centre for Policy Research and Education; Traditions for Tomorrow; and University of Lausanne (18).
6. The list of participants is annexed to this report.
7. Document WIPO/GRTKF/IC/36/INF/2 provided an overview of the documents distributed for IGC 36.
8. The Secretariat noted the interventions made, and the proceedings of the session were communicated and recorded on webcast. This report summarizes the discussions and provides the essence of interventions, without reflecting all the observations made in detail or necessarily following the chronological order of interventions.
9. Ms. Fei Jiao of WIPO was Secretary (*ad interim*) to IGC 36.

AGENDA ITEM 1: OPENING OF THE SESSION

10. The IGC Chair, Mr. Ian Goss, invited the Director General to make his statement.

11. The Director General, Mr. Francis Gurry, welcomed all participants to IGC 36. He recalled the renewed mandate for the 2018/2019 biennium, which foresaw six sessions of the IGC. The first, on the topic of genetic resources (“GRs”), had taken place in March 2018. The second was also on GRs. Two other sessions were foreseen for 2018 and two for 2019, which were on traditional knowledge (“TK”) and traditional cultural expressions (“TCEs”). He expressed his deep gratitude to the Chair for all of the work he had been doing in and between sessions. Everyone owed him a vote of thanks for his dedication and professionalism in leading the process. Equally, he thanked the two Vice-Chairs, Mr. Jukka Liedes of Finland and Mr. Faizal Chery Sidharta of Indonesia, for their great contributions. He thanked the Regional Coordinators (“RCs”) for their consistent and constructive engagement in the process. He said that an *Ad Hoc* Expert Group on Genetic Resources (“the *Ad Hoc* Expert Group”) had met on Sunday at the request of the IGC and he thanked everyone involved in that exercise, in particular the two Co-Chairs, Mr. Pedro Roffe (Senior Fellow, International Centre for Trade and Sustainable Development) and Ms. Krisztina Kovacs (Policy Officer, European Commission), who would be reporting on the results of that meeting. Turning to the IGC meeting, he said the participants were familiar with the documents, which included documents prepared by the Secretariat as well as working documents submitted by some delegations. He mentioned the WIPO Voluntary Fund. The donation made by the Government of Australia, announced at IGC 33, had contributed to ensuring the presence of representatives of indigenous peoples and local communities (“IPLCs”) at IGC 34 and IGC 35 as well as two representatives at IGC 36. The Voluntary Fund had run out of money and he called upon all Member States to consider and address that issue because the participation of representatives of IPLCs was absolutely essential to the success of the process. He mentioned the Indigenous Panel on “Practical Measures Relating to Intellectual Property and Genetic Resources: Databases and Contracts – Indigenous Peoples’ and Local Communities’ Perspectives” and acknowledged the presence of Mr. Aleksey Tsykarev, Member and Former Chairperson-Rapporteur of the United Nations Expert Mechanism on the Rights of Indigenous Peoples, and Ms. Sue Noe, Attorney, Native American Rights Fund, United States of America (“USA”). He regretted the absence of a third member of the Panel, Mr. Eliamani Laltaika, who had had unfortunate travel difficulties. He wished all participants very constructive, fruitful discussions. The IGC had been working on that subject matter for many years. A great deal of progress had been made but the IGC needed to go forward with that progress and ensure to report a positive result to the General Assembly (“GA”) at the end of the biennium. He urged all participants to show the utmost flexibility to achieve such a result.

AGENDA ITEM 2: ADOPTION OF THE AGENDA

Decision on Agenda Item 2:

12. The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/36/1 Prov. 3 for adoption and it was adopted.

13. The Chair thanked the Vice-Chairs for their assistance, support and valuable contributions. He also thanked the Secretariat and the interpreters, without whom the IGC could not conduct its work. He said that Mr. Wend Wendland, the IGC Secretariat, was unwell and would not be joining the session. He had consulted with RCs in advance of the session and thanked them for their support and constructive guidance. He wished to have a good

atmosphere for the session. He recalled that the session was on live webcast on the WIPO website, which further improved openness and inclusiveness. All participants were required to comply with the WIPO General Rules of Procedure. The meeting was to be conducted in a spirit of constructive debate and discussion, in which all participants were expected to take part with due respect for the order, fairness and decorum that governed the meeting. He reserved the right, where applicable, to call to order any participant who might fail to observe the WIPO General Rules of Procedure and the usual rules of good conduct or any statements whose statements were not relevant to the issues at hand. IGC 36 was a five-day session. He intended to use all of the time allocated as fully as possible. He would allow opening statements by the regional groups, the EU, the Like-Minded Countries (“the LMCs”) and the Indigenous Caucus. Others could hand in their opening statements to the Secretariat in writing or send it by email to be reflected in the report. Member States and observers were strongly encouraged to interact with each other informally, increasing the chances that Member States would be aware of and perhaps support an observer’s proposal. He acknowledged the importance and value of the indigenous representatives as well as other key stakeholders, such as representatives of industry and civil society. The IGC should reach an agreed decision on each agenda item as it went along. On Friday, June 29, the decisions as already agreed would be circulated or read out for formal confirmation by the IGC. The report of the session would be prepared after the session and circulated to all delegations for comments. Due to the short turnaround between IGC 36 and IGC 37, the IGC 36 report would be presented in all six languages for adoption at IGC 38 in December.

14. The Chair opened the floor for opening statements. [Note from the Secretariat: Many delegations which took the floor for the first time congratulated and thanked the Chair, the Vice-Chairs and the Secretariat and expressed their gratitude for the preparation of the session, the *Ad Hoc* Expert Group as well as for the preparation of the documents.]

15. The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, said that the Chair’s guidance would result in a progressive, successful session. It supported the working methodology and the work program proposed by the Chair. It hoped that the IGC would continue to expedite its work with the objective of reaching an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to IP which would ensure the balanced and effective protection of GRs, TK and TCEs, as outlined in the IGC’s mandate. It favored the discussion on the core issues in order to arrive at a common approach, namely the issues of objectives, subject matter, disclosure requirements and defensive measures. While some members held different views, most members from the Asia-Pacific Group strongly believed that legally binding instrument(s) for protecting GRs, TK and TCEs could result in a balance of the interests of the users and providers of resources and knowledge. The conclusion of a legally binding treaty(ies) would provide a transparent, predictable regime for the effective protection against misappropriations of GRs, TK and TCEs, thus ensuring sustainable, legitimate use in the future. Therefore, most members were of the view that it could be adequately addressed through the establishment of a mechanism for appropriate benefit-sharing of the utilization or exploitation of those resources based on prior informed consent (“PIC”) and mutually-agreed terms (“MAT”). The IGC could discuss approaches for an effective disclosure mechanism in accordance with national circumstances that would protect GRs, derivatives and associated TK against misappropriation. It also wished to discuss the establishment of the databases and other information systems in order to prevent the granting of erroneous patents in a constructive manner. While some members held different views, most members believed that such defensive mechanisms should be only complementary to the disclosure requirement. The Group was hopeful to reach a common understanding in providing effective and balanced protection, including of the rights of IPLCs. It assured the Chair of its full support and cooperation in rendering the session a success. It remained committed to engaging constructively for a mutually acceptable outcome. It encouraged all Member States and stakeholders to demonstrate flexibility while remaining steadfast to the core

objectives of an international minimum-standards legal instrument that would enhance transparency, efficacy and a legal mechanism for ensuring rightful access to GRs.

16. The Delegation of Switzerland, speaking on behalf of Group B, was confident that the IGC would be able to make progress under the Chair's leadership on the three subjects, namely GRs, TK and TCEs, under the mandate for 2018/2019 biennium. As noted in the mandate, it acknowledged the progress made by the IGC on IP and GRs, TK and TCEs. It also noted that more work needed to be done to narrow existing gaps to reach a common understanding on core issues. It reiterated its firm belief that the protection relating to those three subjects should be designed in a manner that both supported innovation and creativity and recognized the unique nature and importance of the three subjects. IGC 36 was the second session under the new mandate focusing on GRs. It was critical that the IGC make meaningful advancements, guided by sound working methods and an evidence-based approach. The work should build on the existing work carried out by the IGC, including text-based negotiations. Text-based negotiations should be undertaken in a manner that included discussion of the broader context and of the practical application and implications of proposals in order to narrow existing gaps and to reach a deeper understanding on core issues. Group B thanked the experts attending the *Ad Hoc* Expert Group for their work and looked forward to their report under Agenda Item 6. While it was up to Member States to decide on how to use the conclusions of the experts, their report would remain a useful source of information on the issues under discussion. Together with the Secretariat's compilations of materials on databases and disclosure regimes as well as the other documents for the session, it illustrated the work carried out so far in order to advance the work of the IGC. Group B looked forward to the active participation of IPLCs as well as industry and other stakeholders, and acknowledged their valuable and essential role. It remained committed to contributing constructively towards achieving a mutually acceptable result.

17. The Delegation of Ecuador, speaking on behalf of the Group of Latin American and Caribbean Countries ("GRULAC"), said that it was a perfect opportunity to reiterate its commitment and responsibility for the work of the IGC. It awaited with great interest the report of the *Ad Hoc* Expert Group's discussion on the work done, as it would make a valuable contribution to the IGC's discussions. It thanked the participants of the Indigenous Panel. It recalled the IGC's mandate for 2018/2019 biennium. In carrying out that mandate, IGC 36 was particularly important because it was the last of the specific sessions related to IP and GRs. It was essential to continue text-based negotiations. It noted the progress made in the previous sessions on the basis of the Consolidated Text (Document WIPO/GRTKF/IC/36/4). The point of the negotiations had been to close the gaps between various views of those issues so as to ensure complementary and mutual support between the various international instruments that dealt with those issues. Therefore, the IGC should maintain that goal in mind in order to find satisfactory solutions to outstanding problems. It wished to see an open and frank discussion, which would help make practical steps to bring positions on the various issues closer, such as objectives, subject matter, disclosure requirement and consequences of failure to comply. It hoped that the constructive spirit that had prevailed before and would prevail would help Member States come to an agreement on a legally binding instrument after almost a decade of negotiations. An international instrument was essential and should balance the interests of users and providers of TK and GRs. It should also provide due protection against misuse and misappropriation of TK and GRs. Issues relating to disclosure, therefore, were particularly crucial. The conclusion of an international instrument would favor both research and invention. Having a uniform IP legal framework for participants interested in using GRs would be very helpful and also ensure fair and equitable benefit-sharing arising from the use of those resources. All those issues were essential given the multicultural nature in the countries of GRULAC and the high level of biological and genetic diversity. It was only appropriate to acknowledge the amount of progress that had been achieved on the basis of the Consolidated Text and it hoped to make further progress at IGC 36. Thanks to the efforts made by all the

parties, the IGC had made a lot of headway with technical work on those issues. It was certain that the work, together with the essential political commitment that needed to be shown by every Member State, would enable achieving the IGC's goal as soon as possible. It urged all Member States to show flexibility so as to achieve specific results. That would help send a strong message of commitment to the forthcoming GA with a view to agreeing on the convening of a diplomatic conference. It expressed its faith and trust in the working methods suggested by the Chair, and urged Member States to use the time available to have constructive work in a positive atmosphere to finally reach agreement on an effective legal instrument on GRs. GRULAC would do all it could to ensure further progress with discussions at IGC 36.

18. The Delegation of Morocco, speaking on behalf of the African Group, remained convinced that the effective protection of TK, GRs and TCEs required the adoption of a legally binding international instrument(s). It reiterated its attachment to the conclusion of such an instrument(s) to enhance the transparency and efficacy of the system, encourage research and innovation and contribute to a fair and equitable sharing of the benefits arising from the use of GRs and associated TK. It reiterated the principle of the new mandate that made it clear that IGC 35 and IGC 36 should undertake negotiations on GRs with a focus on addressing unresolved issues and considering options for a draft legal instrument. It observed with interest the special report from the *Ad Hoc* Expert Group and hoped that the result of the work would make a substantial contribution to ongoing discussions. The creation of the *Ad Hoc* Expert Group was to lead, after all, to the speeding up of the work of the IGC in accordance with the terms of its new mandate. The Consolidated Text had reached a high level of maturity and that should make it possible for the IGC to make giant strides on outstanding issues. The divergences that persisted were political and therefore could be solved if good faith was shown in a constructive and participatory environment. It hoped that that would enable members to call a diplomatic conference without further delay. There was no doubt that the main goal of a text on GRs was to provide protection against misuse or misappropriation of GRs and related TK. That confirmed the importance of the disclosure requirement which had been supported by many delegations and which would enable countries in which GRs and associated TK originated to get a fair benefit-sharing arising from their use. Any proposed study or recommendation that did not respect the current mandate of the IGC moved away from the IGC's goal and risked watering down the progress already made. The IGC had to use the time available to put finishing touches on the Consolidated Text. It welcomed the fact that some Member States had shown flexibility at IGC 35 and adjusted their positions in a constructive manner. It wished to see those who remained opposed to what the IGC was doing in principle to show similar flexibility in order to pull common interests together, achieve something and go beyond individual national entrenched positions. It hoped that the session would be successful.

19. The Delegation of China was pleased to continue to participate in the discussions on GRs. It had consistently supported the work of the IGC and hoped to reach substantive progress in the discussion on GRs, TK and TCEs and to develop a binding instrument. IGC 36 was the second and last session under the mandate to discuss GRs, thus the task was arduous and urgent. It believed that under the leadership of the Chair and with the assistance of the Secretariat and the joint efforts of all parties, IGC 36 would achieve positive outcomes based on the results of IGC 35 as well as the discussions of the *Ad Hoc* Expert Group.

20. The Delegation of Lithuania, speaking on behalf of the Central European and Baltic States Group ("CEBS Group"), looked forward to a productive IGC session under the able guidance of the Chair. It was prepared to engage constructively in the IGC's work on the Consolidated Text on GRs and looked forward to the report on the work of the *Ad Hoc* Expert Group. Experts from the CEBS Member States had contributed to the work of the *Ad Hoc* Expert Group in their personal capacity. It expected that the report would serve as another source of information in addition to the compilation of materials on databases and disclosure regimes in other documents for the session. Furthermore, it looked forward to the Indigenous Panel and

commended the active and valuable contribution of IPLCs to the work of the IGC. IGC 36 was the second and last session under the mandate entirely devoted to the work on GRs. It was important to focus on substantive discussions on the remaining unresolved core issues. The CEBS Group was prepared to constructively engage in the work of the IGC and believed that it could be feasible to achieve a realistic middle-ground outcome. Its longstanding position was that a system should support innovation and creativity while ensuring fair and sustainable use of GRs.

21. The Delegation of Indonesia, speaking on behalf of the LMCs, stated that, taking note of the IGC's mandate for the biennium, Member States and other stakeholders sufficiently appreciated the importance of the session to charting a progressive course for the rest of the IGC's work. Good faith, flexibility and political will were of critical importance for engagement in the session. It looked forward to the report and the subsequent discussion on the report of the *Ad Hoc* Expert Group. That report would give valuable inputs to the discussions in the IGC. With regard to the Consolidated Document related to IP and GRs, it strongly believed that the main objective was to prevent the misappropriation of GRs and derivatives through the IP or patent system by a disclosure requirement. Utmost efforts needed to be delivered to protect GRs, which included their derivatives as well as associated TK. In line of the objective to prevent misappropriation, it was important to recognize the valuable addition of establishing databases and other information systems as a complementary measure to the mandatory disclosure requirements. Noting the significant progress achieved in the last biennium and at IGC 35, it was optimistic to reach the finish line. It was high time for all stakeholders to finalize the text, with some issues needing to be resolved at a political level. The technical work was almost done. Member States needed to take the GRs text forward and show political commitment. The text provided clear options for Member States to consider, and the IGC could bring those positions forward to a positive decision. IGC 36 would enable guiding the GA on a work program that outlined key deliverables for future work, including the possibility of convening a diplomatic conference. It re-emphasized the urgent need to prevent the misuse and misappropriation of GRs and associated TK. A legally binding instrument could prevent and tackle the transnational problems through a full compliance mechanism.

22. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that, in accordance with the decision adopted at IGC 35, the EU had nominated two experts to participate in a personal capacity in the *Ad Hoc* Expert Group. They had actively contributed to the discussions. It looked forward to hearing a report from the Co-Chairs. As IGC 36 was the last session under the mandate to discuss issues relating to GRs and substantive details, it hoped to pave the way for mutually acceptable outcomes. Although the Rev. 2 document resulting from IGC 35 improved the text to some point, there were still considerable gaps among diverging options in most articles. It occupied the center ground on those often-polarized discussions. The IGC should try to focus its discussions on realistic and achievable outcomes to reap tangible results from the IGC's work. It stressed its willingness to contribute to such positive outcomes. The Delegation remained ready to continue its engagement, as was evidenced at IGC 35. Nevertheless, the international landscape had changed considerably since the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity ("the Nagoya Protocol") had come into force. Further examination of interfaces between the implementation of the Nagoya Protocol and the introduction of the patent disclosure systems in IP legislation could be of practical use for the IGC. It welcomed that the current IGC's mandate placed the evidence-based approach at the heart of its methodology. It looked forward to using the various possibilities provided for in the mandate to that end.

23. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, highlighted some of the concepts that were fundamental in the process. Pursuant to the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP"), the International Labour

Organization Convention No. 169 (“ILO 169 Convention”) and other international instruments and domestic and indigenous law, indigenous peoples enjoyed legal peoplehood, political and cultural self-determination, and the right to maintain indigenous cosmologies and lifeways. Member States had widespread commitments to recognize and respect indigenous peoples’ rights. Negotiations on IP rights had to be consistent with the Nagoya Protocol. She recalled that their rights and responsibilities as indigenous peoples were both inherent and recognized in legal instruments, including treaties with states. Their right to control and steward their GRs and TK had to be implemented in a way that maintained their economic, scientific, cultural and spiritual values. She insisted on remedies for theft and misappropriation, both past and ongoing, of GRs and TK. She supported the inclusion of mandatory disclosure requirements, meaning that parties had to be required to disclose the source of GRs and associated TK in any application for IP rights. Disclosure provisions should require evidence of free, prior and informed consent (“FPIC”) of indigenous peoples upon MAT. Exceptions and limitations, as well as remedies for violations of disclosure requirements, should be developed in conjunction with indigenous peoples. Databases of GRs and associated TK had a supplemental role to disclosure of origin and due diligence requirements for users. Databases had to be voluntary, and indigenous peoples had a right not to place their TK in databases. The development and ongoing use of databases had to recognize the right of indigenous peoples to consultation, participation and FPIC, and be in accordance with indigenous peoples’ own laws, customs and protocols. The publication or inclusion of TK in databases did not place such knowledge in the public domain, nor did the lack of inclusion in databases constitute evidence of lack of ownership. Indigenous peoples maintained their rights to their TK even if it had been published. Databases had to be open only to patent offices, and safeguards had to be in place in perpetuity. Databases should not be used to store unrevealed TK without the collective FPIC of the holders of such knowledge. She called upon Member States and WIPO to support the Voluntary Fund, which was depleted, to ensure continued participation of indigenous peoples. She thanked those states that had contributed. She acknowledged the presence of the UN Expert Mechanism on the Rights of Indigenous Peoples in the session and its support for the protection of indigenous peoples’ human rights, including TK and GRs. She urged Member States to fully consider indigenous peoples’ rights regarding IP and looked forward to a productive set of negotiations.

24. [Note from the Secretariat: the following opening statements were submitted to the Secretariat in writing only.] The Delegation of the Republic of Korea, said that, like many members of the Asia-Pacific Group, it also had abundant and diverse GRs and associated TK. Therefore, it recognized the importance of discussions in the IGC and believed that the spirit of fair and equitable benefit-sharing arising from GRs should be highly respected. It was concerned that disclosure requirements presented an excessive burden and could lead to unexpected obstacles to those wishing to utilize the patent system. During a series of meetings in the Republic of Korea, users and stakeholders had expressed their concerns about the legal uncertainties caused by disclosure requirements. That could lead to the avoidance of the patent system, and even bypassing the IP system altogether. IP policies and patent systems existed for their users; therefore, it was important to focus on their convenience to encourage active use of the system. The most effective form of protection for GRs and associated TK in the patent system was to prevent erroneously granted patents, which could be addressed through the establishment and use of database systems. The Delegation preferred non-legally binding instruments at that stage. The IGC should consider all aspects of the proposals, perspectives of the users and potential consequences on industry and relevant areas. It hoped that all Member States of WIPO would remain open-minded and sincere in the discussions to create new international norms.

25. The Delegation of Nigeria identified with the opening statement presented by the Delegation Morocco, on behalf of the African Group, and stated its resolve to work as a committed and willing partner in the collective desire to ensure concluding work on the GRs text.

Progress had been made at IGC 35 on the GRs text, which remained perhaps the most mature of the three texts under negotiation. IGC 36 was the second in the renewed mandate of the IGC. Significantly, it was the last opportunity to deliberate on GRs under the biennium. It was a crucial moment for all. Time had really come to strive not to kick the GRs text down the road but to do one's possible best to harmonize positions into a document that would reflect the concessions the IGC could collectively make and the consensus that the IGC could build on that important subject. So much had been said about narrowing gaps and progress made, it was high time to have a document that reflected those proclamations in their very concrete representation to transition the process to the next level beyond the IGC as a show of actual progress. Continued delay meant that exploitation of GRs and associated TK continued unabated without accountability, a situation that undermined the reason the IGC had been there nearly two decades and at a great public expense. It pledged its commitment to work with the African Group and all other LMCs to leave no stone unturned to advance and hopefully finalize the work on GRs. It noted with satisfaction the convening of the *Ad Hoc* Expert Group in accordance with the IGC's mandate. It looked forward to receiving the report of that group. It hoped that the IGC would take advantage of the work of the group to expedite and advance the deliberations. It appreciated the important nature of the scope of issues covered by the *Ad Hoc* Expert Group and noted how they had been aligned neatly by the Co-Chairs with the agenda for deliberations. It also appreciated the proposed working methodology and Information Note prepared by the Chair. The latest iteration of the GRs text gave a good basis to advance the mutual supportiveness of other related instruments from the IGC as well as the Convention on Biological Diversity ("the CBD") and its Nagoya Protocol. A combination of insights from the *Ad Hoc* Expert Group and the current GRs text constituted a solid ground to tackle outstanding issues on subject matter, disclosure (trigger, use of associated terms – directly based on, utilization, source, providing country, country of origin) and consequences of non-disclosure. Other issues such as databases and due diligence mechanisms, while important, might not pose as much challenge as the first itemized ones and should not be allowed to dissipate negotiation energy at a time when the IGC was expected to report positive outcome to the GA. After nearly two decades, it was time to eschew any attempt to move away from reaching a consensus. The IGC had to shun any red herring and restore hope to those who were being pushed further down the deep holes of poverty through unrequited exploitation of their GRs and associated TK. Genuine innovators needed a balanced and fair IP regime to facilitate research and development. It thanked the interpreters for their work. It looked forward to a concrete outcome from the ensuing final deliberations on the GRs text for the 2018-2019 biennium.

26. The Delegation of Thailand aligned itself with the statements delivered by the Delegation of Indonesia, on behalf of the Asia-Pacific Group and the LMCs. As one of the countries rich in GRs, it had found ways to protect GRs, their derivatives and associated TK. It attached priority to the timely conclusion of the international legal instrument on GRs. That interesting issue had been a long conversation among WIPO Member States over eighteen years. To gear up the normative works, the IGC needed to narrow down the differences and find common grounds of pending issues in order to have the political will to move forward. It strongly supported the IGC to explore the possibility of establishing a mandatory disclosure requirement that would protect GRs, their derivatives and associated TK against misappropriation and prevent erroneous IP registrations. Utilization or exploitation of GRs should be based on access and benefit sharing ("ABS") requirements including PIC and MAT. It was ready to constructively work on those issues and trusted that the text-based negotiation would be concluded in the near future.

27. The Delegation of Japan recognized the importance of taking effective measures against the misappropriation of GRs and associated TK. It had been actively contributing to the discussions on those issues at the IGC meetings, including making various proposals. A clear distinction should be made between two different factors inherent to the issue of misappropriation of GRs, namely, the lack of compliance with the ABS system and the erroneous granting of patents. The first issue should not be dealt with under the patent system.

The IGC should focus on the issue of erroneous granting of patents, especially on the utilization of databases for prior art searches, given that WIPO had a crucial role to understand global issues from its vantage point as an organization specializing in IP. The Delegation, together with the Delegations of Canada, the Republic of Korea and the USA, had submitted document WIPO/GRTKF/IC/36/8. On the other hand, the mandatory disclosure requirement for ensuring compliance with the ABS system, which did not have a direct link with the patent system, could bring legal uncertainty, decrease legal predictability, and discourage R&D activities utilizing GRs. The same was true for not only developed countries but also emerging and developing countries. It was seriously concerned that the mandatory disclosure requirement might hinder the healthy growth of industries utilizing GRs in emerging and developing countries, both then and in the future. Since the mandatory disclosure requirement could negatively affect the patent system and eventually hinder the creation of innovations, it should not be introduced. It made more sense to conduct measures to protect GRs within the framework of the CBD and the Nagoya Protocol. The Delegation stressed that it had no intention whatsoever to discourage the discussion. It was willing to actively contribute to ensuring the effective protection of GRs.

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

28. The Chair referred to the draft report of IGC 35 and recalled that it was not a verbatim report, and it summarized the discussion without reflecting all the observations in detail. The rules of procedure stated that any intervention under this item had to be solely related to submissions made at and the report of IGC 35.

Decision on Agenda Item 3:

29. *The Chair submitted the draft report of the Thirty-Fifth Session of the Committee (WIPO/GRTKF/IC/35/10 Prov. 2) for adoption and it was adopted.*

AGENDA ITEM 4: ACCREDITATION OF CERTAIN ORGANIZATIONS

Decision on Agenda Item 4:

30. *The Committee unanimously approved the accreditation of the following two organizations as ad hoc observers: Centre de Recherche et de Promotion du Droit (CRPD); and Enda Santé.*

AGENDA ITEM 5: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES

31. The Chair said the Voluntary Fund was depleted. The Fund was critical to the IGC's credibility to ensure that indigenous observers were adequately funded and the IGC was highly regarded outside of WIPO for enabling indigenous observers to participate and funding them. He asked participants to carefully consider their ability to provide funds. IGC 37 was only around eight weeks away. He drew attention to Document WIPO/GRTKF/IC/36/INF/4, which provided the information on the current state of the contributions and applications for support, and document WIPO/GRTKF/IC/36/3 concerning the appointment of members of the Advisory Board. The IGC would later be invited to elect members of the Board. The Chair proposed that Mr. Faizal Chery Sidharta, the Vice-Chair serve as the Chair of the Advisory Board. The

outcomes of the Board's deliberations would be reported on in document WIPO/GRTKF/IC/36/INF/6.

32. The representative of HEP said that the people of Cameroon were united and there were no differences between local communities and indigenous peoples, even when there were minorities.

33. The representative of Tupaj Amaru said that for 25 years he had contributed systematically to the debates on the issues and had made substantive input to the negotiating process. He requested that his substantive contributions and amendments to the draft instruments be recognized.

34. [Note from the Secretariat]: The Indigenous Panel at IGC 36 addressed the following topic: "Practical Measures Relating to Intellectual Property and Genetic Resources: Databases and Contracts – Indigenous Peoples' and Local Communities' Perspectives". The two panelists were: Mr. Aleksey Tsykarev, Member and Former Chairperson-Rapporteur of the United Nations Expert Mechanism on the Rights of Indigenous Peoples, Russian Federation, and Ms. Sue Noe, Attorney, Native American Rights Fund, USA. The Chair of the Panel was Ms. Lucia Fernanda Inácio Belfort Sales from InBraPi. The presentations were made according to the program (WIPO/GRTKF/IC/36/INF/5 Rev.) 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:

"Mr. Aleksey Tsykarev described the Expert Mechanism on the Rights of Indigenous Peoples, which represented seven sociocultural regions and composed of independent experts. The Expert Mechanism had a thematic agenda comprising, for 2018, a study on the right of indigenous peoples to free, prior and informed consent, scheduled for publication in 2018. He stressed that one of the existing seven thousand languages was lost every two weeks and noted that 2019 would be the International Year of Indigenous Languages. He spoke of good practices in securing free, prior and informed consent of indigenous peoples in relation to the cultural heritage, indigenous languages and traditional knowledge, and gave examples such as the national and subnational databases of the Institute of Language, Literature and History of the Karelian Research Center in the Russian Federation, and the phonogram archives of the Academy of Sciences.

Ms. Noe described her organization, which represented 250 Native American peoples from 31 states in the United States of America. She provided IGC 36 delegates with two documents, one of which outlined Native American peoples' views on indigenous protocols, customs and laws and examples of good practices in intellectual property and traditional knowledge. She gave examples of initiatives by Native American peoples. The first concerned interrelated policy documents, protocols, agreements and licenses that had been drafted to form the basis of an intellectual property manual for the Karuk tribe in California, in order to protect the intellectual property rights in Karuk natural and cultural resources and establish a framework for exchanges (Karuk Tribe Protocol with Agreement for Intellectual Property Rights, 2018). The second example concerned the Penobscot Nation, which had signed a memorandum of understanding on research conducted by a University. The Penobscot Nation would retain certain intellectual property rights, including authorship and copyright, and would have rights of consultation regarding its cultural heritage in the University's collections and publications. Furthermore, the University would collaborate in the implementation of Penobscot traditional knowledge labels in order to contribute to appropriate and respectful use of cultural material (University of Colorado and Native American Rights Fund)."

35. [Note from the Secretariat]: The Advisory Board of the WIPO Voluntary Fund met on June 27, 2018 to select and nominate a number of participants representing IPLCs to receive funding for their participation at the next session of the IGC. The Board's recommendations were reported in document WIPO/GRTKF/IC/36/INF/6 which was issued before the end of the session.

36. The representative of InBraPi, speaking on behalf of the Indigenous Caucus, underscored that their participation in the process should be guaranteed fully and effectively so that the results that they were trying to reach under the IGC be legitimate and well balanced. There were not enough funds to support the participation of IPLCs. The Advisory Board was facing a very difficult situation of selecting three candidates for IGC 37 but there were no resources to fund the participation of any of those representatives. The omission of parties to contribute any funds had put indigenous participation in a "square bracket" situation. The IGC would not be able to have successful negotiations without the participation of indigenous peoples. The Indigenous Caucus urged the parties to provide legitimacy to the IGC discussions, a process that should be transparent, inclusive and balanced. Assigning additional resources to the Voluntary Fund was one way of achieving that.

Decisions on Agenda Item 5:

37. *The Committee took note of documents WIPO/GRTKF/IC/36/3, WIPO/GRTKF/IC/36/INF/4 and WIPO/GRTKF/IC/36/INF/6.*

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

39. *The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Ms. Mouna Bendaoud, Engineer Examiner, Industrial and Commercial Property Office, Morocco; Mr. Tomás Condori, Representative, Indian Council of South America (CISA); Ms. María del Pilar Escobar Bautista, Counsellor, Permanent Mission of Mexico; Mr. Preston Hardison, Representative, Tebtebba Foundation - Indigenous Peoples' International Centre for Policy Research and Education; Ms. Lucia Fernanda Inacio Belfort Sales, Expert, Intellectual Property Department, Instituto Indígena Brasileiro para Propriedade Intelectual (INBRAPI), Brazil; Mr. Carlo Maria Marengi,*

Intellectual Property and Trade Attaché, Permanent Mission of the Holy See; Ms. Avanti Olenka Perera, Senior State Counsel, Attorney General's Department, Sri Lanka; and Mr. Gaziz Seitzhanov, Third Secretary, Permanent Mission of Kazakhstan.

40. *The Chair of the Committee nominated Mr. Faizal Chery Sidharta, Vice-Chair of the Committee, to serve as Chair of the Advisory Board.*

AGENDA ITEM 6: REPORTING ON THE AD HOC EXPERT GROUP ON GENETIC RESOURCES

41. The Chair said that, as agreed at IGC 35, an *Ad Hoc* Expert Group had met on June 24, 2018. He thanked Mr. Roffe and Ms. Kovacs for acting as Co-Chairs of the *Ad Hoc* Expert Group. In their capacities as Co-Chairs, they would report on the outcomes and results of the experts' work, and that report would be included in the report of IGC 36. They would report the factual outcomes as they saw them from the meeting, after which any of the experts could make comments on what had been reported. The IGC would not make a decision on the merits of the different outcomes of those discussions, but they were available for Member States to consider in their deliberations. The contact groups (to be established) would consider some of the key areas discussed in the *Ad Hoc* Expert Group to allow continuity. He invited Mr. Roffe and Ms. Kovacs to take the floor.

42. Mr. Roffe and Ms. Kovacs reported as below:

“General remarks [by Mr. Roffe]

We wish to recall that the overall objective of the *ad hoc* expert group on genetic resources, that met for 6 hours on June 24, in line with the mandate of the IGC and the Decisions of IGC 35, was to address specific legal, policy or technical issues. The *ad hoc* expert group was invited to support and facilitate the negotiations of the IGC, by providing advice and analysis on the issues addressed. It was not intended to be a negotiating nor decision-making body. This is the natural responsibility of this body.

Experts were invited to participate in their personal capacity and to follow the Chatham House Rule - participants were free to use the information received, but neither the identity nor the affiliation of the speakers, nor that of any other participant, may be revealed.

The *ad hoc* expert group was called upon to address four major issues: subject matter, disclosure, databases and due diligence mechanisms. In addressing the above issues experts drew on their own experience and made use, in a flexible manner, all the documentation available as well as related information including the rich material produced in the context of the IGC.

I wish personally to thank all experts for their most valuable contributions to the discussions. They made, in the view of many, this *ad hoc* expert group a very successful experience. The meeting was productive and had been held in a very good atmosphere where the views of different stakeholders were duly considered, with respect and consideration.

I had the pleasure of co-sharing the meeting with Ms. Kovacs. We also acted under our own personal capacities. Our brief factual account of what transpired in our deliberations is of our own responsibility. I need to add a note of caution that it is extremely difficult to reflect accurately the richness and high quality of the deliberations.

We wish, before rendering our account, to extend our thanks to the IGC Chair and Vice-chairs, for their trust and support to this work. We also wish to extend our appreciation for the most efficient, experienced and wise support received from the Secretariat.

Subject matter [by Ms. Kovacs]

Addressing subject matter, the *ad hoc* expert group first discussed whether the instrument should apply to any intellectual property right or to patents only. While most experts shared the understanding that the importance of the patent system was primary, some experts stressed that patent issues were not exclusive. Other IP rights such as plant variety protection, trademarks and geographical indications could be implicated, as illustrated by a few examples. In relation to this, it was commented that each solution should fit the specific nature of any other form of IP rights concerned. Some experts found that problems around IP rights other than patents could be dealt with in the relevant WIPO committee and not in the IGC.

The *ad hoc* expert group exchanged views on whether the instrument should cover only GRs or also TK associated with GRs. There was no common understanding on this issue. Reference was made to the difficulties users face when trying to assess whether the invention and the respective TK were identical, or when trying to prove that they were not. Some experts stressed that they did not find it appropriate for the IGC to narrow down to GRs and set aside TK associated with GRs. To them, it was crucial that TK should be kept on the table, and that information had to be disclosed on whether or not consent from TK holders had been obtained.

It was highlighted that in the case of most patents concerned, TK associated with GRs was involved, as indigenous insight was typically brought in or built upon.

Disclosure requirements [by Mr. Roffe]

While the IGC needs to determine, as a policy matter, the nature and features for a disclosure mechanism, if ever; the *ad hoc* expert group was invited to discuss certain policy, legal and technical sub-issues relating to disclosure requirements, namely trigger, content and consequence of non-compliance.

Trigger [by Mr. Roffe]

Regarding trigger, experts were invited to consider what should be the relationship or “link” between the subject matter of disclosure (e.g. GRs) and the claimed invention in order to activate the application of an IP/patent disclosure requirement, such as “utilization of”, “directly based on” or any other term.

In our view, there was a clear understanding, among participants, that such a link between the claimed invention and relevant GR or TK was essential.

Experts expressed a variety of views on whether there should be perceived as a broader trigger (i.e. “utilization of”) or a narrower trigger (i.e. “directly based on”). Useful and solid

comments and suggestions were however made which the IGC may wish to take into account in their deliberations and further refinements of the discussions on this topic.

- Some “middle” ground terms could be used as “trigger”, *inter alia*:
 - direct use of
 - the invention is derived from GR/TK
 - is GR/TK material to the claimed invention
 - invention directly claimed to have utilized GR or TK
- There was also the suggestion that one could link the “trigger” as “directly based on”, to one definition of GRs, in the revised consolidated document, which reads “GRs means any material of plant, animals, or microbial origin containing functional units of heredity of actual or potential value and includes derivatives and genetic information thereof”.
- Comments were also made if technological changes, such as in the digital area, were properly taken into account in the notion of trigger.

Content [by Ms. Kovacs]

Moving on to address the content of disclosure, the *ad hoc* expert group was invited to discuss what kind of information should be required from the applicant: whether only the indication of the country of origin or source, or also information related to compliance with ABS requirements (for example, evidence of PIC and MAT). In other words, experts were requested to comment on whether the aim should be a transparency measure with the objective of mutual supportiveness with other systems, or an ABS compliance measure with the objective of establishing the role of IP offices as checkpoints.

Experts shared a common understanding that the country of origin or source should be required. However, there was no uniform opinion as to whether any further information had to be provided by the applicant. Some experts stressed it was crucial not to impose too much burden either on patent offices or on users. While many experts tended to share concerns about not overburdening the patent system, a number of experts found that these were not the only interests at stake. They stressed that TK holders were also players to consider, and their rights were not safeguarded without checking if the subject matter of the application had been obtained legally. In this context, “legal certainty” was interpreted from various angles.

With reference to a recently conducted study, it was submitted that requiring an internationally accepted certificate of compliance could be a possible solution to address such complexities. Furthermore, the question was raised what kind of information would be required in respect of TK associated with GRs, as this was not apparent to all. No clear understanding emerged on these issues.

Consequence of non-compliance [by Mr. Roffe]

An important aspect relating to disclosure requirements is to determine how situations of non-compliance should be addressed.

A key question relating to consequence of non-compliance is whether non-compliance should affect the validity of a granted patent and, if so, what would the permissible condition(s) for revocation be, especially taking into account that an administrative mechanism is included. Aside from revocation, what other options are there? (See Information Note prepared by the Chair for IGC 36) In general, the discussions on this topic took place in the most open, frank and forward-looking manner.

- In this context, a great number of experts shared the view that a third-party dispute mechanism was relevant to promote legal certainty and solutions that could be

balanced, taking into account the concerns of all key stakeholders. The IGC may wish to consider this idea and further elaborate on it.

- It was pointed out by some that legal certainty was a relevant concept but should apply inclusively. There was a need to seek legal security to users but as well as to the protection of the rights of local communities.

More specifically on revocation, experts recognized that this is an important matter that should, in one manner or the other, be kept on the table. Some useful observations made, that might be of interest for the IGC's and its consideration of the matter, were:

- The group discussed pre and post grant consequences. Discussions focused on the latter.
- A powerful deterrent is needed, and it seems to most that revocation should be a measure of last resort.
- A reference was made to Article 10 of the Patent Law Treaty, on validity of patent and revocation:
 - “(1) [Validity of Patent Not Affected by Non-Compliance with Certain Formal Requirements] Non-compliance with one or more of the formal requirements referred to in Articles 6(1), (2), (4) and (5) and 8(1) to (4) with respect to an application may not be a ground for revocation or invalidation of a patent, either totally or in part, except where the non-compliance with the formal requirement occurred as a result of a fraudulent intention.
 - (2) [Opportunity to Make Observations, Amendments or Corrections in Case of Intended Revocation or Invalidation] A patent may not be revoked or invalidated, either totally or in part, without the owner being given the opportunity to make observations on the intended revocation or invalidation, and to make amendments and corrections where permitted under the applicable law, within a reasonable time limit.”
- What appear to emerge is that the sanction of revocation or non-enforceability of a patent might not apply solely on the basis of failure to disclose, without opportunities for amendments and corrections. Revocation, as a measure of last resort, would apply in extreme cases, such as willful violations.
- Discussions also considered other type of post grant sanctions in cases of fraudulent behavior and misrepresentation, including corrective fines and compensation to affected parties/communities.

Databases [by Ms. Kovacs]

Discussing the issue of databases, the *ad hoc* expert group tended to agree on the usefulness of databases in facilitating the purposes of the instrument negotiated by the IGC. Nevertheless, some concerns were reiterated about the appropriateness of a defensive prior arts approach in the case of TK databases, listing a range of problematic issues. Furthermore, some experts questioned whether databases could add much value as a stand-alone solution.

Due diligence measures [by Mr. Roffe]

Experts considered the importance of due diligence mechanisms, to assess and verify the access to GRs in accordance with applicable national and regional ABS systems. Experts were invited to discuss what kinds of mechanisms might be needed, and technical issues relating to the establishment and functioning of such mechanisms.

As time allowed, discussions on these matters were brief.

In this context, references were made to databases, voluntary codes of conduct, guidelines. The discussion revolved around the nature of these measures, considered by ones, as defensive, complementary or supporting measures. References were made to other relevant international treaties including the Nagoya Protocol and the need for mutual supportiveness.

A discussion took place, with no definite outcome, on having a distinction on due diligence measures that fall in the realm of environmental law, specifically related to the implementation of Nagoya Protocol and those due diligence measures that are proper of IP law.”

43. The Chair opened the floor to experts who had attended the *Ad Hoc* Expert Group and who wished to add any comments that they felt had not been replicated in the report. There were none. He opened the floor to any Member States that might have questions in relation to the discussions held in the *Ad Hoc* Expert Group. There were none. He really appreciated Mr. Roffe and Ms. Kovacs for agreeing to be the Co-Chairs. Chairing could be a difficult task, particularly when trying to accurately replicate strong and different views and portray them in a clear and concise way. Their report was an excellent summary of what had happened in the meetings.

44. The Chair closed Agenda Item 6.

Decision on Agenda Item 6:

45. *The Committee took note of the oral reports from the Co-Chairs of the ad hoc expert group on genetic resources, Mr. Pedro Roffe (Senior Fellow, International Centre for Trade and Sustainable Development) and Ms. Krisztina Kovacs (Policy Officer, European Commission).*

AGENDA ITEM 7: GENETIC RESOURCES

46. The Chair opened Agenda Item 7. He emphasized the importance of IGC 36, as it was the last meeting relating to GRs under the mandate. After ten years of negotiations, the IGC needed to make significant progress in addressing areas of difference on key issues. There were two broad approaches on the table: mandatory disclosure requirements and defensive/complementary measures. The IGC was reaching a point where it needed to consider how to start to negotiate between the two different approaches, knowing they were not mutually exclusive. He asked participants to come prepared to the meeting and engage in a flexible way and to look at things from a realistic perspective. The views in the Chair's Information Note were his alone. They were without prejudice to any Member State's position and had no status. The Information Note also included the WIPO publication on "Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge" [Note from the Secretariat: The publication is available on the WIPO's Traditional Knowledge Division's webpage at <http://www.wipo.int/publications/en/details.jsp?id=4194>], which was a very useful document, as well as the table on national and regional disclosure regimes [Note from the Secretariat: The table is available at http://www.wipo.int/export/sites/www/tk/en/documents/pdf/genetic_resources_disclosure.pdf]. While the Information Note covered similar key issues as previous notes, a key focus was on trends in national and regional disclosure regimes. Some regimes had been in place for some time and others were relatively new and established after the CBD and the Nagoya Protocol.

The variance in the regimes reflected that key issues, such as subject matter, trigger, content of disclosure, and consequence of non-compliance, had been dealt with in different ways within national or regional legislation. In some cases, they were dealt with by environment or biodiversity laws, in others, IP or patent laws or even a combination of both. There might be merits in standardization at an international level, particularly if one continued to see growth in those regimes. Regarding the working method, there had been consensus during the consultation meeting with the RCs and interested Member States. He intended to focus on resolving differences in the key areas highlighted in the Chair's Information Note. Those would also link to the issues covered by the *Ad Hoc* Expert Group. There was some continuity with that work, so it could feed into the deliberations. At IGC 35, there appeared to be support for utilizing contact groups to further the work, noting that those contact groups should be established early in the meeting. That was reflected in the methodology proposed for IGC 36. The proposed methodology and program would be flexible and dynamic, based on progress made. The contact groups would commence on Tuesday and would continue as long as they were adding value. If not, the IGC would revert to informals or plenary. In the interest of transparency, the IGC would meet in plenary at the end of each day for a briefing on the discussions in any contact groups and to provide opportunity for discussions and questions for Member States. Particularly, that would help develop a revised text so there would be some understanding of the issues of that revision itself. The intent would be to produce a Rev. 1 on Wednesday morning for review and a Rev. 2 on Friday morning for review. The revisions had no status until the plenary noted it on Friday. The plenary was the decision-making body. He would continue his practice of ensuring the integrity of Member States' positions. Member States that clearly did not support a proposal should honor that integrity in their interventions. It was appropriate to ask questions and get clarification and try to understand why that position was on the table, but it was important for clarity not to try and modify them so that the positions lost their integrity. He would ask the Facilitators to consider that with their revisions. The Facilitators worked on behalf of Member States. The key focus was on ensuring all Member States' interventions were captured, noting they had a remit to narrow gaps, where appropriate, and enhance clarity and simplify revisions. They also had a remit to present proposals for considerations, noting any such proposals would have to be supported by Member States within plenary. The Chair proposed Mr. Paul Kuruk of Ghana and Ms. Lilyclaire Bellamy of Jamaica to act as "Facilitators" and Ms. Margo Bagley of Mozambique to act as a "Friend of the Chair".

47. [Note from the Secretariat: The following took place after a break.] The Chair made some opening remarks on the state of negotiations. The EU had changed significantly in the past ten years and there had been a big change in the landscape. There was the CBD and there had been a change in the landscape in relation to indigenous rights: UNDRIP and a note from Australia's perspective with a significant focus on repatriation of artifacts. That needed to be recognized when the IGC started to develop instruments. There were two broad approaches on the table, though they were not mutually exclusive. While there was no agreement on all of the elements within it, it was fair to say that the common ground was one of an administrative nature. In relation to the defensive measures approach, some Member States felt that it was the most appropriate mechanism. The Chair had been trying to get clarity around the disclosure regime to have a healthy engagement on the merits, particularly as to how it impacted at a regulatory level on users and owners. Another issue was the issue of balance. Some Member States came from the perspective of owners and beneficiaries and others from a user perspective. The IGC had to try to balance those. From his own perspective, to make progress, the IGC needed to accept both perspectives for the sake of balance. They balanced the different interests and they were accurately captured in the working document. To move forward, there were two broad areas to focus on. Firstly, the IGC could harvest outcomes in regard to issues where there was common ground, which did not mean consensus on all particular elements within that area. The scope might be one of those areas, where there was an opportunity. That related to the need to build consensus over time rather than attempt to address every issue at the beginning. The IGC had to be pragmatic and not to try to agree on

every detail, and those could be agreed later and there had to be a mechanism within the instrument to allow that. Secondly, there was a challenge in relation to the different approaches on the table regarding disclosure requirements and defensive measures. It was difficult for those that did not support a disclosure approach to engage with it when there was divergence on key issues. It was very important to be able to look at a proposal where there was clarity around those key issues. Without that, it was difficult to understand the full consequences in relation to burdens and cost on the user and owner and in relation to legal certainty. Clarity had been a focus of recent meetings. That was a second area to focus on and narrow positions on: trigger, consequences of non-compliance and contents. Based on those priorities, the Chair intended at IGC 36 to gain agreement on areas of common interest and narrow the gaps on key divergent issues in the proposal on disclosure requirements, i.e., trigger and related definitions, content, including related definitions, and consequences of non-compliance. The Chair then explained the process for the contact groups. The mandate of the contact groups was to reduce the number of options and alternatives and narrow gaps. There would be three contact groups: (1) Subject matter, chaired by the Vice-Chair, Mr. Faizal Chery Sidharta; (2) Trigger for and content of a disclosure requirement, chaired by the Vice-Chair, Mr. Jukka Liedes; and (3) non-compliance consequences, chaired by one Facilitator, Mr. Paul Kuruk. Each regional group, the EU, the LMCs and the Indigenous Caucus might nominate one delegate per contact group. The members of the contact groups should ideally be the subject matter experts, where possible, who had attended the *Ad Hoc* Expert Group. That would ensure continuing the healthy discussions held within the *Ad Hoc* Expert Group. The contact groups would work in English only, as there were no interpretation facilities. They would report back to the plenary the day after. The Chair asked members to review the summary of issues and to select the individuals participating in the contact groups. The contact groups were meant to allow an open and frank discussion on realistic proposals, which took account of the different interests of all Member States and ensured balance on the key points. The IGC needed to move away from narrow national perspectives. It did not mean that those were not important, but in order to bridge the gaps, one needed to look at the risks and consequences of moving away from national positions. The IGC was not going to move if one continued to want everything. It needed to find some middle ground as a starting point. What was done in the contact groups had no status. It would be further discussed within the plenary. The Facilitators and the Friend of the Chair would look at that and develop a revision, which itself had no status until noted on Friday.

48. Regarding the objectives, the Chair said that in the working document, there were essentially three objectives under the disclosure requirement approach, namely ensuring mutual supportiveness, enhancing transparency and ensuring that IP/patent offices had access to the appropriate information on GRs and associated TK to prevent the granting of erroneous IP/patents rights. Under the “no disclosure requirement” approach, the objectives were preventing the erroneous grants of patent rights and ensuring patent offices had the appropriate available information on GRs, as well as other objectives regarding the public domain, etc. The IGC had not finalized the objectives and could not agree on them. He asked participants to carefully consider whether or not consensus on objectives could be reached. Opening statements had referred to the terms “transparency” and “efficacy” and those could guide the discussions in order to find consensus. The IGC was looking at the objectives from two different perspectives: (1) the beneficiary and the owner of GRs, and (2) the user. There had to be a middle ground. He opened the floor for comments on objectives.

49. The Delegation of the USA, with respect to the objective in Article 2, had some concerns with paragraph (a) that stated “ensuring mutual supportiveness with international agreements relating to the protection of genetic resources...”. As it might not be feasible to ensure mutual supportiveness, it suggested bracketing the word “supportiveness” and inserting in its place “coherence”. That was a more realistic goal. More fundamentally, it had a concern about that subparagraph and how it would relate to other specific international agreements like the

Agreement on Trade-Related Intellectual Property Issues (the “TRIPS Agreement”). It suggested bracketing that subparagraph until there could be more reflection thereon. With respect to the subparagraph (b) on enhancing transparency, it had some concerns about whether the instrument with respect to disclosure requirements would in fact enhance transparency when some applicants might opt to use other forms of protection such as trade secrets to protect their rights and not use the patent system out of concern of a disclosure requirement, especially when a disclosure requirement might be onerous. It also suggested bracketing that subparagraph. It understood the Chair’s concern about trying to reach a consensus, but nevertheless it had concerns and was happy to work with other delegations to resolve those.

50. The Chair noted the comments. He reiterated his comments about maintaining the integrity of different positions and reminded the Delegation of the USA that the whole paragraph was bracketed.

51. [Note from the Secretariat: Three contact groups were established as the Chair announced above, and they met from 10 a.m. to 1 p.m. and from 3 p.m. to 4 p.m. on June 26, 2018. This part of the session took place on June 26, 2018 after the meeting of the contact groups.] The Chair invited the three contact groups to report on the discussions. He mentioned an issue with one of the contact groups where a representative from Azerbaijan had been unable to attend the contact group due to a miscommunication. He took responsibility for that and apologized. He would ensure that did not occur in the future.

52. One of the Vice-Chairs Mr. Sidharta, chairing one contact group, said that the contact group on subject matter had conducted its meeting with members from Chile, Czech Republic, EU, Republic of Korea, Islamic Republic of Iran, Niger, Canada, China and the Indigenous Caucus. The discussion had focused on the issue of patent versus IP rights and briefly on the issue of GRs and associated TK.

53. Mr. Patrick Blonar from Canada, speaking as the Rapporteur of the contact group on subject matter, said the group had focused on subject matter and had discussed whether the instrument should apply to any IP right or to patents only. While most experts shared the understanding of the importance of the patent system, there were questions regarding its premise. It was also noted that in some countries, plant varieties were not patentable at all and that plant breeders’ rights were the only form of IP right that could be used. Furthermore, it was also noted that other GRs, such as animals and microorganisms, might not be covered by patents. Other existing forms of IP, such as utility patents, trade secrets and contracts, might be related to GRs. Emerging IP issues relating to GRs included digital genetic information and potentially, artificial intelligence. The idea of developing a framework instrument that was open-ended and could take on further work including, as appropriate, new disclosure issues, triggers and criteria as well as other administrative measures while focusing on patent rights and possibly other priority issues was discussed. Such a framework would elaborate issues related to patents and invite members to develop IP-relevant instruments in the future. The group had also discussed whether the current instruments should apply to associated TK. The group identified that there was a need for a good working definition of associated TK in order to facilitate future discussion and minimize overlap with a TK instrument.

54. One of the Vice-Chairs Mr. Liedes, chairing the contact group on trigger for and content of a disclosure requirement, said that the program was rather heavy. There was a lot of substance for analysis and a lot of potential for taking steps forward in the clarity in the Consolidated Text. Ten members had participated from Mexico, Romania, Sweden, India, Brazil, Nigeria, Russian Federation, Switzerland, China and the Indigenous Caucus. The method was to concentrate on certain selected items. The emphasis was on the operative clauses (Article 4) and on the terms used.

55. Mr. Patrick Andersson from Sweden, speaking as the Rapporteur, said that they had had a lot of heated discussions, mostly focused on operative provisions, in particular on Article 4.2. They had a proposal for wording for Article 4.2, which, however, was not supported by the group. He presented it as something to discuss and consider in the IGC. They had relied on the principle not to use the terms “utilization” or “directly based on”. In respect of the chapeau of Article 4.1, concern had been raised as to whether it provided sufficient clarity and included digital sequence information. The group had simplified the clause regarding the content. They had removed the “providing country” layer and the subparagraphs had been developed to better fit GRs and associated TK, respectively. There was redundancy between the end of Article 4.1(a) and the new 4.1(b), referencing IPLCs. The subject matter was left in square brackets in the text. An understanding in the group was that the multilateral mechanism would be applicable for GRs from countries other than where the application was made. It read: “4.1 Where the subject matter for which protection is sought in an [IP][patent] application make use of genetic resources [and/or traditional knowledge associated with genetic resources] that is material to said subject matter each [Member State]/[Party] [shall]/[should] require applicants to disclose the following information: (a) the country of origin that supplied the genetic resources or if not applicable or unknown to the applicant source of the genetic resources, and/or [traditional knowledge associated with genetic resources], (b) [the indigenous peoples and local communities that were the source of the traditional knowledge associated with genetic resources], (c) if the information under (a) or (b) is not known to the applicant, a declaration to that effect.” That was the information the applicant of IP rights should disclose. It had also been suggested that clear text could be achieved if tailored to each respective IP. The group had also discussed that the source and/or the geographic origin could be managed as an alternative to the country of origin. On Article 4.2, the group had done a minor change, which read: “When applicable, a [Member State]/[Party] may in accordance with national law, require applicants to provide relevant information regarding compliance with ABS requirements, including PIC, [in particular from indigenous [people[s]] and local communities], where appropriate.” In the discussion regarding Article 4.2 and ALT 4.2, no agreement had been reached in the group. There had not been much discussion on Article 4.3. On Article 4.4, they had noted that the content of the footnote had to be considered once the content of the disclosure would be agreed. As to definitions, the need for definition would depend on the final text and on the use of the terms in that final text. The group had not had sufficient time to analyze the definitions. Regardless, it had examined the definition of “country of origin” and whether, if there was a term used in another international instrument, one should stick to that definition or use another term. The group suggested that the definition of “country of origin” would read as in Article 2 of the CBD. Regarding the “ALT” of country of origin, it was a difficult clause and the IGC could consider deleting it.

56. One of the Facilitators Mr. Kuruk, chairing the contact group on sanctions and remedies, noted that the meeting had started with members from Malaysia, Jamaica, Latvia, Netherlands, Egypt, South Africa, USA, China, Russian Federation and the Indigenous Caucus. The group had been tasked with reviewing Article 6 on sanctions and remedies with a view to narrowing gaps. To that end they had deleted some parts of the existing text and redrafted others and had come up with others that reprised three separate paragraphs. They had gone over all the proposals in Article 6 to identify minimum positions worthy of further consideration. In that respect, Article 6.1 was a useful starting position because it recognized the need to provide, in general language, for measures to deal with cases of non-compliance with the disclosure requirement. Due to the recognition that the measures would be provided for in accordance with national law, they had determined that it would be more appropriate to leave the specifics to the national law and not delineate them in the proposed instrument. Accordingly, they had deleted the old Article 6.2 as well as ALT Article 6.2 to the extent that the above referred to pre-grant and post-grant measures and provided details of the same in ALT Article 6.2. To accommodate concerns about the use of revocation with regards to non-compliance with the

disclosure requirement, it was useful to provide assurance in Article 6.2 that a failure to fulfill the disclosure requirement should not affect the validity or enforceability of granted patents. However, to make it clear that that assurance did not disregard but would also be subject to doctrines of fraud, recognized in various national jurisdictions, it was useful to incorporate for further consideration the language on the exception in Article 10.1 of the PLT. That part had been incorporated without change whatsoever. The third substantive matter dealt with was with regards to cases of non-compliance that did not rise to the level of fraud indicated in Article 6.2. The group had created a space for the patent holders to engage with the relevant IPLCs to work out for themselves solutions that were mutually satisfactory.

57. Ms. Sue Noe from the Native American Rights Fund, speaking as the Rapporteur, said that the group had addressed Article 6 on sanctions and remedies. They had worked very diligently and efficiently. The members of the group had shared examples of sanctions and remedies under existing national, regional and international laws as a foundation for the discussion. Members had expressed concern that sanctions and remedies should not increase legal uncertainty within the patent system. The desire for balance so that everyone benefited from the patent system, including rightsholders, patent holders and states with respect to GRs, had also been discussed. The group had worked to narrow gaps, eliminating alternative language and identifying the three provisions that were considered worthy of further consideration. Those would create a framework for allowing flexibility for Member States. The first provision was existing Article 6.1, which left it to the Member States to identify and put into place appropriate sanctions. It read: “[Each [Member State]/[Party] [shall]/[should] put in place appropriate, effective and proportionate legal and administrative measures to address non compliance with the disclosure requirement of Article 4.” The second provision would place a ceiling on sanctions, specifically limiting the sanction of patent invalidity to the narrow circumstance where the failure to comply with the disclosure requirement occurred as a result of a fraudulent intention, i.e., for example, where someone knowingly gave false information for economic benefit. Related to that was a discussion of fraud being a crime under national laws and consideration that criminals should not be protected from suffering revocation of patents fraudulently obtained. The text of Article 6.2 read: “Failure to fulfill the disclosure requirement [shall]/[should] not affect the validity or enforceability of granted [IP] [patent] rights, except where the non-compliance with the formal requirement occurred as a result of a fraudulent intention.” That proviso “except where the non-compliance with the formal requirement occurred as a result of a fraudulent intention” came from Article 10.1 of the PLT. In cases where failure to disclose occurred in the absence of fraud, the final provision considered worthy of further consideration to establish dispute resolution mechanisms. Article 6.3 read: “Without prejudice to noncompliance as a result of a fraudulent intention as addressed under 6.3, [Member States]/[Parties] [shall]/[should] [may] put in place adequate dispute resolution mechanisms that allow all parties concerned to reach mutually satisfactory solutions in accordance with national law.” Those were the provisions on which the group had been able to narrow gaps and identify as worthy of further consideration.

58. The Chair thanked the Chairs and Rapporteurs of the contact groups and the members of those contact groups. He appreciated the efforts of the contact groups and saw significant positive contributions intended to narrow gaps. He said the scope of the instrument as determined in the operative articles was shaped towards the patent system. He appreciated the notes provided by the contact group on subject matter. He opened the floor for comments by the plenary.

59. The Delegation of Azerbaijan addressed the question of participation of experts in the work of that contact group. Unfortunately, the expert from Azerbaijan was not admitted into the group.

60. The Chair took responsibility for any miscommunication and apologized for that. He said he would ensure that would not occur in the future.
61. The Delegation of Nigeria said that one could borrow definitions from other instruments, including the CBD and the Nagoya Protocol, only when it was appropriate or suitable for the instrument. Because of the unique nature of the IGC instrument, delegations should not shy away from coming up with a definition that suited the very document. On definitions, in general, it noticed that new terms had been dropped and new ones were coming in. It suggested to the Chair to create, at some stage, a contact group specifically tasked with definitions.
62. The Delegation of the Islamic Republic of Iran said that there was a very wide range of GRs that patents might not cover and some GRs might be addressed by different types of IP rights. The instrument should address all GRs and all forms of IP related to all GRs. If the IGC was not able to develop an instrument that might cover all GRs and its relevant IP forms, the IGC could develop a framework instrument that recognized all types of GRs and their relevant IP. For the sake of compromise, the text could be focused on patents at that stage, but recognizing other forms of IP for GRs and providing ground for the obligation to develop the text further to cover all other GRs through specialized IP instruments.
63. The Chair said there were no further comments on the reports from the contact groups on trigger for and content of disclosure requirements and sanctions and remedies. That meant that there was general agreement with the materials presented, which had no status until such time that the plenary made any decisions thereon. He opened the floor for general reflections and any interventions in relation to the material provided, which would be considered by the Facilitators in developing Rev. 1.
64. The representative of Tupaj Amaru was convinced that the treaty on GRs and associated TK of indigenous peoples should be dealt with as part of the CBD, the Nagoya Protocol and other instruments of UNESCO. Going out of that international legal framework would mean losing one's way and never being able to reach consensual wording. He submitted the following proposal in order for all to agree on definitions: "TK and GRs include the whole set of dynamic and cumulative processes of traditional ecological knowledge in constant evolution closely linked to traditional systems based on biological resources, innovations, traditional technologies, language, natural cycles and preservation and sustainable use of biodiversity which are owned, maintained and preserved collectively by the IPLCs since time immemorial and which are transmitted from generation to generation."
65. The Chair said there was no support for the proposal made by the representative of Tupaj Amaru.
66. [Note from the Secretariat: all speakers thanked the Chairs, Rapporteurs and members of the contact groups.] The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, welcomed the reports by the contact groups and noted that the Facilitators and the Friend of the Chair would have a long night to prepare Rev. 1. It looked forward to more comments the following day.
67. The Delegation of Ecuador, speaking on behalf of GRULAC, supported all the work going on in the IGC to try to achieve actual results. It was open and prepared to continue working in a constructive way. It looked forward to receiving Rev. 1 so as to continue the discussions.
68. The Delegation of Morocco, speaking on behalf of the African Group, said that relative progress had been made in the contact groups. It proposed that the groups continue and work on definitions. It awaited Rev. 1 with interest.

69. The Delegation of Indonesia, speaking on behalf of the LMCs, trusted that the Facilitators and the Friend of the Chair would be able to appropriately reflect the report of the contact groups in Rev. 1. It wished to discuss definitions, including the relationship between GRs and associated TK. It was under the guidance of the Chair and trusted his judgment on how to move forward to make progress.

70. The Delegation of the EU, speaking on behalf of the EU and its Member States, was hopeful that the hard work of the contact groups would be useful for the Facilitators' work and looked forward to hearing the introduction of Rev. 1.

71. The Delegation of China wished to add, in Article 4, after the reference to IPLCs: "entities provided under national laws".

72. The Delegation of Lithuania, speaking on behalf of the CEBS Group, looked forward to Rev. 1.

73. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, considered the contact groups a very effective way of working and welcomed the progress made. While a few of her proposals had not been accepted in the contact groups, in the spirit of compromise, she could not expect every single proposal to be reflected. She looked forward to receiving Rev. 1 and to the continuation of the IGC's work.

74. [Note from the Secretariat: the following session took place on June 27, 2018.] The Chair invited the proponents of documents WIPO/GRTKF/IC/36/7, WIPO/GRTKF/IC/36/8 and WIPO/GRTKF/IC/36/9 to introduce their proposals, which had been introduced previously. The Delegation of the USA had submitted a new document, WIPO/GRTKF/IC/36/10, the day before.

75. The Delegation of the USA was pleased to introduce document WIPO/GRTKF/IC/36/10 entitled "The Economic Impact of Patent Delays and Uncertainty—U.S. Concerns About Proposal for New Patent Disclosure Requirements." That document was relevant to disclosure requirements and the IGC's mandate to use an evidence-based approach in its consideration of national experiences with IP and GRs. The paper was based on recent studies including one conducted by a USPTO Edison scholar in collaboration with other economists. The paper analyzed the impact that research and development had in biotechnology and pharmaceuticals and the uncertainties they would introduce into the patent system. The paper considered the effect of patent review delays on employment and sales growth for startups. Among its findings, in a single year of patent review, delays would reduce employment growth for a startup by an average of 19.3 percent over a five-years period of time. A single year of patent review delay would also reduce sales growth for startups for over five-years by an average of 28.4 percent. The paper also considered legal uncertainty from disclosure requirements, which might encourage companies to forego patent protection in favor of weaker or non-disclosed forms of protection such as trade secrets. The paper's findings were consistent with the conclusions reached by a recent report commissioned by IFPMA and CropLife, which had been introduced at a side event the day before. A new disclosure requirement would have negative effects, including negative effects on licensing, research and development and investment and litigation. The Delegation had significant economic-based concerns about proposals for new patent disclosure requirements that were under consideration in the IGC and it urged the IGC to exercise caution when exploring those proposals. The Delegation also introduced document WIPO/GRTKF/IC/36/7 entitled "Joint Recommendation on Genetic Resources and Associated Traditional Knowledge", cosponsored by the Delegations of Canada, Japan, Norway, the Republic of Korea and the USA. It had previously introduced that proposed joint recommendation at IGC 35 as document WIPO/GRTKF/IC/35/7. The document could be used as a confidence-building measure to help the IGC move forward on key issues concerning GRs and associated TK. The co-sponsors had re-tabled the document based on discussions in past

IGC sessions when some delegations had expressed interest in that document and its objective, which included preventing the erroneous grant of patents. The proposed joint recommendation could be negotiated, finalized and adopted without slowing down the work of the IGC. The proposal would promote the use of opposition systems to allow third parties to dispute the validity of a patent, the development and use of voluntary codes of conduct, and the exchange of access to databases, among other things, in order to prevent the erroneous granting of patents for inventions based on GRs and associated TK. With respect to opposition systems, US patent law provided a mechanism for third parties to submit printed publications of potential relevance to the examination of a patent application with the concise description of the asserted relevance of each document submitted. That provision had been introduced in 2012 under the America Invents Act. Such submissions had to be made prior to the date of a notice of allowance. Third party submissions did not delay or otherwise interfere with the examination of patent applications because they merely provided additional information to patent examiners without creating procedural requirements. Almost half of the third-party submissions between 2012 and 2015 had been filed in technology centers that examined biotechnological, pharmaceutical and chemical inventions as well as those related to food and chemical engineering. Those submissions might include non-patent literature such as published GRs and TK. In fact, over 30 percent of the submitted documents for the same time period were related to non-patent literature. With respect to voluntary codes of conduct, a number of pharmaceutical and biotechnological inventions, including life-saving medicines, utilized compounds and processes that existed in nature. Many companies had established guidelines and rules for proper bio-prospecting. For example, the Biotechnology Innovation Organization ("BIO"), a global trade organization that included SMEs and other companies, academic institutions, state biotech centers and related organizations in more than 30 nations and had developed bio-prospecting guidelines for its members. They identified certain best practices that could be followed by certain companies that elected to engage in those activities, if and when that company engaged in bio-prospecting activities. Thus, the guidelines identified steps that companies should take before engaging in bio-prospecting, such as obtaining PIC. They also provided useful information about benefit-sharing and sharing of research results and IP and related provisions and set forth measures to protect the rights and interests of indigenous or local communities and steps for the conservation and sustainable use of biological diversity. Those guidelines provided a useful example of how private sector innovators were taking proactive steps to preserve biodiversity and promote sustainable use of GRs and equitably share benefits arising from the use of GRs. The Delegation wished to continue the discussion on that proposed joint recommendation because it captured key objectives and facilitated the establishment of effective mechanisms for the protection of GRs and associated TK. It invited other delegations to express their support for the proposal and welcomed additional cosponsors. It looked forward to continued discussions on the proposal. It thanked IFPMA and CropLife for their informative side event, where it learned about the report on the economic impact of disclosure requirements in patent applications for GR-based innovations, which had been commissioned by those associations. The report was relevant to the IGC's mandate to use an evidence-based approach in its consideration of national experiences with IP and GRs. The report focused on two issues: (1) what were the social and economic effects of disclosure requirements, and (2) whether the disclosure requirement procedure in the patent system was efficient in assuring ABS compliance? Two countries rich in GRs and with mandatory disclosure requirements, Brazil and India, had been selected for the study. With respect to ABS compliance, the study found that in India many GRs were commercialized without patents while the disclosure requirement was applicable only to patented inventions. In both countries, the disclosure requirement was found to delay the patent examination process. In addition to delay, it might negatively impact research and development costs and increase uncertainty in the patent system.

76. The Delegation of Japan expressed its appreciation to the Delegation of the USA for providing document WIPO/GRTKF/IC/36/10. As indicated in the document, the introduction of

the mandatory disclosure requirement would result in the delay of the patent grant process and create uncertainty for patent applicants, and the mandatory disclosure requirement might hinder the healthy growth of industries utilizing GRs in emerging and developing countries, both then and in the future. It shared that common concern. The analysis based on the objective data shown in the document was highly useful to advance the work of the IGC, using an evidence-based approach. For example, taking into account the fact that the duration of patent right was limited (20 years from the filing date, in principle) panels A and B of figure 4 indicated in the document were very persuasive. The document shed light on the influence of disclosure requirements on startup companies. Since supporting startup companies was critical for emerging and developing countries as well as developed countries, it also offered Member States valuable insight for that highly important aspect. The Delegation remained committed to contributing to constructive discussions in the IGC in an evidence-based manner, based upon the valuable lessons obtained from the detailed analysis shown in the document. It thanked the Delegation of the USA for the explanation on document WIPO/GRTKF/IC/36/7 and supported it, as a cosponsor. That recommendation was a good basis for the discussion on the issues regarding IP and GRs, especially on the prevention of the erroneous grant of patents. It looked forward to continuing discussions on the joint recommendation.

77. The Delegation of the Republic of Korea welcomed the submission of document WIPO/GRTKF/IC/36/10 by the Delegation of the USA. That submission provided the valuable information for further discussion by the IGC. In April 2018, it had received similar feedbacks from GR users and other stakeholders in a meeting organized for hearing their opinions on the possible impacts of introducing disclosure requirements in the patent system. It wished to share their opinions briefly. The first opinion was their difficulties in obtaining the right information related with disclosure requirement from intermediaries. At times, GR users might not be able to confirm the authenticity of the relevant ABS documents from intermediaries. In the Republic of Korea, approximately 57 percent of GR users obtained their GRs of interest through intermediaries (GR users might have to take responsibilities of intermediaries' wrong information.) The situation could become more complex if the invention was based on the use of many GRs in combination. In such cases, it took much more time for GR users to attempt to meet the disclosure requirement for each GR used in the invention, leading to a significant delay of the patent filing date. In addition, complex disclosure requirement could prolong the patent examination procedure. The presentation by IFPMA also provided very useful information. It stood ready to engage in the discussion of that submission in a constructive way at the session. In addition, it supported document WIPO/GRTKF/IC/36/7 proposed by the Delegation of the USA, as a co-sponsor. The establishment and use of database systems to prevent erroneously granted patents and the use of opposition measures would be an effective and efficient form of promoting the protection of GRs and associated TK in the patent system. A well-developed database would be a very practical and feasible method for reducing the number of erroneously granted patents in each Member State.

78. The representative of AIPLA said the members of AIPLA represented both users and owners of IP. Its mission included helping to establish and maintain fair and effective laws and policies that stimulated and rewarded inventions while balancing the public's interest in healthy competition, reasonable costs and basic fairness. She thanked WIPO for its continued focus to provide a global policy forum to address IP issues. AIPLA had been following with interests the discussions and proceedings of the IGC. Over at least the last three years, AIPLA had been seeking to collect practical experience of patent practitioners and companies on compliance with disclosure requirements for patent applications involving GRs. AIPLA Biotechnology Committee had published in its monthly newsletter findings on the experience before the Swiss Patent Office and Swiss patent practitioners with the Swiss Patent Law on disclosure requirements. Article 49a of the Swiss Federal Act on Patents not only required that the applicant provide that information, but Article 59(2) and 59a(3) also provided pre-grant penalties, including rejection of the patent application, if the applicant failed to comply.

Furthermore, Article 81a of the Swiss Federal Act on Patents provided a post-grant penalty in that any person, who willfully provided false information under Article 49a was liable to a fine of up to CHF100,000 and the Court might order the publication of the judgment. To learn more about the experience of the Swiss Patent Office and patent practitioners with the disclosure requirements, AIPLA had sought information from the Sustainable Development and International Cooperation Division of the Swiss Patent Office and from Swiss patent attorneys. AIPLA sought to determine how patent applicants had dealt with the Swiss mandatory disclosure requirements and whether the Swiss Patent Office had ever invoked the sanctions for failure to meet the disclosure requirements in accordance with Article 81a of the Swiss Federal Act on Patents. AIPLA's study had found no practical impact had come to the attention of either the Swiss Patent Office or Swiss patent attorneys contacted. There had been no rejection of any patent application based on the violation of Article 49a, nor had there been any publication of a judgment in accordance with Article 81a. The provisions of the Swiss Federal Act on Patents only and exclusively applied to "national" Swiss patent applications, i.e., applications directly filed with the Swiss Patent Office. The provisions did not apply to the European Patent applications, which were then validated in Switzerland. They were governed by the European Patent Convention, which did not include any disclosure requirements corresponding to Article 49a and 81a. According to statistics obtained from the Swiss Patent Office, the number of patent applications directly filed with the Swiss Patent Office was typically between 1,000 and 3,000 applications per year. Those "national" applications typically originated from small Swiss companies, and also from specific areas of technologies typically not including biotechnology. By contrast, about 100,000 patents per year were validated in Switzerland via the European Patent Office system. Those "EP-CH" patents included essentially all applications filed by biotech companies and essentially all applications filed by "multinational" companies. Thus, it could be concluded that about one to three percent of the Swiss patents were subject to the disclosure requirement, and, of that small fraction, there were few or none in the biotechnology arts. The Swiss patent attorneys interviewed by AIPLA Biotechnology Committee were not aware of any company that had or would file directly with the Swiss Patent Office, which was the only way in which a company would be subject to the mandatory disclosure requirements of the Swiss Patent Office. In summary, AIPLA had not been able to identify or collect any practical experience in complying with the Swiss disclosure requirement. She thanked the Secretariat for connecting AIPLA with the Swiss Patent Office. She also thanked the Swiss Patent Office for providing AIPLA with helpful information regarding the disclosure requirements for the use of GRs under the Swiss Patent Law. AIPLA was collecting practical experience on compliance with mandatory disclosure requirements to enable assessment of the potential impact of mandatory disclosure requirements in other jurisdictions.

79. The Delegation of the Russian Federation thanked the Delegation of the USA for the newly submitted document but could not yet discuss it. It was a very serious document, which contained figures and analysis and required further study. It supported document WIPO/GRTKF/IC/36/7 and agreed with the recommendations. That document was a good basis for the IGC's work and could be used as working principles for discussion.

80. The Delegation of Japan, together with the Delegations of Canada, the Republic of Korea and the USA, was pleased to offer a brief explanation of document WIPO/GRTKF/IC/36/8. Most of the Member States shared a common recognition of the importance of taking effective measures to prevent the misappropriation of GRs and associated TK. Based on that recognition, it had been contributing to the discussions at the IGC and other fora by proposing to create a database for GRs that would prevent the erroneous granting of patents. As indicated in document WIPO/GRTKF/IC/35/5 issued by the Secretariat, ever since the IGC had been established, Member States had submitted a number of proposals on databases relating to GRs and associated TK. In order to achieve that purpose, it would be more appropriate to establish databases on GRs that would provide information that examiners needed to determine novelty and inventive steps of inventions claimed in patent applications. That should be done

instead of introducing a mandatory disclosure requirement. Such databases enabled patent examiners to make efficient searches for relevant prior arts among thousands of patent documents and non-patent literature. By examiners utilizing the proposed databases during the patent examination process, the quality of patent examination in the area of GRs would be improved and protection of GRs would be enhanced. It hoped the document would foster a better understanding of the proposal for creating databases among Member States.

81. The Delegation of Morocco, speaking on behalf of the African Group, thanked the Delegation of the USA for document WIPO/GRTKF/IC/37/10, which dealt with an essential item on the agenda of the IGC, i.e., disclosure requirements. It also thanked the Delegation of Japan for its presentation as well. However, it considered that the proposals would hold up the work done thus far, hence there is a need to concentrate on the Consolidated Document as it would be revised and submitted.

82. The Delegation of Egypt supported the statement made by the Delegation Morocco, on behalf of the African Group. The document submitted by the Delegation of the USA dealt with the concerns of Egypt vis-à-vis the penalties for failure to disclose and other disclosure issues. One contact group had pointed out those concerns and had concluded by proposing a draft of Article 6 that took into account all the issues and concerns expressed. The IGC was requested, as per its mandate, to move ahead in the discussion of the Consolidated Document.

83. The representative of InBraPi, speaking on behalf of the Indigenous Caucus, said, concerning on document WIPO/GRTKF/IC/36/10 submitted by the Delegation of the USA, that the misappropriation of TK associated with GRs which had led to the grant of patents had caused damage much greater to IPLCs than the damage caused to the patent system. The improvement of the IP system, in particular the patent system, to provide legal certainty was the reason why indigenous peoples were at the IGC since its inception. An evidence-based approach based on practical experience clearly showed that disclosure requirements could lead to an additional burden for patent examiners. But it was an instrument that related to a significant drop in erroneous patents. Consequently, to increase the legal certainty for indigenous peoples and the whole society, the Indigenous Caucus would in the future submit to the IGC documents on economic, social and cultural damage done to indigenous peoples, based on the practical experience set in their national context due to the erroneous grant of patents that could have been avoided if the patent system were to include disclosure requirements of information as to the source of TK and GRs and information on PIC. She wished to concentrate on the Consolidated Document and the outcome of the contact groups in order to make progress since that was the last session of the IGC on GRs.

84. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, thanked the Delegations of the USA and Japan for introducing the documents. The new document required further reflection. He said that the IGC's mandate referred to "balance", which entailed a full investigation of the issues from all perspectives. The proposed documents presented an extremely unbalanced assessment, because they focused on GRs users, IP owners and the public interests. The interests and rights of IPLCs, the holders and owners of TK, were not reflected. Any full evidence-based investigation would have to be based on all perspectives and the rights and interests of all entities involved. There was also the long-standing issue of the distribution of burdens. Databases put the burden of proof on the holders and owners of TK to provide evidence that it was their property, whereas the disclosure of origin put the burden of proof on those who wished to do development to show that they had had legal title to access to TK and GRs. He recalled that the CBD and the Nagoya Protocol had been designed to stop the use of GRs without authorization of states. There was a problem because some GRs were obtained from markets and no one knew where they came from. Both instruments were meant to stop those. That was the reason the IGC was discussing IP rights. There needed to be an understanding of basic terms, such as "effective protection", which could

receive 10 or 100 different interpretations as to what was protected, from whose point of view, and according to whose values and rights. He called for a risk/benefit analysis that took into account all risks and benefits. For example, he asked what the risk was of fast tracking patents to IPLCs. He asked for an analysis of cultural and ecological risks (and not just socioeconomic). In a normal risk analysis, one would independently look at the factors on their own terms. As such, cultural issues were not economic issues. That made a difference with respect to “evidence based”. The IGC needed a much larger understanding. He said he would further reflect on those documents, which were not adding value because they were introducing a highly biased assessment of just one group of users’ point of view.

85. The representative of Tupaj Amaru said that the proposals made by the Delegation of the USA and supported by the Delegation of Japan and other western countries infringed the principle of the CBD (Article 17.1) and its Nagoya Protocol, where states had to disclose the origin of GRs for the access to and use of natural resources by companies. He said the Delegation of the USA had come along with proposals every year. That undermined the value of the Consolidated Document, which would become a binding instrument to protect GRs and associated TK. The purpose of the Delegation of the USA was always to obstruct in order to facilitate access to the GRs and TK of indigenous peoples by pharmaceutical companies. That was the objective of all the western powers that had large technological companies. The basic problem addressed at the IGC was biopiracy, which referred to GRs and TK and the grant of patents. In the usual definition, biopiracy was the pillaging of GRs and associated TK to the detriment of IPLCs. Patents were key instruments used in biopiracy. In the IGC, there were representatives of pharmaceuticals, agro-industries and research industries that appropriated seeds and TK associated with GRs through IP. The IGC had to protect those resources that were fast disappearing. That was the task of the IGC and of states, according to the IGC’s mandate.

86. The Delegation of the Russian Federation agreed with the proposal within document WIPO/GRTKF/IC/36/8 on the setting up of a one-click database search system. That would lead to more effective searches by search authorities and would protect GRs and associated TK and would avoid the erroneous grant of patents.

87. The Delegation of the Republic of Korea, as a cosponsor, supported the recommendation in document WIPO/GRTKF/IC/36/8. A well-developed database was a very practical and feasible method for reducing the number of erroneously granted patents in each Member State and promoting the protection of GRs and associated TK. Developing an integrated, one-click database and WIPO-portal system would effectively and efficiently enhance the protection of GRs and associated TK.

88. The Delegation of the USA supported the comments made by the Delegation of Japan regarding document WIPO/GRTKF/IC/36/8. As a cosponsor, the proposal was a valuable contribution to the work of the IGC that aimed at providing an international legal instrument(s) for the effective protection of GRs and TK. In particular, it helped to address concerns raised in the IGC relating to the erroneous granting of patents. Moreover, it was essential that the IGC further engage on that proposal in order to address questions and concerns raised about the use of databases in past discussions. The Delegation looked forward to discussing the WIPO portal proposal, including any follow-up questions. It welcomed any suggestions for improving that proposal that other Member States might have. It thanked the AIPLA for introducing the paper on the Swiss experience, which had been written by a European patent attorney with knowledge of laws and practices in Europe. That paper was entitled “Disclosure requirements for Genetic Resources - what can be learned from the ‘Swiss experience’?” and was available on the AIPLA website. The author pointed out that Switzerland had a national patent law that included a mandatory requirement for a patent applicant to disclose the source of any genetic materials to which the inventor or patent applicant had access and which had directly led to the

invention, from which the applicant or patentee intended to benefit. The law provided for both pre-grant and post-grant penalties if the requirement was not complied with. Post-grant penalties could include a fine of up to CHF100,000. That was contrasted with other western jurisdictions, where any GR-related patent disclosure was completely optional and did not affect patent examination, and where non-compliance did not result in any sanctions. The author had interviewed Swiss patent attorneys working in biotechnology and inquired with the Swiss Patent Office about any practical experience and impact of that mandatory disclosure requirement. The author reported that the Swiss disclosure requirement only applied to those 1,000 to 3,000 patent applications that were filed with the Swiss Patent Office, which were mostly not biotechnology-related. That requirement did not apply to the approximately 100,000 EPO-filed patents, which were validated in Switzerland. Thus, that requirement was easily avoided by filing a patent application with the EPO and validating the resulting patent in Switzerland. Despite the fact that penalties under the Swiss disclosure requirement were limited to fines, “any biotech company with a commercially relevant portfolio” would choose to avoid that requirement by filing through the EPO and not directly with the Swiss Patent Office. The Swiss disclosure requirement did not include penalties of revocation, yet even a fine could be a deterrent from filing in a jurisdiction with a disclosure requirement.

89. The Delegation of Canada was pleased to cosponsor document WIPO/GRTKF/IC/36/8 as the proposal was one of several possible positive ways forward including as a means to consider the full range of options available. Databases played a valuable role in the prevention of the erroneous grant of patents with regard to GRs and associated TK. At the same time, the Delegation fully acknowledged the concerns expressed by IPLCs. Its proposal was without prejudice to the IGC’s work and outcome(s). It was pleased to cosponsor document WIPO/GRTKF/IC/36/9 together with the Delegations of Japan, Norway, the Russian Federation and the USA. It set out a list of questions intended to update the 2004 WIPO Technical Study related to Genetic Resources and Traditional Knowledge with information regarding disclosure requirements and related ABS systems implemented by Member States. That type of information was important for the consideration of any proposed standard on the mandatory disclosure of GRs and associated TK. That was in line with the IGC’s mandate for 2018-2019 biennium, which called for an evidence-based approach and contemplated compiling and updating studies. Some Member States might not have been convinced of the value of such proposed study, citing, for example, that studies existed. While the existing studies were certainly informative and useful, they fell short of providing quantitative and qualitative comparative data regarding the practical application and implementation of disclosure and its implications. It intended to focus on the future of national legislation and sought to enrich the discussions of those Member States implementing disclosure requirements and related measures. It remained available to discuss the proposal with other Member States and the Indigenous Caucus.

90. The Delegation of the Russian Federation supported and was extremely interested in carrying out a study of the practice of offices that had a disclosure requirement. Practical experience would help achieve clarity and contribute significantly to progress in the IGC.

91. The Delegation of Republic of Korea, as a cosponsor, supported document WIPO/GRTKF/IC/36/9. The proposed study would provide factual and evidence-based information on current national experiences, in order to have a better understanding of the effects of the disclosure requirement in the patent system. Through that study, one could hear diverse opinions and experiences from a variety of stakeholders, not only from GR providers, but also from patent examiners and patent users directly influenced by the introduction of the disclosure requirement. The proposed study would help reflect the views from various stakeholders in a balanced manner, and contribute to assessing the possible impacts of the disclosure requirement in the patent system and better understanding core issues in the IGC.

92. The Delegation of Japan, as a cosponsor of the proposal, thanked the Delegation of Canada for the presentation. It supported the proposal contained in document WIPO/GRTKF/IC/36/9. Many Member States had recognized the importance of an evidence-based approach. The proposed study was an effective and productive way to foster a common understanding on core issues on GRs without delaying text-based negotiations.

93. The representative of Tupaj Amaru asked, in relation to the statements made by the Delegations of the USA and Japan, what was the spirit of the broad guidelines. He proposed the following language: "In cases where the applicant has not disclosed the source or origin of the GRs or associated TK or has submitted fraudulent information to obtain through misconception and mischief the patent in violation of the national legislation of country or country of origin of the GRs, the members of the current international instrument will then impose administrative and criminal sanctions including revocation of the IP right." That was the focus of the discussion.

94. The Chair asked whether any Member State supported the proposal. There were none.

95. The Delegation of Egypt said that the new proposals would make the IGC go backwards. It recalled what had happened at IGC 35 on Rev. 1. That approach removed the IGC further away from its mandate and objectives. The IGC had to work on the text to achieve its objectives. That was a balanced approach, which respected the interests of all the parties concerned. The approach of submitting more documents did not help achieve any results and distracted the IGC from reaching its objectives.

96. The Delegation of the USA joined the delegations that supported the proposal made by the Delegation of Canada on document WIPO/GRTKF/IC/36/9. It recalled the IGC's mandate and its reference to studies of national experiences. In the past sessions, the IGC had had constructive discussions about national laws and how disclosure requirements and ABS systems functioned. Those discussions had helped to inform text-based negotiations. Questions in the study explored issues such as the impact that national disclosure requirements had had in securing compliance with ABS systems and the penalties associated with non-compliance. That study was intended to generate important information to support the IGC's work and not to slow it down. It welcomed any additional questions or suggested improvements for the proposed study.

97. The Delegation of Brazil said that over the years, it, together with other biodiverse countries, had been listening to the concerns over the potential impact of disclosure requirements on the patent systems. The IGC had been addressing those concerns in discussions and in practice. It called attention to a footnote in the study presented by the Delegation of the USA (document WIPO/GRTKF/IC/36/10) that referred to the previous Brazilian law, which was no longer in force and drew conclusions that were no longer applicable. It had tried to be constructive and had been and remained open to dialogue with any Member State. Every concern, without exception, was legitimate. Yet it would feel reassured if its own concerns were equally addressed in a constructive manner. The WIPO Secretariat had produced various studies over the past two decades. It was concerned with the timing of the study being requested. Documents WIPO/GRTKF/IC/35/5, WIPO/GRTKF/IC/35/6 as well as the WIPO study on patent disclosure requirements answered many if not all of the questions raised in document WIPO/GRTKF/IC/35/9. In the terms of the IGC's mandate, studies or additional activities were not to delay the work of the IGC towards its effective results.

98. [Note from the Secretariat: This part of the session took place after the distribution of Rev. 1 dated June 27, 2018 prepared by the Facilitators and the Friend of the Chair.] The Chair opened the discussion of Rev. 1. He asked participants to carefully listen to the context and the explanation behind the changes by the Facilitators and the Friend of the Chair. Rev. 1 was

always the most difficult revision because it took Member States out of their comfort zones in trying to move the process forward. Rev. 1 had no status and reflected the discussions, observations and interventions that had occurred within the meeting, through the *Ad Hoc* Expert Group, contact groups, and plenary. The role of the Facilitators and the Friend of the Chair was to balance all interests and all interventions to lead to an outcome. The Facilitators and the Friend of the Chair had a demanding task and worked for the IGC. They could be approached directly to provide clarity over context. The Chair encouraged participants to engage with them to clarify the text. He invited the Facilitators and the Friend of the Chair to present Rev. 1.

99. Mr. Kuruk, speaking as one of the Facilitators, said that Rev. 1 took into account the reports of the discussions of the contact groups and general comments made in plenary. The goal of the revisions was to narrow gaps and to streamline the text. Revisions had been made to five articles, specifically Article 1 on definitions, Article 2 on objectives, Article 3 on subject matter, Article 4 on the disclosure requirement and Article 6 on sanctions and remedies. A new article had been proposed as Article 5 to deal with the applicability of the disclosure requirement to other areas of IP. The articles following that new article were therefore renumbered accordingly. The Facilitators and the Friend of the Chair would jointly describe the changes made and explain the rationale for the changes. Regarding Article 1, they had revised only one definition on “country of origin”. The definition had been subject to heavy debate in the contact group and no clarification had emerged from that debate. They had inserted the term of “GRs” to the definition to clarify that the definition was to be applied in the context of GRs. Most had found it useful to insert those in the definition to clarify that the definition was to be applied narrowly in the context of specific GRs that were relevant to the subject matter of protection as opposed to GRs in general. They had moved up the definition of the term “*in situ* conditions” as the term was to be referred to in key provisions of the Consolidated Text and therefore qualified as an operative term. Article 7 in Rev. 1 was essentially the proposal that had emerged from the discussion of contact group on sanctions. No changes were made at all by the Facilitators or the Friend of the Chair to Article 7. As it stood, it contained three provisions. The very first provision read as follows: “7.1 [Each [Member State]/[Party] [shall]/[should] put in place appropriate, effective and proportionate legal and administrative measures to address noncompliance with the disclosure requirement of Article 4.” That was in recognition of the need to provide in general language for measures to deal with cases of non-compliance with a disclosure requirement. However, as a recognition that those measures would be provided for in accordance with national law it was determined that it was appropriate to leave the specific details of the measures to national laws and not to try to deal with them in the proposed instrument. Accordingly, they had deleted the old Article 6.2 as well as old ALT 6.2 to the extent that the above referred to pre-grant and post-grant measures. They had moved up old Article ALT 6.3 to 7.2 as the second paragraph and revised it with the addition of new language. The second paragraph read as follows: “7.2 Failure to fulfill the disclosure requirement [shall]/[should] not affect the validity or enforceability of granted patent rights, except where the noncompliance with the formal requirement occurred as a result of a fraudulent intention.” The last phrase in that second paragraph was taken from Article 10.1 of the PLT. Its inclusion was intended to clarify that failure to comply with the disclosure requirement would not invalidate the patent but would not exempt it from doctrines of fraud recognized in various national jurisdictions. The third paragraph provided as follows: “7.3 Without prejudice to noncompliance as a result of a fraudulent intention as addressed under 7.2, [Member States]/[Parties] [shall]/[should][may] put in place adequate dispute resolution mechanisms that allow all parties concerned to reach mutually satisfactory solutions in accordance with national law.” Paragraph 3 dealt with cases of non-compliance with the disclosure requirement that did not rise to the level of fraud as indicated in Article 7.2. It created space for the patent holders to engage with the relevant IPLCs to work out for themselves solutions that were mutually satisfactory. Accordingly, they had tackled the old Article ALT 6.3 on the subject of dispute settlement. The matters addressed in that article were captured in Article 7.3, and old Article ALT 6.3 had been deleted.

100. Ms. Bagley, speaking as the Friend of the Chair, said that they had taken the information from the contact groups and attempted to narrow gaps and streamline the text in several ways in coming up with their proposals. Their goal with that text was to try to move the process forward, realizing it was not possible to satisfy all Member States as everyone would not see their exact national regime or approach reflected in the text. She hoped that the significant benefits and international mandatory disclosure requirement with minimum and maximum provisions could bring to both demandeurs and non-demandeurs alike and would ultimately be evident in Rev. 1 and that the revision would be a positive step towards reaching that goal. Articles 2 and 5 represented a compromise approach to addressing a challenging issue related to the scope and whether the disclosure requirement should relate only to patents or also to other types of IP. Members of the contact group who had worked on that issue had not reached agreement, but put forward the idea of creating a framework instrument that was open-ended and could take on further work on other IP rights and emerging technologies. The Facilitators and the Friend of the Chair had taken the suggestion onboard and attempted to implement it by modifying Article 2 in the mandatory disclosure requirement section to focus on the IP system, deleting the reference to patents. That captured the recognition that an international mandatory disclosure requirement could in the future apply to forms of IP beyond patents. The disclosure requirement in Article 4 only related to patents. They had added a new Article 5 entitled “Applicability to other areas of IP” which stated: “The applicability of a disclosure requirement, as in Article 4, to other areas of intellectual property and emerging technologies, shall be reviewed no later than four years after the entry into force of this instrument. [Member States][Parties] shall establish a working group to facilitate this review.” That language was modeled after language of Article 27 of the TRIPS Agreement, and they discussed that the concerns in TRIPS Agreement had not been satisfactorily fulfilled. The IGC was in WIPO and not the WTO. There were regular reviews and revisions to the WIPO agreements. A specific example of a subject matter extension was the WIPO Beijing Treaty on Audiovisual Performances developed to extend provisions of the World Copyright Treaty (“WCT”) and the World Performances and Phonograms Treaty (“WPPT”) to audiovisual works based on a declaration made during a diplomatic conference. Having a review commitment in an article in an instrument or agreement would be an even more substantial commitment to such a review actually taking place. She hoped that that would give comfort to those concerned about that possibility. Through that combination of provisions, namely a broad objective in Article 2, and a patent-focused disclosure requirement in Article 4 and Article 5 requiring review of the applicability of the disclosure requirement to other forms of IP, they were proposing a framework consistent with the input from the contact group. Terminology in Articles 6 and 7 was also changed to “patent” from the bracketed “IP/patent” alternatives, and the opposite change made in Article 2 from brackets around both “IP” and “patents” to just “IP” without brackets was also made in Article 11 dealing with relationship with international agreements. A Member State had noted in plenary that the agreement would not necessarily ensure mutual supportiveness with other agreements. That was a valid point and the word “facilitating” was inserted in place of “ensuring” as representing a better fit for that clause, in the view of the Facilitators and the Friend of the Chair. Some Member States had also explained that the disclosure requirement would not necessarily enhance transparency if, for example, some inventors chose to use trade secret protection instead of the patent system due to concerns regarding a mandatory disclosure requirement. Nevertheless, for those applicants operating in good faith who chose to use the patent or other IP system to obtain protection, the properly crafted disclosure requirement certainly should enhance transparency in relation to GRs and/or associated TK disclosed in those applications. The entire Article 2 was bracketed in a way that maintained the integrity of Member States’ positions.

101. Ms. Bellamy, speaking as one of the Facilitators, said that, concerning Articles 3 and 4, the Facilitators and the Friend of the Chair had taken into consideration all the discussions and deliberations that had taken place, including the discussion in the *Ad Hoc* Expert Group. For

Article 3, they proposed: “This instrument applies to genetic resources, and [traditional knowledge associated with genetic resources].” The deletion of the alternative was based on the absence of consensus on “directly based on” and that Article 3 reflected the subject matter of the instrument. It was only a brief statement on subject matter. Article 3 reflected the intent to shift to patent to reflect a first step, in the spirit of moving forward. The new Article 5 would cover all IP areas. As to Article 4, the contact group had a great challenge in trying to arrive at a consensus. In reviewing the notes from the contact group, the Facilitators and the Friend of the Chair had tried to find a balanced approach. In Article 4, the disclosure requirement was based on a framework approach that dealt with patents. It read: “4.1 Where the claimed invention in a patent application makes use of genetic resources [and/or traditional knowledge associated with genetic resources] that is material to the invention, each [Member State]/[Party] [shall]/[should] require applicants to disclose: (a) the country of origin that supplied the genetic resources, or if not applicable to, or if unknown to, the applicant, the source of the genetic resources. [(b) If applicable, the source of the traditional knowledge associated with the genetic resources.]” The word “source” was used instead of a specific reference to IPLCs due to an intervention requesting the inclusion of entities. She hoped that the use of the word “source” would cover all angles. There was no agreement on GRs versus TK associated with GRs, so that remained bracketed. Article 4.2 reflected the content of prior Article 4.1(c): “4.2. If the source and/or the country of origin of the genetic resources [and/or traditional knowledge associated with genetic resources] is not known, the applicant shall make a declaration to that effect.” Similarities on whether transparency and/or linkages to ABS regimes had been retained and they had used the term “may”. The former alternative to that subparagraph had been deleted, as the issue of whether to use a patent office as a Nagoya Protocol checkpoint seemed a matter best left to national law. Article 4.3 read: “4.3 When applicable, a [Member State]/[Party] may, in accordance with national law, require applicants to provide relevant information regarding compliance with ABS requirements, including PIC, [in particular from indigenous [people[s]] and local communities], where appropriate.” No changes were made to Article 4.4 or 4.5 except the renumbering to adjust for the new subparagraph 4.2.

102. The Chair invited Member State to make interventions on clarification or errors or omissions only.

103. The representative of Tupaj Amaru said that, with so many alternatives, the text was difficult to comprehend.

104. [Note from the Secretariat: This part of the session took place after a short break when delegations reviewed Rev. 1.] The Chair emphasized that Rev. 1 was a revision and had no status. The plenary was the decision-making body. He opened the floor for general comments on Rev. 1.

105. [Note from the Secretariat: all speakers thanked the Facilitators and the Friend of the Chair for their work.] The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, was committed to discussing Rev. 1 in a constructive manner. Individual members of the Group would take the floor in their national capacity for any detailed comments.

106. The Delegation of Ecuador, speaking on behalf of GRULAC, welcomed the progress made in Rev. 1 and said discussions could continue on that basis, with a constructive spirit and commitment in order to reach joint agreements.

107. The Delegation of Switzerland, speaking on behalf of Group B, said that the work of the IGC on GRs should remain focused on the patent system. Group members might have further comments on Rev. 1 and would take the floor individually.

108. The Delegation of Lithuania, speaking on behalf of CEBS, was ready to engage in the discussions concerning the provisions of the document, as it observed both positive and problematic elements in the text. It looked forward to the discussion.

109. The Delegation of Morocco, speaking on behalf of the African Group, considered that the text could constitute a good basis for negotiation in a constructive spirit. It had a number of concerns that it would raise in informals.

110. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that, as regards the process, it had constructively engaged in the exercise of the *Ad Hoc* Expert Group and contact groups and had tried to give its contributions to those discussions, which were not negotiations. It had looked at Rev. 1 in light of the discussions. However, it was concerned to see some elements that touched upon well-established and consequently stated elements related to its position. Regarding the disclosure clause in Article 4, it had some problematic issues. While it understood the concept as explained by the Facilitators on the relationship between Articles 2, 3, 4 and 5 that tried to capture some discussions in handling the issue of whether the instrument should only relate to patents or IP rights, how that was transferred into Rev. 1 was problematic. It still had very strong positions on some elements regarding the disclosure requirement for patent applications, one of them being that it should be a transparency measure and not a compliance measure. It could not accept the concept of requiring from the applicant information that went beyond the country of origin or source and that required evidence of ABS compliance. It was still very attached to the definition of “directly based on” and elements related to physical access, while it understood the endeavors by the Facilitators and the Friend of the Chair to handle discussions and various elements around that definition throughout Rev. 1. Concerning Article 6, sanctions outside of patent law were the appropriate sanctions. It had very strong elements in its position about revocation, which were not appropriately transparent in Rev. 1. Against that background, it remained open to further analysis of and discussions on the basis of that approach.

111. The Delegation of Indonesia, speaking on behalf of the LMCs, said that Rev. 1 captured and reflected progress achieved in the contact groups. Without reflecting its positions on each article, it was still attached to its traditional positions. However, it was open and ready to stretch its flexibility further. It reiterated its commitment to discussing in a constructive manner on the basis of Rev. 1. It was under the Chair’s guidance on the way to continue discussions in the session, noting the positive result of the contact groups. Individual members would constructively engage in the process of the discussion based on Rev. 1.

112. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, said that Rev. 1 was somewhat more balanced and offered some elegant solutions to positions that had been very far apart. She had some concerns and proposals on specific articles. She was happy to work on the basis of Rev. 1 and looked forward to further discussion.

113. The Delegation of China said that Rev. 1 took into account the flexibility and sincerity of everyone. It was prepared to negotiate that text, which was a summary of the positions of all parties. It would not satisfy everyone. Delegations should try to find a balance. Everyone would have to make compromises, not just one party.

114. The Chair recognized that Member States did not agree with all the elements in Rev. 1, but the IGC had demonstrated collectively that it was willing to make progress and there was a leap of faith in some of the elements presented that needed to be elaborated further. He suggested going through article by article. The Chair opened the floor for comment on Article 1.

115. The Delegation of Italy asked the Facilitators whether, if someone bought coffee (which was a GR produced in several different countries) in Costa Rica, he or she had to indicate the source of origin of coffee when he or she invented something involving that coffee. In the previous text, there had been a reference to the word “unique” or “single”. It wondered whether that aspect was clarified in the discussion.

116. Mr. Kuruk, speaking as one of the Facilitators, said that he was not part of the contact group that had examined that issue of a GR found in multiple jurisdictions. Each provision was to be interpreted using the ordinary meaning. If a GR was found in multiple jurisdictions but the applicant, in good faith, knew it came from jurisdiction A, where such a requirement existed, the applicant would have to comply with that requirement. The provision for international cooperation should be able to grapple with issues of that sort.

117. Ms. Bagley, speaking as the Friend of the Chair, added that it was an area that still needed thought, and she was looking for additional Member States’ input on the various scenarios that could be covered and what the requirement in that case should be.

118. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, said that the meaning of “*in situ* conditions” was very clear but it was a very generic term that was applied to many different circumstances in normal use and scientific use. It might be better to call them “natural conditions”. For example, there were *in situ* agricultural conditions where genetic materials and agriculture systems were maintained.

119. The Delegation of the USA said it had participated in the contact groups in a very constructive spirit along with other delegations. It appreciated the opportunity to comment on the text even though it had not been able to participate in the discussion on all of those issues in the individual contact groups. With respect to “country of origin”, it agreed with the comment made by the Delegation of Italy and to address that it suggested bracketing the word “possesses” and inserting “first possessed” and to add “and still possesses those GRs”, at the end of the sentence. With respect to “country providing/providing country”, that definition had been deleted by the contact group, and it had its own definition that would be relevant to the text: “country providing/providing country is the country of origin that has the GR and/or TK and that provides the GR and/or TK.” The definition of “country providing GRs” had been deleted and it preferred to keep the alternative version.

120. The Chair observed that the term “country providing GRs” had been deleted because it was not in the operative text.

121. The Delegation of the EU, speaking on behalf of the EU and its Member States, concerning the term “country of origin”, preferred the definition as contained in the CBD and reiterated that definitions included in other international instruments should not be changed for the purposes of the IGC process. As to the definition of “country providing”, it had no problem with its deletion. As to the term “*in situ* conditions”, it thanked the Facilitators and the Friend of the Chair for moving it up under the operative terms as requested.

122. The Delegation of Switzerland thanked those delegations and stakeholders that showed continuous interests in its national disclosure requirement. As stated correctly by the representative of AIPLA, Switzerland had a national disclosure requirement that applied to national patent applications filed through the national patent office. While that requirement applied to all GRs and associated TK, including those from other countries, that national requirement could not solve all issues related to GRs and associated TK. Some of the issues were addressed in Switzerland outside of the IP system such as ABS compliance measures in the Swiss environmental legislation. Yet other issues needed an international solution and that was exactly the reason why it had long engaged constructively in the IGC’s work. With regard

to the terms, what was crucial was that Switzerland was a party to many different international instruments, and therefore it had a preference to apply, if needed, those terms that were contained in international instruments exactly as they stood. That related in particular to the terms “country of origin”, “utilization”, “genetic resources”, “genetic material”, etc. as defined in the Nagoya Protocol.

123. The Delegation of South Africa said that if delegations went back to the positions from IGC 35, there would be no progress. It welcomed the initiative by the Facilitators and the Friend of the Chair to draft a definition of “*in situ*” that was trying to meet the needs of both sides and meant “natural *in situ*”.

124. The Chair noted that the Delegation of South Africa had agreed with an observer’s comment on “natural *in situ* conditions”.

125. The Delegation of Brazil supported the statement made by the Delegation of Ecuador, on behalf of GRULAC. It did not like what it considered an artificial division between the main terms and other terms. Ideally, terms like “biotechnology”, “derivatives”, “*ex situ* conservation” and “misappropriation” should be among the main definitions, as that would ensure coherence with other international instruments and with what the IGC was trying to achieve.

126. The Delegation of Egypt supported the statements made by the Delegation of Morocco, on behalf of the African Group, and by the Delegation of South Africa. Regarding definitions, what defined any article as being an operative one or a non-operative one was, in fact, an academic exercise, not one undertaken by legislators. There should be a unified list of definitions, as stated by the Delegation of Brazil.

127. The Delegation of Nigeria identified with the statement made by the Delegation of Morocco, on behalf of the African Group, and wished to engage with Rev. 1 as it was. Rev. 1 was not perfect, and it could never be. Yet, the Delegation wished to work with it. The fixation of positions was no longer fashionable, if the IGC was to make progress. Therefore, it intended to remain flexible. As to definitions, the idea of the “country that first possessed a GR” was problematic and not functional for the purpose of the instrument. The Delegation gave the example of a GR that could be both in Nigeria and Ghana, and one would have to know the one that first possessed the GR. When one took a GR from somewhere that was not natural or *in situ* in origin, it did not mean that the country that originally, naturally had it but did not possess it any longer had no stake in the GR. The IGC document was not part of the CBD or the Nagoya Protocol. The most practical thing to do for the purpose of making progress was to recognize that there were some instances where there was a technical overlap with those regimes and to complete with definitions that really spoke to the instrument. As part of the mandate, the IGC could create something unique that spoke to the nature of the instrument.

128. The Delegation of Canada stressed that all its comments were without prejudice to its positions and did not indicate endorsement of any approach. In addition, while it took note of concerns regarding the integrity of the text, it was nevertheless important to be able to comment on and consider all approaches and options. It noted that the Facilitators and the Friend of the Chair proposed to delete the concept of “country providing” or “providing country” to retain only “country of origin”. In its view, it would be unrealistic to expect that any users would be able to identify the country of origin of any GR. Identifying the country of origin would be less relevant to the stated policy objectives of the draft instrument than identifying the country providing the GR. Further, the concept of “the country of origin” assumed that endemism of species was somehow the rule, and that endemism was always exclusive, and neither of those was true. In fact, because the distribution of species did not follow national borders, species were very regularly found in more than one country, and a number of species also had cosmopolitan distribution, such that more often than not it would be difficult or impossible to trace the origin of

a GR back to a single country, and in fact the underlying expectation was not that applicants would have to do that exercise. Notwithstanding, there was a need to use a more practical concept, such as “country providing” or some other similar concepts (such as “source”, which was present in the text) that was also more relevant to the stated objective of the approaches using that terminology. There was also a need in consistency in managing definitions not used in the text. If “country providing” or “providing country” was or were deleted, all non-operative terms should be deleted. Alternatively, “country providing” could and should probably be retained.

129. The Delegation of India said that although it was not happy with Rev. 1, Rev. 1 was a good, balanced document for discussion. Wherever some definitions were given in international instruments and treaties, the IGC should try to use those definitions to avoid misinterpretation.

130. The representative of ILA said that “GRs” and “country providing GRs” were in the CBD and the question was whether the IGC wanted to be consistent with those definitions or to adopt new definitions.

131. The Chair opened the floor for comments on Article 2.

132. The Delegation of the EU, speaking on behalf of the EU and its Member States, recognized the linkage between Article 2 and new Article 5. It also recognized the more overarching package approach relating to the articles, including Articles 3 and 4. It was a new concept that had emerged on the basis of discussions partly in the contact groups and partly in the *Ad Hoc* Expert Group. The Facilitators and the Friend of the Chair had captured the issues very comprehensively. Having said that, Article 4 included substantive elements that made the Delegation very difficult to immediately open up to the solution. It remained open to looking into that solution in new Article 5 and examining it further. However, on the basis of the current Article 4, it saw problems with the balance of that package as it stood.

133. The Delegation of Japan said that, regarding Article 2, the original terms of “[IP][Patent]” had been revised to just “IP”. However, the contact group could not reach consensus whether the subject matter of the instrument should be IP or patents. Since there was no consensus, it could not accept that revision. Therefore, it proposed that the term “IP” in Article 2 go back to “[IP][Patent]”. “Patents” rather than “IP” was more appropriate because patents, rather than IP as a whole, were more relevant to GRs and ABS thereof. So-called “biopiracy” meant the obtaining of patent rights by developed countries’ companies or research organizations on GRs without obtaining permission from the countries or communities that owned the resources. Biopiracy could be stopped through appropriate examination using a database, as proposed by the Delegations of Canada, Japan, the Republic of Korea and the USA, to prevent erroneous granting of patents. In addition, it did not find any direct relationship between ABS of GRs and GIs or trademarks. Should there be anyhow indirect relationship between them, GIs and trademark systems in many countries had their own built-in defensive functions to prevent such registration of marks likely to mislead or confuse consumers in bad faith. Therefore, it was not necessary for the subject matter of the instrument to include GIs or trademarks. Discussions for enhancing such preventive mechanisms against bad faith registration of GIs or trademarks, if necessary, should be made within the Standing Committee on Trademarks (“SCT”). Therefore, there was no need to expand the subject matter to include any kinds of IP other than patents. It proposed that Article 5 be dealt with as an alternative provision.

134. The Delegation of the USA said the word “facilitating” could be beneficial in Article 2(a). The problem with the new formulation was that “facilitating mutual supportiveness” would imply that the supportiveness went in both directions: from that instrument to other instruments and from other instruments back to that instrument. It suggested inserting as an alternative the word “coherence” and to bracket “IP” and maintain “patents” as an alternative.

135. Ms. Bagley, speaking as the Friend of the Chair, confirmed that the request was not to replace “facilitating” with “coherence” but to replace “mutual supportiveness” with “coherence”.

136. The Delegation of Canada requested the retention of the term “patent”. Whichever approach was ultimately agreed upon by Member States, any instrument would - at least initially - apply to patents. It understood that the proposal was for the term “patent” to be deleted and that the term “IP” be retained so as to accommodate the proposed new Article 5, which would introduce a review clause, but while it needed to consider that proposed new languages before engaging on it further, the outcome of any such review would dictate whether Article 2 would be amended, or not, so as to use the term “IP” instead of “patent”. Article 2 should use “patent” until such time.

137. The Delegation of Nigeria said that Article 2 was an objective, not an operative provision. It took notice of Article 4 on the disclosure requirement, which was heavily in favor of patents, and, therefore, it wondered what the harm was. It suggested not putting “patents” in bracket and being guided by the wisdom of the Facilitators and the Friend of the Chair.

138. The Delegation of South Africa said it was looking at the document as a product of intense negotiations in the contact groups, with the added value by the Facilitators and the Friend of Chair of giving a package arrangement. In going forward, the IGC needed to be cautious in how it managed that package. The IP system included patents so the phrasing in Article 2 was all-embracing and covered all IP rights concerned. It concurred with the inputs by the Delegation of Morocco, on behalf of the African Group, and the Delegation of Nigeria. It wanted to go with a package, as a compromised position. All Member States had to show flexibility to reach a negotiated result.

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

140. The Delegation of the EU, speaking on behalf of the EU and its Member States, requested that the old text (that had been deleted) be reinserted, as long as the issues that were of primary importance to it were dealt with in the framework of Article 4. The major issue seemed that while the disclosure requirement was for patents only, the subject matter was not limited to the disclosure mechanism but sat in the whole of the instrument, in case that it would be transferred from the TK/TCEs texts. It was not against the package as such, but the package needed to be right.

141. The Delegation of Canada requested retention of the alternative language in Article 3, at least while it considered whether any instrument, under whichever approach, would apply to GRs and associated TK, or rather to applications that pertained to GRs and associated TK.

142. The Delegation of South Africa asked to drop the brackets around TK associated with GRs for the sake of completeness.

143. The Delegation of Niger supported the statement by the Delegation of Morocco, on behalf of the African Group. It accepted the current Article 3, on the condition that it would be linked to an article on GRs that included derivatives.

144. The Delegation of Egypt wished to delete the brackets around TK associated with GRs. If not, derivatives should be included in square brackets.

145. The Delegation of the USA supported the suggestions by other delegations to retain the alternative because the IGC was in WIPO and the subject matter of the instrument related to patents. With respect to removing the brackets from TK associated with GRs, it had suggested

that it might be possible not to have a TK component to that particular instrument, as one would address associated TK in the IGC. Until that issue was resolved, it preferred to maintain the brackets.

146. The representative of InBraPi welcomed Rev 1. Article 3 was simpler, clearer and cleaner, and was what all parties hoped for in order to achieve concrete results, make progress and provide answers to indigenous peoples, industries and states in the context of the IGC process. She would be delighted to see fewer square brackets in the text, especially as regards TK associated with GRs, because misappropriation, misuse and the erroneous grant of patents regarding TK associated with GRs was one of the main reasons that had led to her participation in the IGC, with funds or without. She had been present at the meetings relating to the Nagoya Protocol and the CBD, and she had managed to resolve everything to do with GRs apart from the IP rights and the patent system as it related to TK associated with GRs. She did not understand why there were still brackets around TK associated with GRs. She wondered how an instrument would be useful if it did not contain appropriate protection for TK. The patent system needed to change so as to include new rights or rights that were not so new but were recognized in international law, and TK needed to be there. She said that TK was at the heart of the discussion, and should thus be in the text without square brackets.

147. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, recalled the impasse during the negotiation of the Nagoya Protocol concerning IP related to GRs. There had been a gentlemen's agreement that in order for that to go forward, those issues would be covered at WIPO because the argument was that Nagoya Protocol was not a competent authority to deal with IP issues. The sources of GRs and TK were important issues in evaluating the validity of a patent. The IGC instrument would be meaningless if it did not include TK. He had made many compromises. He did not reject TK databases but asked for proper safeguards and terms of reference for the construction and operation of those databases. He was not against the databases *per se*. That was a major consideration and he had shown flexibility in that. The new Article 5 was a major concession and showed flexibility to accommodate the interests of all IGC Member States. It was very clear that patents were the first and primary subject matter that should be treated by any instrument that came out of that process. It contained guarantees that other aspects of IP should be addressed as well. He demanded those brackets be removed. He could not go forward on that instrument, even if there were continued proposals to say that TK should not be there and indigenous people should not be there, they should just have an instrument on GRs and focus on issues of patentability. There had been an agreement at the Nagoya Protocol negotiation that the IP issues would be dealt with in the IGC.

148. Mr. Kuruk, speaking as one of the Facilitators, said the Facilitators and the Friend of the Chair had paid close attention to the form, relevance and logical arrangements of the different provisions. A problem had been coming up with the calls to reinstate previous Article 3. The ALT applied distinctly to patent applications, and the very same idea was captured in Article 4. He did not see the reintroduction of the ALT to be helpful. The instrument was not focused narrowly, specifically and only on patent applications. There were different articles that dealt with distinctly different subject matter such as references to databases, transboundary cooperation and the WIPO portals. The ALT was not very helpful and deleting it was a step in the right direction.

149. The Delegation of Morocco said that in order to be coherent with the terminology used in the text, it wished to retain TK without the brackets. It wished to add derivatives in Article 1, the same way as was done in the definition of GRs. The article had been much simplified. It hoped that other countries or groups would be realistic and re-consider their positions on the pending issues.

150. The Delegation of Senegal supported the statement by the Delegation of Morocco, on behalf of the African Group, and endorsed the statements by the Delegations of South Africa and Nigeria about the historical aspects and the importance of the holders of TK. The subject matter should be GRs and TK associated with GRs.

151. The Delegation of Switzerland was not convinced that there was a need to have such an article because the subject matter at the end should be sufficiently clear based on the provisions of the instrument. However, for the time being, it supported the maintenance of that article and was in favor to delete the alternative. It also supported the deletion of the brackets, as it should cover GRs and TK associated with GRs. This was important in order to support the mutual supportiveness with other international instruments relating to those issues.

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

153. Mr. Lieder, one of the Vice-Chairs, chairing the contact group on trigger for and content of disclosure requirements, said the group could not tackle all the issues. The group was pointing out the direction to take and elements that should be in the different places, and had presented imperfect drafting. It had tried to come up with text on the trigger and content that was as simple as possible. The version, as far as the trigger was concerned, was a holistic one. The solution was concentrating on patents, which made it possible for the Facilitators and the Friend of the Chair to put it in more concrete terms, adapted to patents. The drafting was trying to get out of the trap of insisting on “directly based on” and “utilization”.

154. The Delegation of Colombia supported the statement by the Delegation of Ecuador, on behalf of GRULAC. The proposal was balanced, and the language leaned towards a disclosure requirement leading to transparency as regards patents and the contribution to the protection of GRs. In Article 4, the inclusion of the expressions “use of GRs”, “utilization” of GRs and/or associated TK, and the appropriate link between the claimed invention and associated TK led to the identification of what was important in the patent examination, and created a modality adapted to a *sui generis* IP instrument. That article was fairly well balanced, although it would lead to a greater burden on offices when checking the applications. Guidelines would have to be provided. In Article 4.3, it would be grateful if the Facilitators and the Friend of the Chair could clarify whether it was necessary to put the term “where appropriate” in square brackets at the end of the article, bearing in mind that those words were already at the beginning of the paragraph, which referred not only to the requirement on applicants to comply with ABS requirements, but also PIC which might also apply in respect of IPLCs.

155. The Delegation of Switzerland appreciated that the new draft Article 4 focused more clearly on patent applications. As already noted in the report of the Contact Group, if the IGC focused on a specific IP application, such as a patent application, the language in draft Article 4.1 could be refined. It was pleased to see that the Facilitators and the Friend of the Chair had tried to do that. However, it should be further refined. It was crucial to establish a clear link between the invention and the GRs and associated TK and to draft the content of disclosure in a way that reflected the actual situations where specific GRs and associated TK could be sourced. It had a number of questions with regard to the current trigger in the chapeau and whether the current content was practical, and sufficiently recognized the situations where the GRs and TK could be sourced, in particular in the context of IPLCs. It hoped to address those issues in the informals. No one should just use specific terms based on who had proposed or supported them, but carefully evaluate their practical implications. Therefore, it requested that the trigger “directly based on” be reflected in the text. Regarding Article 4.3, it recalled that the contact group had not reached an agreement on that issue. Any ABS compliance issues, including PIC, should be addressed outside of the patent/IP system, such as in environmental laws. Therefore, it requested to keep the former ALT Article 4.2 in the text.

156. The Delegation of the EU, speaking on behalf of the EU and its Member States, appreciated that the article had a clear focus on patents. In Article 4.1, the element “directly based on” was still very important. It was important to establish the link between the subject matter and the invention, as that part of the text was still evolving. There had been a shift linked to the text being narrowed down to patents. It needed further time to analyze that text, as it was highly technical in nature, and to come up with alternative wording at a later stage. Regarding Article 4.3, it agreed with the Delegation of Switzerland that disclosure mechanisms should be a transparency measure, and it wished to have the flexibility to keep ALT 4.2, which was a clear reflection of its original position.

157. The Delegation of Lithuania, speaking on behalf of the CEBS Group, supported to focus the application of Article 4 on patents only. Having noted the proposed changes in Articles 2 and 3 and new Article 5, in the spirit of compromise, it considered the changes if they were balanced with other parts of the text, and, in particular, Article 4. It was important to maintain the disclosure provision clear to avoid any legal uncertainty. The new wording of the trigger “material to”, which was included instead of “directly based on”, was not defined at that point, and it was important to keep certain elements like physical access in that notion. Bearing in mind that compliance with ABS measures was dealt with in other international instruments, the provision in Article 4.3 should not be included. It preferred the text contained in former ALT Article 4.2. Previous versions of the text on disclosure contained a provision that currently was in Article 10 “Preventive measures”. That provision was problematic as it concerned substantive patent law and contradicted its legal acts and policy principles.

158. The Delegation of Sri Lanka said that Article 4 dealt with the disclosure requirement for patent applications only, and Article 5 only gave some comfort based on a future and conditional possibility that GRs would receive IP protection beyond the patent system. However, despite the fact that it was not fully satisfied with the *status quo*, it accepted Rev. 1 in the spirit of compromise. Article 4.1(a) seemed to broadly capture two scenarios: (1) the country of origin supplied the GRs, in other words, voluntarily provided the GRs; and (2) if it was not the country of origin or the country of origin was unknown, the source of the GRs. In the definition of the term “source”, all alternatives contemplated situations where the source was not the country of origin, so Article 4.1(a) would not capture a scenario where the GRs were taken from the country of origin, but not necessarily supplied, in other words, where they were taken without the country of origin concerned. The words “that supplied” should be deleted.

159. The Delegation of Canada said that in Article 4.1, it would welcome a discussion as to how the phrases “makes use of” and “material to the invention” would operate in actual situations, or currently operated in practice if those terms were used by any Member State with regard to a disclosure requirement. Article 4.1(a) would require “applicants to disclose [...] the country of origin that supplied the GRs.” Because “country of origin” was a defined term in the text, and because of the use the term “supplied”, it wondered what would be expected of applicants under that provision. It saw tension and inconsistencies between the phrase used there and the concept of “source”. It wondered what would be the policy intent of having an applicant disclose the country of origin as opposed to the source of GRs, as well as whether the expectation would be for applicants to trace back a GR not to the country that provided it, insofar as it was provided by a country, but rather to its ultimate origin. It reserved the right to come back with additional comments as it considered the text.

160. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, was pleased to provide comments on Article 4.1 which had been the subject of intense debate within the Indigenous Caucus. Her original position had been that the instrument should apply to IP and not just to patents. However, she had come to a position that was cautiously supportive of the focus on patents in Article 4, provided that under Article 5 there would be a possibility of amending that article down the road to include other forms of IP. She accepted

that indigenous peoples were not explicitly mentioned in Article 4.1, but that would be mentioned in the definition of “source”, which, however, currently had three alternatives. She needed clarity in the definition of “source” so as to ensure that IPLCs were not prejudiced by the instrument. On Article 4.2, she wished to bring in the concept of “due diligence”, because there were many instances where GRs were sourced from a public market, and in those instances there should be a requirement that the applicant assert due diligence to look for the actual source, the country of origin of the GR. On Article 4.3, she could have flexibility with respect to the reference to ABS; however, PIC was necessary to balance the instrument and to take into consideration the rights of IPLCs. She looked forward to further discussions. She agreed with the Delegation of Colombia that that article was highly qualified. There were three qualifying processes in that article and one or two could be deleted. There were many countries that actually linked ABS with IP, and one example was the Philippines. There should not be anything in the instrument that would prevent countries from doing that. Finally, the word “confidential” in Article 4.5 caused some concern because it was a business term and it did not fully reflect the situation of indigenous peoples. In that regard, she had a proposed definition that she could offer for discussion in the informals.

161. The Delegation of Brazil said that the full effect of that article, which would be the operative article in the instrument, would only become clearer when the IGC agreed on the definition of GRs and other terms. For the time being, suggestions to use “directly based on” and similar expressions instead of “make use of” or other expressions, which were more flexible and which reflected the effort of compromise that the Facilitators and the Friend of the Chair had engaged in, raised issues for Brazil and many other countries. Derivatives were essential and so was the digital sequence information on GRs. If that was excluded, there would be a risk of making the instrument toothless. In Article 4.3, it had difficulty understanding how information about PIC could be voluntary. One of its foremost goals in pursuing that instrument was ensuring that research and investments on biodiversity would benefit all relevant stakeholders, thus providing legal certainty and encouraging GR-based innovation. That was what it was after, and that was a very reasonable basis for compromise among all Member States.

162. The Delegation of Japan said that Article 4 should contain only minimum requirement for mandatory disclosure. However, Article 4.3 prescribed a discretionary provision and, therefore, did not seem necessary for the instrument. It was seriously concerned that, as the instrument should not include any prejudicial prescription for the future international patent system, even if such prescription was an optional and discretionary one, the new Article 4.3 might provoke the misunderstanding as if providing relevant information regarding compliance with ABS requirements including PIC was an internationally recommended option. It proposed to bracket Article 4.3 and, as the Delegation of the Switzerland had mentioned, to bring back former ALT 4.2.

163. The Delegation of China agreed with the statement by the Delegation of Sri Lanka on Article 4.1(a) regarding “supplied”, which caused confusion and should be deleted. Article 4.2 was similar to a provision in its national law, which did not put an additional burden on the applicant. Sometimes the applicant might know the country of origin and sometimes he might not, so the applicant could state his reasons according to the condition. However, the applicant should know the source. Whatever means to express the source, be it the inventor, the researcher, if he got resources to study and to create, definitely he should know the source. It suggested deleting the word “source” in Article 4.2 because it was difficult to imagine that one could start research and develop an invitation if one had no idea where a GR came from. Although there should be no additional burden to the applicant, the applicant should, as far as possible, provide the information concerning the source.

164. The Delegation of South Africa said that Article 4 and its narrow focus on patents was the result of a compromise position. To that end, one could not assume that balance could be

sacrificed to the needs of the current patent system. There had to be a balance within Article 4 of all the interests of the negotiators, including those that wanted only patents and those pushing through indigenous knowledge, TK and GRs. It could not accept Article 4.3 as an option, as it was the basis of negotiations, because it was the only element that also brought in the direct link to TK and hence the need for PIC and the other arrangements that arose from that. It would be a failure to understand that that was a framework approach to activities. Concerning Article 4.1, the phrase “directly based on” was actually in the Swiss legislation. Many countries, such as France, Italy, Romania and the EU, had no “directly based on” in their laws. It wondered why one was lifting the bar above the national level, when it involved indigenous knowledge. It called on Member States to be genuine and to negotiate from the point of view of their own legal position. It was not about national issues, but rather an international body where one needed to compromise. In Article 4.1(a), it had issues with the use of “supplied”, which was a limitation and an indirect way of introducing “directly based on”. It agreed with the statement by the Delegation of China that in Article 4.2 there was a challenge with “source”. To research into GRs and not to know their source was highly unlikely. Researchers had to know their sources, and it was an ethical requirement to conduct due diligence. Article 4.2 had to mention the obligation for the applicant to make a declaration to that effect after due diligence had been done. It was happy with Article 4.3 as the basis of compromise in looking at patents only. To have a balance was a must. In its national law, ABS was linked to patents. To that extent, South Africa was not the only country. The IGC should not invent new requirements that were not within normal practice.

165. The Delegation of Egypt said the IGC had been discussing the system of a single package based on compromise. Regarding Article 4, it supported the statements by the Delegations of South Africa and Brazil. To restrict the protection of GRs and associated TK in the area of patents was an aggression against the other instruments, such as GIs or trademarks. The text had to take into account the legal sanctions for fraud as well as the requirement to remove any such erroneous indications or trademarks. The current system to protect new plant breeds was equivalent to patents, which were part of the IP system. One could not tie down the present in favor of a future promise that one did not know when it would be achieved. History had taught many lessons. Article 27 of TRIPS, which dealt with life forms, stated that it was subject to review within a given timeframe, yet the review had not taken place. Article 5 had to be removed because it was only based on good intentions without anything else to back it. Article 4.3 had to be binding.

166. The Delegation of Australia said that GRs were frequently distributed over more than one jurisdiction and there was often more than one country of origin. It was rare that a species was unique to a single country. The clarifying language put in by the Facilitators and the Friend of the Chair to specify that the country of origin which supplied the GR was at a minimum required to be disclosed and not just any possible country of origin was a useful addition, as it was important for ensuring that provision and the package was workable as a whole. It had heard the concerns expressed by others in that regard and looked forward to discussing those concepts in informals. Article 4.1(b) could be further enhanced by recognizing that IPLCs were the primary source. The IGC could consider working on a more nuanced approach that would allow enough flexibility to allow IPLCs to determine how they were identified.

167. The Delegation of Kenya aligned itself with the views expressed by the Delegation of Morocco, on behalf of the African Group, on the previous articles. In considering Article 4.3, it called for inclusion and support of PIC. The use of “supplied” in Article 4.1 did not go well for the reasons given by the Delegation of South Africa. It supported due diligence to offer guidance in Article 4.2.

168. The Delegation of India said that although Article 4 was limited to patents and did not cover other IP forms, it wished to go forward and be positive in discussing the “package”

provisions further. Source and origin were different, and had different meanings and separate purposes. Article 4.1(a) gave the impression that it was optional to disclose the source of origin as country of origin. It proposed deleting the words “that is material to the invention”. It agreed with the comments by the Delegations of Sri Lanka, China, South Africa and others concerning the deletion of “supplied”. Article 4.2 gave the impression that applicants could get away from the disclosure requirement on the ground that they were not aware of the origin or source of the GR. It proposed that that should be deleted or amended, as proposed by the Delegation of South Africa.

169. The Delegation of the USA wished to replace “makes use of” with “directly based on” in Article 4.1. That would be a clearer formulation. In the third line of that article, there was a “should/shall” clause, and it wanted to add a “may” alternative that could preserve the option of a system similar to the EU. Since the term “material to the invention” was used in Article 4, it suggested a definition as follows: “Material to the invention means that absent the use of a GR in making the invention, that invention could not have been made.” With that definition, it supported continued inclusion of the phrase in the text. In Article 4.3, it suggested replacing “compliance with ABS requirements” with “entitlement to use the GRs, for example, a license from the patent owner or a permit from the relevant authority to access the GRs.” That was more specific. In Article 4.4, it suggested adding “as well as an opportunity for applicants or patentees to correct any disclosures that are erroneous or incorrect” at the end. It suggested a new Article 4.6: “Where access to a GR or associated TK is not necessary to make or use the invention, information regarding the source or origin of the GR or associated TK may be provided at any time after the filing date of the application and without payment of a fee.”

170. The Delegation of Nigeria said that Article 4 was a clear demonstration of flexibility. It was a big shift to limit it to patents. Therefore, that compromise was dependent upon the negotiations around other specific details attached to Article 4. There was a tendency for delegations to keep sticking to predetermined positions, phrases and text. It agreed with the use of “material to the invention” in Article 4.1, and found some merit in the definition proposed by the Delegation of the USA, but suggested bringing in all associated TK to that definition. As to Article 4.1(a), it aligned with previous remarks that the country of origin of GRs would be sufficient. In Article 4.2, it agreed with the statement made by the Delegation of South Africa, seconded by the Delegation of India and others, to bring in the language of due diligence. Regarding the suggestions made by the Delegation of the USA toward the amendment to Article 4.4, it suggested that those could be dispensed with if one could continue to look at Article 4.2. It suggested adding “the disclosure requirement shall/should/may/does not place an obligation on the patent offices” and to add a reference to the authenticity of the disclosure.

171. The Chair opened the discussion on Article 5.

172. The Delegation of Nigeria said it had a lot of skepticism about an international law-making process that looked at the future, but nonetheless, in the spirit of progress and compromise, it welcomed the draft and looked forward to continued engagement in terms of fleshing it out and making it more concrete as a source of hope going forward. In the interim, it suggested adding “that are relevant to the subject matter of this instrument” after “emerging technologies”.

173. The Delegation of Niger said that the African Group had deployed many efforts on Article 5 but in spite of those, it had not been rewarded. It supported the statement by the Delegation of Nigeria. It wanted to continue working with the revision clause, particularly in light of Article 27 of TRIPS. That was a useful experience to be involved in. Instead of “facilitate”, it suggested using the term “concretize” to reinforce a hard and fast commitment. It should not be an option.

174. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, said that whatever process or working group was established to implement Article 5 and decide on some of the elements and reviews in the future, the participation of all relevant parties, including IPLCs, should be ensured.

175. The Delegation of South Africa said that Article 5 was a necessary building block of the package. In agreeing to that element, the work should continue “without prejudice to the work going on in other fora” so that the period of suspending the IGC’s discussions should not have an impact on other ongoing work within WIPO and other bodies. It had a vested interest in one of the activities going on within WIPO dealing with indigenous knowledge and associated TK. It referred to the statement by the Delegation of Niger around the nature of the commitment about future work and the attempt to frame it. In the informals, the IGC should elaborate on what was appropriate in terms of mechanisms, including a standing committee. It endorsed the suggestion by the Delegation of Nigeria around technologies being relevant to the subject matter. In Article 4.4, it preferred a positive statement, which referred first to patent offices providing guidance to patent applicants on how to meet the disclosure requirement, followed by others clauses, which would qualify that positive statement.

176. The Delegation of the USA had concerns with respect to the treaty language “the entry into force of”, which appeared to prejudge the outcome of the negotiation. It suggested replacing it with “the finalization of” and to have further discussions on it. If one left open the door for that instrument to apply to all IP (and it had not heard any convincing arguments as yet as to why it should apply to all IP), implementation at the national level related to all of IP could create difficulties for compliance. It wanted to discuss that more. The Delegation had not participated in that contact group, where discussions might have shed more light on that.

177. The Delegation of Canada said that in Article 5, without prejudice to its positions, it was unclear how any disclosure requirement could apply to “emerging technologies”, and it welcomed clarification on that issue. More generally, it would have to consider Article 5 domestically before making further comments on that proposed new article. It had questions as to how any disclosure requirement applied in practice to rights other than patents. To inform consideration of Article 5, it would welcome, without prejudice, information from Member States that applied mandatory disclosure requirements to rights other than patents regarding their country experience with such a measure.

178. The Delegation of Colombia considered that Article 5 was a way of achieving in the future various aspects of GRs that would satisfy the concerns of some countries as regards emerging technologies. It was comprehensive and could be discussed in relation to the application of the instrument. It supported its continued inclusion. There could be some clarifications as to what it meant during informals. It supported the intervention of the representative of the Tebtebba Foundation, on behalf of the Indigenous Caucus, that the review should be done with the participation of IPLCs.

179. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that its understanding of Article 5 was based on its participation in the contact group, and it understood it as an attempt by the Facilitators and the Friend of the Chair to channel the discussions into a new document on the basis of a packaged approach that linked various articles. Article 5 was not supposed to be seen as a standalone solution in itself. It attempted to acknowledge that, to some participants, a result narrowed down to the patent system would not be seen as a balanced result of the IGC process. The *Ad Hoc* Expert Group had also addressed the issue of whether the instrument should relate to only patents or IP rights and had tried to discuss what kind of other IP rights would be implicated. That discussion had continued in the contact group and some other forms of IP rights were actually discussed, such as plant varieties protection. That article attempted to capture the notion that there should be the

opportunity to address something else other than patent. It was part of the packaged solution. The Delegation was, however, cautious about what the implications would be. It needed more time to consider it, especially as its initial position in the proposal was about a patent system only. However, it was open to considering a packaged solution and considered it as one element. It was important that the package was balanced and acceptable.

180. The Delegation of Sri Lanka said that Article 5 referred only to a conditional possibility and that the word “shall” should be used to ensure that the disclosure requirement would be reviewed. That had been added in the spirit of compromise. It would give more comfort if it was drafted in more certain terms and reinforced by an acknowledgment in the preamble so that, at first sight, the instrument gave the idea that it did not accept that GRs were only referable to IP rights in the forms of patents. The preamble had to make it very clear that while the instrument might only deal with patents, in any other instrument or in the future, IP rights in a more general sense could be applied to GRs.

181. The Delegation of India said that the wording of Article 5 should cover the cases of countries that already applied the disclosure requirement to other IP forms and how those should not be affected by that particular provision. As to emerging technologies, that wording was irrelevant and could be dropped because in IP law, technology was already protected.

182. The Delegation of Egypt said Article 5 had to be looked at in the general context, not in isolation.

183. The Delegation of Lithuania, speaking on behalf of the CEBS Group, said that Article 5 was part of the package and linked especially with Article 4. It did not see how the disclosure requirement could be applied to other IP areas. So instead of a working group, a standing committee might be better placed to discuss that issue. It was open to discussing that article in the informals.

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

185. The Delegation of the EU, speaking on behalf of the EU and its Member States, generally welcomed the deletion of the long list and said it was a good solution from the Facilitators and the Friend of the Chair to introduce a ceiling. It far preferred handling the issue with a ceiling. However, as regards to content of the ceiling, it could still not find it acceptable. Its position had not changed, and therefore current Article 7.2 was not at the right level. It proposed to retain an alternative solution so that the text reflected that there were participants with a different position. It proposed an ALT 7.2 as follows: “Failure to fulfill the disclosure requirement should not affect the ability of granted patent rights.” That was actually reflected in the Rev. 1 of IGC 35. As regards Article 7.3, it was happy to work on the basis of that text, and might have proposals to elaborate it further.

186. The representative of NARF, speaking on behalf of the Indigenous Caucus, agreed with the framework approach embodied in Article 7.1. With regard to Article 7.2, she believed that revocation should be on the table. As revocation was already allowed within the patent system, it would be a lowering of the standards to not permit that. On Article 7.3, she wished to clarify that the language “all parties concerned” included IPLCs. For further consideration in informals, she suggested the following wording “with the participation of IPLCs and taking into account their customary laws and protocols”. She announced that the Indigenous Caucus had made available a two-page summary of points related to indigenous peoples, customary laws and protocols in Spanish, English and French.

187. The representative of InBraPi said that Article 7 was a reflection of the efforts of all parties to make progress in the process and should be treated in that spirit. The aim was to find a

balance. The participation of IPLCs in the creation of dispute settlement mechanisms was very important. She wished to include in Article 7.3, after “dispute settlement mechanism”, the words “including the customary law of indigenous peoples, where appropriate”. She proposed offering in the informals interesting examples of how customary laws had resolved conflicts that ordinary law would not have achieved with such ease.

188. The Delegation of South Africa supported the proposal by the representative of InBraPi.

189. The Delegation of Switzerland appreciated that the text was much clearer and more concise. In order to develop a disclosure requirement that maximizes legal certainty and the attractiveness of such a requirement for all stakeholders, there was a need for a clear, tight ceiling when it came to post-grant sanctions. Without a clear ceiling, the instrument could become a disincentive as regards to transparency as well as innovation on GRs and associated TK. It was not in a position to support provisions that would allow invalidating patents or making unenforceable patent rights based on non-compliance of that type of disclosure requirement. That was a unique disclosure requirement, namely a transparency measure, and therefore it required unique sanctions in order to provide legal certainty to all stakeholders. Other post-grant sanctions such as fines seemed to be more appropriate for willfully providing wrongful information. It did not support the new language in Articles 7.2 and 7.3 with regard to fraudulent intention. It had a number of questions and it hoped to address them further in informals.

190. The Delegation of Japan did not believe that the mandatory disclosure requirement would be the most effective way to address issues concerning GRs. It was more appropriate to take measures to protect GRs within the framework of the CBD and the Nagoya Protocol. The latter part of Article 7.2 might give room to permit the disclosure requirement to affect the validity or enforceability of a patent right. Even supposing, only as a result of a fraudulent intention of a patent applicant or patent holder, such kind of sanction might be imposed against them, any undue sanction under the patent regime could cause a chilling effect on industries' R&D activities utilizing GRs. Instead, any measures to protect GRs for ABS purposes should be pursued not under the patent regime but within the framework of the CBD and the Nagoya Protocol. Therefore, the latter part of Article 7.2 should be bracketed. The former part of Article 7.3 should also be bracketed, because it referred and thus was related to the condition indicated in Article 7.2.

191. The Delegation of Lithuania, speaking on behalf of the CEBS Group, said the contact groups were going in the right direction. It looked forward to the informals to discuss further some aspect of that new wording. On Article 7.2, it preferred “shall” instead of “should” in the first part of the sentence. It agreed with bracketing the second part, as it was not convinced that there was a need for such a strong provision. On Article 7.3, it looked forward to further explanations to understand what would be applicable in dispute resolutions and how the mechanism would work.

192. The Delegation of South Africa said that Article 7.1 had been taken from the original text. No change had been made to it. Article 10 of the PLT covered administrative issues and that might not lead to a revocation. However, that treaty also recognized a limitation in terms of criminal activities, which were not the role and space of that WIPO treaty. Therefore, national laws had to deal with that. The treaty was not above the law. It had to be subject to what was considered to be lawful, and fraud, in most countries, was considered unlawful. Should anyone cross the line and become criminal, that person would be subject to criminal law. The points made to retain the original Article 7.3 failed to recognize that it was language taken from the PLT to which the very members raising questions belonged. Article 7.3 was about creating the certainty that criminal offenses would be dealt with as criminal offenses and no less than that. Otherwise, the IGC would be promoting anarchy.

193. The Delegation of the Plurinational State of Bolivia supported the proposal to include the participation of IPLCs and to mention customary laws in Article 7.3.

194. The Delegation of Egypt valued the statement made by the Delegation of South Africa. Article 7, in its present wording, would not be implemented alone but within a package. It had made many major concessions to reach that wording and to agree to include it in a package. Therefore, it was unable to provide any further concessions. If it did not obtain flexibilities for Article 4 and other articles in return, what had been achieved would have no standing. There was not a single country in the world that did not sanction and punish the crime of fraud.

195. The Delegation of Brazil said that it had referred to the need to provide adequate punishments to stimulate correct behavior by applicants. That was the case of Article 7.2 regarding revocation. It was an exceptional measure to extreme circumstances and it was necessary to avoid a moral hazard situation. Revocation based on fraud was provided in many laws, including the Brazilian legislation. The use of fraud to mislead governments could not only lead to the loss of patent, but also to additional criminal sanctions. It was a very serious offense. It was a minimum to provide revocation to fraud. It was a major flexibility on its side and should be taken into account. It supported the Delegation of South Africa that excluding revocation even in case of fraud could stimulate a situation of lawlessness and that was certainly not the intent of the IGC participants. The possibility of revocation due to fraud was provided in Article 10.1 of the PLT. The Delegations of Switzerland and Japan were part of the PLT. It was puzzling to understand their position on Article 7.2. It supported the proposal for the inclusion of language in Article 7.3

196. The Delegation of Colombia said the text was much cleaner and gave flexibility to the Member States on that important aspect. With a constructive approach, it wished to be involved and see how it could contribute to maintaining that standard. As a country part of the Andean Community, it had to be in line with the IP regulations and sanctions in the Andean Community. In Article 7.3, revocation might be considered an exceptional case if there was fraudulent intention. It congratulated the Facilitators and the Friend of the Chair on their flexibility but that went against the rules of the Andean Community because there were cases that did not resolve just on fraudulent intention. However, it wanted to look at it together with other members of the Andean Community and to make maximum efforts to contribute to progress and consensus with rather more open language that might cover all positions. For the moment, it remained open about Article 7.3 and it suggested adding “considering national legislation” at the end. It wished to continue to look at options together with the Andean Community that did not affect its present legislation and to keep up that effort to achieve clean text that reflected all positions.

197. The Delegation of the USA, with respect to Article 7.1 and the shall/should clause, reserved a permissive clause by inserting “may”. On Article 7.2, several delegations had suggested bracketing the exception clause and it supported that not as an objection to the exception clause but as it wanted to have more time to look at the PLT and to consider it in light of national provisions. With respect to Article 7.3, at least one delegation had suggested bracketing that provision and it supported that, even though it had interest in further discussing that particular article and considering options for dispute resolutions outside of the course of the national level and indicating a better understanding of what it might be and how it would work in the context of the agreement.

198. The Delegation of Indonesia said that Article 7, along with other issues discussed as currently reflected in Rev. 1, was a package to move forward with the current instrument. It supported Article 7 as it was, as the Facilitators and the Friend of the Chair had tried to narrow the gap, taking into account the existing differences at national level. As to the so-called creation of a ceiling, the article was already broad enough but at the same time tried to create

legal certainty. The issue of dealing with fraud was not alien to patent regimes or even other IP regimes. It supported the positions of the Delegations of South Africa and Brazil of including IPLCs in a dispute resolution mechanism, as reflected in Article 7.3. The IGC had moved forward and was at a critical point to narrow gaps.

199. The Delegation of Turkey said that Article 7.1 should be read in conjunction with Articles 7.2 and 7.3. Fraudulent intention should be defined in Article 1 for a clear understanding of when it happened and under which conditions. Those matters could be made clearer in the informals.

200. The Delegation of Nigeria said that it was a significant improvement and probably the closest to consensus in relation to sanctions and remedies. It recalled that Article 7 was in brackets, so the practice of bracketing text was no longer fashionable. To move forward, disclosure was not a stranger to the patent system. In fact, the system took its legitimacy from disclosure, and therefore, it was confusing when the Delegation of Japan was trying to push the IGC to the ABS system, which it had consistently rejected. The emphasis on Article 4 was on the patent system and it broke with the references to ABS in the Nagoya Protocol and the CBD. The IGC could not afford to entertain a system where people blew hot and cold at the same time. It was time to begin to think seriously about how to get an outcome. Without prejudice to the position of some delegations that insisted that revocation had to be in the text, there had been a lot of heavy lifting for most of the delegations to even entertain the idea that the text did not use the word "revocation". It wondered if the IGC was in a position to suggest that non-disclosure should have no consequences whatsoever in all circumstances, not even in the circumstance of fraud. There was some merit in using the option of a dispute settlement mechanism. There were so many case studies that showed how that option had been facilitated. Article 7.3 was bringing IPLCs into that space. There were many empirical studies that showed that their participation was very crucial for investment purposes and for the ease and operation of the patent system. Therefore, it identified with the interventions made by the Delegations of South Africa, Egypt, Brazil and Indonesia.

201. The Delegation of Niger said the article showed the kind of approach that the IGC should take. Some members appeared to be taking a rather contradicting view, and rather than trying to move forward and bridge gaps, they were trying to widen gaps. The text was no longer about revocation, but about appealing to alternative dispute settlement mechanisms, which would include IPLCs and be based on conciliation and a customary law-based approach. That should help avoid disputes, and therefore all of the revocation problems. Most national laws made provision(s) for revocation when required. That was the spirit within which the IGC should work.

202. The Delegation of Malaysia supported the formulation of Article 7. It provided a balance that took into account the interests of all concerned to enable moving forward. A lot of concessions had been given, as discussed by the contact groups.

203. [Note from the Secretariat: the informals took place on the afternoon of June 28, 2018, to further some issues relating to Rev. 1. This part of the session took place after the distribution of Rev. 2 on June 29, 2018.] The Chair invited the Facilitators and the Friend of the Chair to introduce Rev. 2. Rev. 2 was a significant breakthrough, which would allow delivering an outcome. Rev. 2 reflected the positions on key issues and different approaches, recognizing that there was an approach towards a disclosure regime and another directed towards defensive measures. The IGC had not bridged that divide. There first had to be clarity between those two so as to come up with positions that were not mutually exclusive. A key task was to maintain the integrity of the key positions put forward. Without clarity it was difficult to negotiate and come to a mutual agreement. He asked members to carefully consider the comments by the Facilitators and the Friend of the Chair, which provided context for their efforts. It was too

easy to jump into the text and see where one's material had not been reflected. He invited the Facilitators and the Friend of the Chair to introduce Rev. 2.

204. Mr. Kuruk, speaking as one of the Facilitators, said that Rev. 2 took into account the interventions made by the delegations after Rev. 1. The goal of the interventions was to narrow gaps and streamline the text. Concerning the alternative preamble, Article 5 (regarding the applicability of the instrument to other areas of IP) was a new proposal in Rev. 1 that had received support from some Member States. The article introduced the principle of a review of the disclosure requirement for that purpose with the participation of all parties no later than four years after the entry into force of the instrument. The principle was considered to be important and to deserve mention in the preamble. To that end, language had been inserted in the alternative preamble as follows:

“Reaffirming and emphasizing the requirement for ongoing work related to the applicability of a disclosure requirement to other areas of Intellectual Property and emerging technologies, through a binding commitment to conduct a review of this instrument no later than four years after its entry into force.”

That was the only change made regarding the alternative preamble. In Article 1, they had removed the distinction made previously in Rev. 1 between the so-called operative terms and other terms. As some delegations did not see the need for that distinction, they had removed the subheadings. That left in place a single heading for Article 1 “Definitions”. For the term “country of origin”, they had placed a missing bracket at the end of the definition. They had also reinserted, as requested by a Member State, a previous alternative definition that had been deleted in Rev. 1. The term “country providing GRs” was a new definition proposed by a Member State and read as follows:

“‘Country providing genetic resources’ is the country that possesses the genetic resource and/or traditional knowledge in *in situ* conditions and that provides the genetic resource and/or traditional knowledge.”

The terms “country providing” and “providing country” had been previously deleted in Rev. 1 and had been reinserted based on the request of a Member State. Furthermore, an alternative definition was inserted as an ALT as proposed by a Member State. Therefore, the descriptions with respect to those terms were as follows:

“‘Country providing/Providing country’ means, [[in accordance] [consistent] with Article 5 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity], a [providing country][country providing] that is the country of origin [or that has acquired the genetic resources and/or that has accessed the traditional knowledge [in accordance] [consistent] with the [Convention on Biological Diversity].]”

ALT

‘Country providing/Providing country’ means the country of origin that has the genetic resources and/or traditional knowledge in *ex situ* conditions and that provides the genetic resources and/or traditional knowledge.”

They had also made a minor modification in the definition of *in situ* conditions. They had amended that definition by inserting the word “natural” before “conditions”. The definition read as follows:

“In-situ conditions” means [natural] conditions where genetic resources exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties [Article 2, CBD].”

There was a new definition inserted based on the request of a Member State with regard to the term “material to the invention” as

“‘Material to the invention’ means that absent the use of a genetic resource and/or associated traditional knowledge, in making the invention, the invention could not have been made.]”

That intervention had been supported by another Member State that proposed to add additional language, specifically “and/or associated traditional knowledge.” An initial reaction had been to combine the two interventions as a new definition but it was best to bracket that additional intervention. There were two issues open to further consideration: either use brackets or separate the two proposals. Including brackets was more appropriate while capturing the differences in approach. On Article 7, the only change was with regards to Article 7.2 on the subject of revocation. As explained in the presentation of Rev. 1, it was considered useful based on some Member States’ interventions to provide an assurance with respect to the application of revocation as a sanction. But it was also important and certain delegations felt it important to qualify the application of revocation only in the specific context of fraud. From the discussion in plenary and informals, while some delegations did not object in principle to creating policy space for revocation on account of fraud in accordance with national laws, they did not feel comfortable with the idea of an automatic application of revocation as a sanction. To allow for the emergence of a common understanding in that area, it was agreed to remove the idea of an automatic application of revocation to cases of fraud. Accordingly, they had deleted a phrase found previously in Rev. 1 “except where the noncompliance with the normal requirement occurred as a result of a fraudulent intention”. That phrase was taken from Article 10.1 of the PLT but it was found not to provide adequate satisfaction or comfort to certain delegations. They had modified that. They had deleted that phrase and inserted in its place: “However, each Member State/Party may provide for post grant sanctions, including revocation, in exceptional circumstances where there has been fraud in fulfilling the Article 4 disclosure requirement.” A Member State had asked for an insertion of the word “may” in Article 7.1 after the words “shall/should”. However, such an amendment would leave open the possibility that no sanctions would ever be applied even in the face of noncompliance with the disclosure requirement. Such a development, if it occurred, would seem to affect the integrity of the provision and indeed would defeat the purpose behind the disclosure requirement. It was therefore considered best to leave out the word “may” to the extent of that inconsistency. Article 7 read as follows:

“[ARTICLE 7] [SANCTIONS AND REMEDIES

7.1 [Each [Member State]/[Party] [shall]/[should] put in place appropriate, effective and proportionate legal and administrative measures to address non-compliance with the disclosure requirement of Article 4.

7.2 Failure to fulfill the disclosure requirement [shall]/[should] not affect the validity or enforceability of granted patent rights. However, each Member State/Party may provide for post grant sanctions, including revocation, in exceptional circumstances where there has been fraud in fulfilling the Article 4 disclosure requirement.

7.3 Without prejudice to non-compliance as a result of a fraudulent intention as addressed under 7.2, [Member States]/[Parties] [shall]/[should][may] put in place adequate dispute resolution mechanisms that allow all parties concerned to reach mutually satisfactory solutions in accordance with national law.]]”

205. Ms. Bagley, speaking as the Friend of the Chair, described the changes to Articles 2, 3, 5 and ALT Article 4 in Rev. 2. Rev. 2 reflected a good faith effort to listen to and review carefully the interventions made in plenary and the discussions held in informals and to revise the text in a way that maintained the integrity of Member States’ positions, safeguarded the progress made in Rev. 1 and improved the text by narrowing gaps where possible. One such narrowing was reflected in the title of the section where the brackets had been removed from “mandatory”. They had taken note of the disagreement among Member States favoring disclosure, as evidenced by the broad support for Articles 7.1 and 7.2, despite obvious differences of views. She hoped to have accurately gauged the sentiment on that point. Article 2 on objective was a critical part of a compromised approach involving several other articles. The only change to Article 2 vis-à-vis Rev. 1 was the insertion of “coherence” and bracketing of “mutual supportiveness” in paragraph (a) at the request of a Member State. The brackets did not appear in Rev. 2 but that would be corrected when the draft would be finalized. Article 2 read as follows:

“[The objective of this instrument is to contribute to the protection of genetic resources and traditional knowledge associated with genetic resources within the IP system by:
(a) facilitating coherence/mutual supportiveness with international agreements relating to the protection of genetic resources and/or traditional knowledge associated with genetic resources and those relating to IP;
(b) enhancing transparency in the IP system in relation to genetic resources and/or traditional knowledge associated with genetic resources; and
(c) ensuring that IP offices have access to the appropriate information on genetic resources and traditional knowledge associated with genetic resources to prevent the erroneous granting of IP rights.]]”

Article 3 on subject matter was unchanged in relation to Rev. 1. Some delegations in favor of mandatory disclosure had noted a preference for the prior alternative formulation but expressed a willingness to be flexible on that issue. Brackets had been retained around TK associated with GRs pending refinement of the definition of that term. Article 3 read as follows:

**“[ARTICLE 3]
[SUBJECT MATTER OF INSTRUMENT**

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

206. Ms. Bellamy, speaking as one of the Facilitators, said that, on Article 4, they had reviewed the request and as far as possible had sought to reflect the interventions. They had worked in the spirit of seeking to narrow the gaps and she trusted that their revisions would find favor. In Article 4.1, they had replaced the word “is” with “are” as that had been requested during informals. There had been a request for the reinsertion of the words “directly based on”. But they had noted that Member States had indicated some amount of flexibility. In keeping with the spirit of that compromise which they had hoped to reflect there, they had retained “directly based on” in the list of terms but it was not in the article specifically. There was a lot more work to be done on the trigger mechanism. It was still a work-in-progress. The words “that supplied” had been deleted in Article 4.1 at the request of Member States. In Article 4.2, a number of delegations had requested that the words “source and/or” be removed. However, they had retained them but placed them in square brackets. There were also requests that the words

“due diligence” be inserted and since that was a good faith provision. In Article 4.3, there had been a request regarding the redundant language “when applicable” and “where appropriate”. Both had been removed. They had also inserted the word “shall”. They recognized that national law would have a critical role to play. A fundamental issue that was not possible to resolve surrounded the references to ABS and PIC. They had reinserted ALT Article 4.3, at the request of a number of Member States. Article 4.3 also needed a lot of work. In Article 4.4 they had taken into consideration the views of Member States to make it easier to read and clearer, so they had flipped the order of the sentences to reflect a more positive approach to the role of the patent offices in providing assistance to the applicants to allow them to satisfy the disclosure requirement. In addition, as requested, they had inserted “accuracy of the content of the disclosure.” In Article 4.5, there had been no additions or deletions. Article 4 read as follows:

**“[ARTICLE 4]
[DISCLOSURE REQUIREMENT**

4.1. Where the claimed invention in a patent application makes use of genetic resources [and/or traditional knowledge associated with genetic resources] that are material to the invention, each [Member State]/[Party] [shall]/[should] require applicants to disclose:
(a) the country of origin of the genetic resources, or if not applicable to, or if unknown to, the applicant, the source of the genetic resources;
[(b) if applicable, the source of the traditional knowledge associated with the genetic resources.]

4.2. If [the source and/or] the country of origin of the genetic resources [and/or traditional knowledge associated with genetic resources] is not known, the applicant shall, after conducting due diligence, make a declaration to that effect.

4.3. A [Member State]/[Party] may/shall, in accordance with national law, require applicants to provide relevant information regarding compliance with ABS requirements, including PIC, [in particular from indigenous [people[s]] and local communities].

ALT

4.3. The disclosure requirement of Paragraph 1 shall not include a requirement to provide relevant information regarding compliance with ABS requirements, including PIC.

4.4. Patent offices [shall]/[should] provide guidance to patent applicants on how to meet the disclosure requirement. However, the disclosure requirement [shall/should/may] [does] not place an obligation on the patent offices to verify the accuracy of the contents of the disclosure.

4.5. Each [Member State]/[Party] [shall]/[should] make the information disclosed publicly available[, except for information considered confidential.¹]]”

207. Ms. Bagley, speaking as the Friend of the Chair, said that a Member State had requested several specific textual amendments be made to the provisions of Article 4. However, the majority of those amendments had been introduced in prior IGC sessions and inserted in ALT Article 4 relating to “no new disclosure requirement.” To ensure that all the of the interventions were reflected somewhere in the agreement in a way that preserved Member State positions and in particular the compromised approach being considered, amendments were made to ALT Article 4 as follows: ALT Article 4.1 was amended to include a final sentence at the end of the

¹ An alternative formulation from the Nagoya Protocol Art. 14(2) is “without prejudice to the protection of confidential information”.

paragraph. That last sentence had been requested to be placed in Article 4.3 but it did not seem consistent with the ABS/PIC evidence intentions related to that article. It seemed inconsistent with that concept and hopefully it was dealt with by the reinsertion of ALT 4.3. They had amended ALT 4.4 by replacing “can” with “may” and moving “associated” before “TK”. That language was also requested to be inserted in regular Article 4 but Article 4 related to disclosure requirement and if it was not necessary to make or use the invention then that information regarding the GR would not be relevant to a disclosure regime. The Facilitators and the Friend of the Chair noted that it did not appear to belong there. There was also the request to insert into Article 4.4 the language relating to the disclosure requirement not placing an obligation on patent offices to verify contents of the disclosure, but for patent offices to provide guidance to patent applicants on how to meet the disclosure requirement. Some had requested to add “as well as an opportunity for applicants or patentees to correct any disclosures that were erroneous or incorrect.” As the Facilitators and the Friend of the Chair had contemplated that wording, it seemed exceptionally broad and not related to solely a disclosure requirement, not narrowing gaps and creating a variety of challenges for the provisions of the agreement. There was also the issue of Article 2 having a reference to IP and Article 4 having only a reference to patent applications. Some members were seeking to revert to the pre-Rev. 1 formulation of inserting IP in brackets and patent in brackets in Articles 2 and 4. Because that proposal was for members not clearly in favor of a new disclosure requirement, the Facilitators and the Friend of the Chair had sought to maintain the integrity of Member States’ positions by not reverting to that pre-Rev. 1 formulation. If those parties were in fact in favor of a disclosure requirement, one perhaps different from that reflected in the current articles, the Facilitators and the Friend of the Chair stood ready to create a new part of the instrument that would reflect that approach. Article 5 had first been introduced in Rev. 1 and was part of the compromised approach of a patent-focused disclosure requirement in Article 4 and a commitment to review the applicability of the disclosure requirement to other types of IP within a set time period. Modifications were made to the wording of Article 5 to ensure the inclusion of IPLCs in the review process. It read:

“The Member States/Parties commit to a binding review of the applicability of the disclosure requirement in Article 4, to other areas of intellectual property and emerging technologies that are relevant for the application of this instrument, no later than four years after the entry into force of this instrument. Member States/Parties shall establish a working group as directed by the Member States/Parties to this instrument to concretize this review. The review of this subject shall include full and effective participation of indigenous peoples and local communities. The review shall be without prejudice to ongoing work in other fora.]”

208. The Chair said Rev. 2 was simply a working document that hopefully captured the intellectual capital of the negotiations as supported by interventions on the record. It did not represent agreement but rather a point in the negotiations. The only decision the IGC would make was whether or not to transmit Rev. 2 to IGC 40, where the IGC would consider whether or not it was suitable to go forward to the GA for a decision. No member had to agree with everything in it. All comments were on the record together with reservations and concerns. Rev. 2 would not be reopened, unless there were clear errors and omissions that needed to be discussed with the Facilitators and the Friend of the Chair, recognizing that their working method was to maintain the integrity of Member States’ positions to get clarity.

209. [Note from the Secretariat: all speakers thanked the Chair, Vice-Chairs, the Facilitators and the Friend of the Chair for their work.] The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, welcomed Rev. 2 and said that individual members of the group would make remarks regarding Rev. 2.

210. The Delegation of Lithuania, speaking on behalf of the CEBS Group, said that despite progress achieved, Rev. 2 fell short of its expectations. It regretted that some very important

elements of its proposals had not been taken into account, in particular on the content of and trigger for disclosure. The provision containing substantive patent law remained, as Article 10, which posed a difficulty to the CEBS Group. More discussions were needed on mechanisms of a possible review process of the instrument as proposed in Article 5. It could go along with transmitting this text as a working document for IGC 40.

211. The Delegation of Switzerland, speaking on behalf of Group B, recognized that significant work had been done to narrow gaps on key issues. For example, in Rev. 2, the patent system was the main focus of the disclosure requirement in Article 4. However, it had concerns on some aspects of the work. Individual members would make further comments.

212. The Delegation of Ecuador, speaking on behalf of GRULAC, appreciated the work done and significant progress made that week. Rev. 2 was the fruit of intense labor. The IGC had met to focus on the IGC's mandate, which was to reduce imbalances and concentrate on the issues of the negotiation. While it had not been possible to bridge all the gaps, it recognized the important contributions made with Rev. 2, which would enable the IGC to continue with the its work. It could be transmitted to IGC 40. There were a number of concerns, which would be addressed in further discussions, such as the exclusion of issues relating to derivatives and digital sequence information. The group members would make comments in their national capacity. GRULAC stood ready to play a good role in forthcoming discussions.

213. The Delegation of China noted that some Member States had demonstrated a great deal of flexibility to achieve Rev. 2; however, regrettably, in the end, there was no consensus on the text. It had carefully studied the text and agreed to transmit it to IGC 40.

214. The Delegation of Morocco, speaking on behalf of the African Group, said that Rev. 2 reflected the progress made at IGC 36, although certain concerns, already raised, still remained. Realizing the importance of the progress made, it accepted that Rev. 2 in its present format be transmitted to IGC 40.

215. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that many positive advances had been made during the week. It remained committed to making further progress on GRs as demonstrated by the level of investment it had made that week. It understood the Chair's desire to introduce unorthodox working methods to achieve a breakthrough in the negotiations. That methodology could serve its purpose and it looked at transparent, open-ended approaches. As regards Rev. 2, it had a number of reservations that would make it problematic as a basis for future work. It was not alone in those reservations. Its positions were well-known and frequently presented before the IGC members. It remained the only group to have made a formal proposal on GRs. It encouraged members to examine its proposal, which bridged the middle ground.

216. The Delegation of Indonesia, speaking on behalf of the LMCs, welcomed the addition of the alternative preamble, and still preferred ALT 1 for TK associated with GRs. It noted the additional definition of "material to the invention" and was committed to be constructive in working on that basis of the definition. There was an addition of "coherence" in Article 2 on the objective and it would be constructive to work on that basis. With regard to Article 4, it noted the progress to try to bridge the gaps between different positions on a mandatory disclosure requirement, but it was not in a position to support ALT Article 4.3. It welcomed the addition of Article 5. On Article 7, revocation was the position that the LMCs held very clearly, but in the spirit of compromise, it was an example of how to strike the very fine balance between clarity, legal certainty and different national positions. It stood ready to compromise and work on the basis of the current wording of Article 7. In general, all of those positions were under the framework of the package (Articles 2, 4, 5 and 7). It agreed to transmit Rev. 2 to IGC 40.

217. The Delegation of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, said that there were differences remaining, but IGC 36 had been held in a spirit of cooperation, trust, good will, good faith and he hoped to maintain that and move forward in bringing those long conversations and negotiations to a successful conclusion. Moving to a framework approach would take a good amount of trust and a leap of faith but the framework would provide enough to all countries, users, providers, holders and the public interest that would balance their interests and rights. Those proposing the framework package had made significant concessions and shown the trust and leap of faith that a fair, equitable outcome could be achieved and that the IGC could move to a diplomatic conference on the basis of Rev. 2. He had concerns about the imbalance in Rev. 2, but as stated by many groups, he would take his concerns and put his trust and leap of faith in Rev. 2 and hope that other groups that had remaining concerns would trust the process. He urged the IGC to finish the instrument and not to laden it down with issues that would keep the IGC going for another five, 10, 15 or 20 years. The IGC had a framework that could go to a diplomatic conference, so he urged everybody to accept Rev. 2 and to transmit it to IGC 40.

218. The representative of InBraPi, speaking on behalf of the Indigenous Caucus, thanked the Member States that had been flexible and had endeavored to create a whole set of solutions to enable the contributions of the Indigenous Caucus to Articles 1, 4.2, 4.3 and 5. Under the discussion of Rev. 2, she had witnessed the desire of most Member States as well as the Indigenous Caucus to make headway towards cooperation and consensus. She welcomed Rev. 2, but unfortunately, some Member States were not able to do the same thing. She urged Member States to think about Rev. 2, which could achieve more balance in the future. She mentioned an omission in Article 7. The Indigenous Caucus had expressed in plenary the need of ensuring the participation of IPLCs to the dispute settlement mechanisms and that had been supported by the Delegations of South Africa, Indonesia, Nigeria and Niger but was not included in Rev. 2. That was essential. Furthermore, she had submitted a proposed text to be included in Article 7.3 to include a reference to the customary laws of indigenous peoples, as directly supported by the Delegations of Brazil and the Plurinational State of Bolivia and that was also not in Rev. 2. She asked the Facilitators and the Friend of the Chair to include in the text of Rev. 2 towards the end of Article 7.3 the following: "Ensure the participation of IPLCs and take into account the customary rights of indigenous peoples." She expressed gratitude to the parties that might be able to support the Indigenous Caucus.

219. The Chair said the possible omission would be looked into when finalizing Rev. 2.

220. The Delegation of the Plurinational State of Bolivia had faith in the fact that the process would reach a good, fruitful end. The inclusion in Article 7.3 of the customary laws of indigenous peoples had been omitted and should be reflected in the text. Furthermore, it could not leave aside its position on no patents on life forms and GRs and their derivatives as found in nature. It wanted to have that position strengthened in a substantive part of the text because currently it was part of the alternative. It did not want to reopen the whole document. It was aware of the progress, but it wished to indicate its position clearly.

221. The Delegation of the Philippines, as one of the mega diverse countries, attached great importance to the work of the IGC. The IGC had covered a lot of ground at IGC 36, notably on key issues such as subject matter, sanctions and remedies, and disclosure requirements, in particular mechanisms giving primary importance to FPIC, which was a key feature of its national regulations. It was therefore in its interest to see that reflected in an international instrument that embodied an IP system that ensured balanced and effective protection of GRs. It applauded the attempts to seek compromise. It remained cognizant of the bigger picture of the exercise. The Philippines was updating its legal framework for the effective implementation of a fair, equitable sharing of benefits arising from the use of GRs. It would continue to take part in related discussions at the international level, believing that the IP system should be able to

support the objective of ABS mechanisms for the use of GRs and TK associated with GRs. It remained hopeful that the international community, with political will and willingness to engage, would soon arrive at a consensus. Finally, it extended its appreciation to the Chair for his continued guidance and leadership, as well as to the Secretariat, the contact groups, the Facilitators, the Friend of the Chair and the interpreters for their hard work and it looked forward to the next session.

222. The Delegation of Malaysia said Rev. 2 was not an ideal text, but it supported it in the spirit of good faith to reflect and take on board all of the different positions of Member States. It supported its transmission to IGC 40.

223. The Delegation of Canada had a number of concerns on Rev. 2. It requested the reinsertion of the square brackets after “mandatory”. The removal of that bracket had not been discussed in plenary or informals at IGC 36. It viewed that as an error. It was important not to make the draft text about only two options, and to maintain voluntary disclosure as an option. It was important because it continued to look forward to information that was key to a mutual understanding of the concrete experience of Member States implementing mandatory disclosure, which information would allow making informed determinations regarding the most appropriate way ahead. It was needed to make sure that alternative options such as voluntary disclosure remained on the table. In Article 2, it requested the reinsertion of “patent” as an alternative to “IP”. If that meant that IP was reinserted as an alternative to patent in Article 4, that would be acceptable. It stressed there was no consensus either way as to whether any instrument would apply to patents in particular or IP rights in general, while it believed, without prejudice to its general position, that any instrument would apply initially to patents only. It was unclear how the mandatory disclosure of GRs or TK applied in Member States with regard to rights that were not subject to formalities. The review contemplated in Article 5 would be what dictated the scope of the instrument as regards patents versus IP. In Article 3, it was not clear as to why the ALT language had been removed. That was an area where agreement would be relatively easy to reach. It was nevertheless important to fully consider whether any instrument would apply to GRs and TK themselves or rather, at least initially, to applications for patents that pertained to GRs and/or associated TK. Regarding Article 4, its concerns regarding any mandatory disclosure requirement itself remained. On Article 5, with the view of being constructive, it was not opposed to considering the proposed new review clause, without prejudice. It stressed, however, that for any review to be conducted on informed grounds there was a need for information, sooner rather than later, from those Member States seeking for any instrument to apply to all IP rights. Regarding the rationale for such an approach and the concrete experience regarding the application of mandatory disclosure for rights other than patents, and particularly the rights not subject to formalities, it reserved the right to come back to those and other provisions, including Article 7 on sanctions and remedies, which was contingent on an array of outstanding issues, including the nature of any outcome. While it took note of calls to maintain the integrity of the text, any approach limiting a constructive approach by any Member States limited opportunities for meaningful negotiation and created perceived disagreements where there could be none. It was committed to fully engage, without prejudice, on the text as a whole and to do so from a technical point of view, as evidence-based working methods would ensure that the contributions from all Member States regarding the text as a whole on GRs and other issues were fully considered.

224. The Delegation of the USA expressed its appreciation to the Chair, the Vice-Chairs, the Facilitators, the Friend of the Chair and the Secretariat for their dedication. It had had a chance to review Rev. 2 in detail. It was disappointed not to see many of the textual contributions that it had made over the course of the week reflected in the document. Since the beginning of the process, it had actively participated in the IGC in a good faith manner. It had actively and constructively contributed during the plenary, informals, the contact group on sanctions and the *Ad Hoc* Expert Group. However, despite its efforts to provide comments and proposals on the

text, the majority of its contributions were either not included or not included in the context that it had suggested. It understood that the views of certain other delegations had also not been included in the text. Rev. 2 was therefore neither an accurate nor full reflection of the IGC discussions that had taken place at IGC 36. More importantly, Rev. 2 was not an acceptable basis for future work. Similarly, Rev. 1 was based on a non-inclusive contact group process where each regional group had only one representative and the vast majority of Member States had not had the opportunity to participate. Therefore, it also could not accept Rev. 1 as the basis for future work. It did not support the transmission of either Rev. 1 or Rev. 2 to IGC 40. Lastly, the mandate for the biennium stated that text-based negotiations should include any other contributions of Member States. It was concerned that the IGC had strayed from the customary WIPO working methods where all Member States' views and contributions were taken into account in a negotiation process. It remained committed to the IGC process and looked forward to working with other delegations, the Chair and the Secretariat to continue the work of IGC in future meetings.

225. [Note from the Secretariat: The Chair suspended the session to hold consultations.] The Chair said the break had been an opportunity for some key Member States to engage and consider the comments made by groups and members. There was no consensus for transmitting Rev. 2 to IGC 40. The decision would be to forward the Consolidated Document from IGC 35 to IGC 40. However, Rev. 2 would be in the report of IGC 36, available as a resource for Member States to consider in future discussions. He was keen not to lose the momentum of that work and the great effort done through the contact groups and the *Ad Hoc* Expert Group, recognizing that the reason Rev. 2 would not be forwarded to IGC 40 was Member States had a number of reservations regarding that document. IGC 36 was the last meeting on GRs. He said he would produce a Chair's text, without prejudice to any Member States' position. It was solely his text. For that to go forward, there would need to be consensus from all the members around the Chair's text. It was not unusual for a Chair to produce a text. It was an opportunity to break the difficulty with the working document, which the IGC was circling around. Member States had a right to develop their own proposal, collectively or individually, and that was another possible avenue. The Chair's text would have explanatory notes on the key issues to explain the rationale behind the positions and to help inform the IGC's decision making. Obviously, it would be different from the Consolidated Document. There were already a number of working documents on the table, as well as some joint recommendations.

226. The Delegation of Indonesia, speaking on behalf of the LMCs, said that all Member States had been engaging actively. However, intentions of engagement seemed to be of different colors. There was engagement in narrowing gaps to make progress and moving forward in a process that had started 18 years before. Unfortunately, there were engagements with the intention to delay or to widen gaps or even to block progress. To that effect, it deeply regretted having come to that point. Since the negotiation of the mandate, including the decision to set up the *Ad Hoc* Expert Group, the meeting with the Chair the week before the IGC, the documents created on the Monday on the establishment of the contact groups and the decision on holding informals, it all had been a transparent and open process. It had heard no objection to the way the Chair had proposed to guide the meeting until then, when the result and outcome of the IGC's work in the last six days had come to fruition. That methodology was being cited as one of the reasons why one Member State could not approve Rev. 2 and would not move forward to make any progress. It was only one Member State that had tried to stop the process by not supporting transmitting the text for further work of the IGC. Should there be any other Member States similarly inclined that the IGC could not in any way transmit Rev. 2 as a basis for further work, it would appreciate it if they could come forward and put it on the record as well. Nothing stopped members of the LMCs to build their own national and regional systems to protect GRs and TK associated with GRs. The LMCs had been engaging with good faith and with the trust and belief that every WIPO Member State would be coming to IGC meetings in full

respect of the IGC process to achieve the same objective as stated in the agreed mandate. However, it had been proven otherwise. It had thought the process would not be held hostage by one Member State. It had confidence in the IGC, but it needed a lot of effort to trust each other in order to negotiate, sit down and find a way to make progress. The IGC was not the only organization in WIPO. It was disappointed and its confidence in the IGC was shaken. However, the IGC had made significant gain that week, as reflected in Rev. 2. It had put a lot of effort, exerted a lot of flexibilities and compromises far away from its traditional positions. It refused to accept that the significant gain as reflected in Rev. 2 was lost just because of an intention not to move forward. The IGC had come a long way and the LMCs refused to be held back. It would base its further work on the protection of GRs on Rev. 2. It was time to reach the final line and it was committed to staying constructive with a view to achieving effective and equal protection of GRs and TK associated with GRs. Congratulations were due to the Chair and Vice-Chairs, the Facilitators, the Friend of the Chair and all members that had been flexible and had helped make progress. The unexpected turn of events did not widen the gap among the group. It strengthened its unity to the cause of the effective protection of GRs and TK associated with GRs.

227. The Delegation of Sri Lanka agreed with the statement made by the Delegation of Indonesia, on behalf of the LMCs.

228. The Delegation of Ecuador said that Rev. 2 was to be a tool to guide the IGC in future and to be supported by all parties. It hoped and trusted that, at the next meeting, the IGC would find a true compromise and a true commitment of all members, despite differences, and would be able to fulfill its mandate. It supported the statement made by the Delegation of Indonesia, on behalf of the LMCs.

229. The Delegation of Brazil regretfully associated itself fully with the statement made by the Delegation of Indonesia, on behalf of the LMCs. That did not augur well for the organization as a whole. The demoralization of WIPO did not benefit anyone.

230. The Delegation of Japan fully supported the intervention made by the Delegation of the USA. Regarding Article 2, the original terms, “[IP][Patent]”, had been deleted and only “IP” remained. However, “patents” rather than “IP” was more appropriate because not IP as a whole, but patents were quite relevant to GRs and ABS thereof. Therefore, it recognized no need to expand the subject matter to include any kinds of IP other than patents and asked that the original terms, “[IP][Patent]”, should be brought back. The necessity of the built-in binding review stipulated in Article 5 was not agreed to by all Member States, even after intensive discussions. Article 5 should be dealt with as an alternative provision. Article 7.2 had not been changed substantially from Rev. 1. Thus, the second sentence of Article 7.2 should be bracketed. Even only in case of a fraud by a patent applicant or a patent holder, any undue sanction under the patent regime could cause a chilling effect on industries’ R&D activities utilizing GRs. Its view toward the Chair’s intention regarding Rev. 2 was quite positive. However, from various viewpoints, including the aforementioned ones, should the IGC have Rev. 2 as the only basis for its future work, it would have a grave concern about adopting it.

231. The Delegation of Morocco, speaking on behalf of the African Group, said that whenever the IGC took one step forward, some Member States took two steps back. It had been committed to the extremely constructive negotiations on the basis of a methodology accepted by all regional groups. That methodology had allowed the IGC to make progress. It thanked all of those who had made efforts to achieve that. What had just happened demonstrated that all of the progress that it wanted to see within the process or other processes underway required first and foremost political will. The African Group had negotiated in good faith based on objective arguments, but in fact what had happened did not give an image of the compromise being forged within the contact groups. It would, however, continue to negotiate in good faith. It

invited other Member States to take the same approach in order to allow the IGC and other committees to make progress.

232. The Delegation of Egypt thanked all of those who had participated in the work that week, including the Secretariat, the *Ad Hoc* Expert Group, the members of the contact groups and the Facilitators and the Friend of the Chair. All of the efforts made over the past two sessions were really above and beyond what anyone could have expected. The IGC made efforts to produce a consensus-based document, which of course, did not make everybody happy—that was what a consensus-based document was. It had the responsibilities and rights not to go beyond Egyptian law. As a matter of fact, the document contained only about ten percent of what was in its legislation. It had to swallow quite a lot to agree with that document. IGC members needed to live up to their commitments to work in good faith and in accordance with the mandate (which called for effective and balanced protection) and other relevant decisions. The IGC was supposed to find a consensus that would make that a reality. However, some parties had a different goal; they sought to hinder the work and to hinder the attainment of a legal, consensus-based document. It asked if the rule of consensus was the rule for all of the work done within WIPO. It wondered what consensus meant in light of the attempts to sabotage the work it had just witnessed. Rev. 2 represented a robust legal basis for further progress. It asked for a legal opinion on that.

233. The Delegation of Ecuador, speaking on behalf of GRULAC, expressed its recognition of the tremendous effort and the work accomplished by the Friend of the Chair and the Facilitators as well as each of the experts involved in the *Ad Hoc* Expert Group and contact groups. It recognized the commitment with which they had worked throughout this week. IGC 36 was of particular importance for the GRULAC since almost a decade of negotiation, the IGC should have been able to reach positive results. It had participated in good faith in all the work that week. It recognized that the methodology and the work undertaken throughout the session had allowed the IGC to make considerable progress. The methodology, which had been validated by all parties, allowed the inclusive participation of all members and all stakeholders who, throughout the week, had contributed to making considerable progress, as was reflected in Rev. 2. The valuable inputs to that work were recognized and the IGC should continue to work and use it in future sessions. The goal was to achieve language that allowed protection of GRs in a constructive manner. It recognized the flexibility expressed by a number of delegations which, with true commitment, had participated in a pragmatic manner, putting their trust in the work of the IGC despite that not all national interests were included. It was extremely distressed that not all parties were motivated in the same manner. It awaited with interest the Chair's text, which it hoped would contain the substantive progress made at IGC 36. It recognized the work done and the commitment of all members who really wanted to achieve concrete results.

234. The Delegation of South Africa empathized with the Chair and supported the Facilitators and the Friend of the Chair for the genuine effort they had made to truly reflect the discussions that had taken place over the week. It supported the statements made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Morocco, on behalf of the African Group. The reasons that had been proffered for not transmitting the text were really not based on the facts of the work that week. It would have been useful to raise the objection to the methodologies earlier on in the week. It was a bit disingenuous to wait until the end of the process, after the result had come out, to point out that the methodology was defective. That was not a fair and transparent way of working. During the week it had attempted to go with an evidence-based approach that respected the rule of law and the rules that the Chair had put on the table. If some had issues earlier on, one should have raised them then. Deciding not to transmit Rev. 2 on the basis of a flawed process was really unfair. In the evidence-based discussions, there was no rebuttal of the arguments, either through evidence or otherwise. That was clearly an indication of not engaging in the process with good faith. The result was fairly distributed, thoroughly discussed and had been achieved with equitable participation. The

LMCs had managed to put up credible arguments, which had not been refuted. It was disappointed. It had hope that the text would see the light of day. Disappointment did not mean despondence but was actually hopeful. That gave it more strength because it could see that it was succeeding in its work.

235. The Delegation of the Islamic Republic of Iran stated that all members of the had set up and agreed on the methodology for the contact groups. Nobody had objected to the reports by the contact groups. Yet at the end, what the IGC had built broke. There was a lack of fairness and good will. That was not good for an organization. It thanked the Chair, the Vice-Chairs, the Facilitators, the Friend of the Chair, and all those who had worked very hard to bridge the gaps. The LMCs had really stretched themselves quite a lot to be able to be flexible and find a middle point. It associated itself with the statement by the Delegation of Indonesia, on behalf of the LMCs. The time had come for IP to be applied to GRs. The landscape was not the landscape of ten or 20 years before. The landscape had changed and that imposed a new development in WIPO. Sooner or later WIPO had to do that. Member States needed each other's support in the IGC and in other committees.

236. The Delegation of India strongly aligned itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs. The Chair, the Secretariat, the Friend of the Chair and the Facilitators had put in a lot of positive effort at IGC 36 to arrive at Rev. 2. Reaching consensus was all about making compromises to arrive at an agreeable middle ground. Unfortunately, while a number of Member States, including the Delegation of India, had shown commitment to make a compromise from their traditional positions, the same commitment could not be said of Member States from the other side. It said that consensus seemed to be a stumbling block and point of weakness in arriving at major decisions in WIPO.

237. The Delegation of Lithuania, speaking on behalf of the CEBS Group, extended its thanks to the Chair, the Vice-Chairs, experts, the Facilitators and the Friend of the Chair, as well as the Secretariat, for their hard work during the session and for their efforts to move the discussions forward. It also thanked interpreters for their patience and professionalism, as well as the WIPO conference staff who had ensured excellent working conditions for all. It appreciated the hard work of all delegations as well as representatives of IPLCs for their valuable contribution to the discussions. Though its efforts had not resulted in a new text acceptable to all delegations, at least the intensive work during the session had helped understand different perspectives. It had a better feeling of the impasses, where there was no possibility to pave a way. Hopefully, that had brought ideas to the Chair on the possible ways forward. It wished the Chair inspiration in drafting the Chair's Text. It remained open for consultation and committed to the IGC process under the mandate.

238. The Delegation of Nigeria thanked the Chair for all his effort throughout the week. It thanked all the colleagues and experts who had served in various capacities, including in the *Ad Hoc* Expert Group, the contact groups and informals and all members who had participated in the plenary. It thanked the Secretariat and interpreters for facilitating the IGC's work. It thanked everybody who had made all the necessary sacrifice during the past six days. Contrary to the very sudden shadow that had been strategically cast on the IGC's efforts, IGC 36 had been exceptionally fruitful. It strongly shared the Chair's sentiments and observations that the use of the *Ad Hoc* Expert Group, the deployment of contact groups and the strategy of informals had been collectively productive in enhancing the quality of the negotiations and in fostering good will among the negotiators. Going forward, such flexibility and strategy were desirable. It should not be discouraged. There had been significant shifts and concessions made in the spirit of good will, compromise and good faith. The traction in Rev. 2 towards patents with secondary attention to other IP regimes was an impeccable example of the good will of the majority of the negotiators to make progress. As such, Rev. 2 remained an important document for advancing the work in the IGC and possibly for exercising other options, as hinted at by the

Delegation of Indonesia, on behalf of the LMCs. It had come a long way and was determined to continue to advance the progress in a direction that ignited hope and brought about an outcome that all could live with in a very balanced way and with regard to all interests. It remained committed to the IGC process and was determined, in collaboration with other LMCs, to see it through.

239. The Delegation of China thanked the Chair, the Vice-Chairs, the Facilitators, the Friend of the Chair, the Secretariat and other staff members for their hard work. The session and its process had achieved a lot. It appreciated the Chair's innovations very much in his methods, such as the contact groups. It also appreciated the flexibility shown by various parties. It understood the concerns and positions of different parties, but one could always look for the commonalities in different views. If countries just insisted on their differences and positions, that was not favorable in an international arena work. It was disappointed by the result. It also had some concern about the IGC's future work. It agreed with the statements made by the Delegation of South Africa and other countries. It hoped that with the guidance of the Chair, every party should make contributions to the IGC's future work.

240. The representative of Tupaj Amaru stated that the IGC's failure was due to the lack of political will of Member States and to the economic geo-political interests represented. There were failures in the procedure of the IGC. The IGC could not continue along the same path. He urged the IGC to submit the text to the GA.

241. The Chair concluded the discussion on Agenda Item 7 and proposed the decisions as follows: "The Committee discussed document WIPO/GRTKF/IC/36/4 and decided to transmit the text in the annex to document WIPO/GRTKF/IC/36/4 to the Fortieth Session of the Committee, in accordance with the Committee's mandate for 2018-2019 and the work program for 2018, as contained in document WO/GA/49/21. The articles as prepared by the Facilitators and the Friend of the Chair will be reflected in the report of the session."

242. The Delegation of Indonesia, speaking on behalf of the LMCs, proposed the following language for the decision under Agenda Item 7: "The Committee based its discussions on document WIPO/GRTKF/IC/36/4. Following the methodology agreed to by the Committee, the Facilitators and the Friend of the Chair developed a revised text based on all interventions and discussions in the Committee. While the text received broad support from the majority of delegations and observers, however, consensus could not be reached, as some Member States were not in agreement to support the text developed by the Facilitators and the Friend of the Chair. To that effect, the Committee decided to transmit the text in the annex to document WIPO/GRTKF/IC/36/4 to the Fortieth Session of the Committee in accordance with the Committee's mandate for 2018-2019 and the work program for 2018, as contained in document WO/GA/49/21. The articles as prepared by the Facilitators and the Friend of the Chair will be reflected in the report of the session."

243. The Chair said he was not sure the proposed language was right, particularly around the methodology. He said he would present a proposal from the Chair, noting the important contribution from the Delegation of Indonesia, on behalf of the LMCs. He proposed: "The Committee developed, on the basis of document WIPO/GRTKF/IC/36/4, a further text, "Consolidated Document on Intellectual Property and Genetic Resources Rev. 2" (Rev. 2). However, the Member States were unable to reach consensus on Rev. 2. The Committee decided to transmit the text in the annex to document WIPO/GRTKF/IC/36/4 to the Fortieth Session of the Committee, in accordance with the Committee's mandate for 2018-2019 and the work program for 2018, as contained in document WO/GA/49/21. Rev. 2 as prepared by the Facilitators and the Friend of the Chair will be reflected in the report of the session." That proposal reflected the different views, and he hoped that the IGC could move forward.

244. The Delegation of Indonesia, on behalf of the LMCs, supported the Chair's proposal for the decision on Agenda Item 7. The proposal reflected the very fine balance and reflected what had happened in the discussions at IGC 36.

245. The Delegation of Switzerland, on behalf of Group B, associated itself with the comment made by the Delegation of Indonesia, on behalf of the LMCs. The proposal put forward by the Chair gave a balanced reflection of the discussion at IGC 36. It fully supported the Chair's proposal.

246. The Chair closed Agenda Item 7.

Decisions on Agenda Item 7:

247. *The Committee developed, on the basis of document WIPO/GRTKF/IC/36/4, a further text, "Consolidated Document on Intellectual Property and Genetic Resources Rev. 2" (Rev. 2). However, the Member States were unable to reach consensus on Rev. 2. The Committee decided to transmit the text in the annex to document WIPO/GRTKF/IC/36/4 to the Fortieth Session of the Committee, in accordance with the Committee's mandate for 2018-2019 and the work program for 2018, as contained in document WO/GA/49/21. Rev. 2 as prepared by the Facilitators and the Friend of the Chair will be reflected in the report of the session.*

248. *The Committee took note of and held discussions on documents WIPO/GRTKF/IC/36/5, WIPO/GRTKF/IC/36/6, WIPO/GRTKF/IC/36/7, WIPO/GRTKF/IC/36/8, WIPO/GRTKF/IC/36/9, WIPO/GRTKF/IC/36/10 and WIPO/GRTKF/IC/36/INF/7.*

AGENDA ITEM 8: ANY OTHER BUSINESS

Decision on Agenda Item 8:

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

AGENDA ITEM 9: CLOSING OF THE SESSION

250. The Chair said he took full responsibility for the inability to deliver an outcome. Member States had placed their trust in him and he took that very seriously. He had not been able to harvest the work, in some ways that was because he had pushed too hard. He commended Member States for their engagement that week. That offered a way forward, because there was a way forward. He said that he would develop a Chair's Text as a step forward. The Rev. 2 was in the record of the meeting. All Member States or groups had the ability to put forward their own proposals, such as joint recommendations. He was open to any new way to run the process more efficiently. The methodology with the contact groups and the *Ad Hoc* Expert Group worked, but the plenary tended to take things backwards. He hoped that what had happened was only a speed bump. He had heard optimistic comments and a desire to progress the IGC's work. That was very positive. The Chair's Text would be a work-in-progress with explanatory notes. He thanked the Co-Chairs of the *Ad Hoc* Expert Group, the contact groups, the Facilitators, the Friend of the Chair, the Vice-Chairs, the Secretariat and the RCs. Despite the outcome, the meeting had been held in a very respectful, considered and friendly environment. He thanked the interpreters.

251. The Delegation of Indonesia, speaking on behalf of the LMCs, said it was time to reach the final line. It was committed to stay constructive with an effort to have adequate protection of GRs and TK associated with GRs. It congratulated the Chair, the Vice-Chairs and all Member States who had been engaging in the effort to move forward and make progress. IGC 36 had strained its commitment to the unity and to the objective, but it stayed optimistic. It thanked the Secretariat, the Facilitators, the Friend of the Chair and interpreters.

252. The Delegation of Ecuador, speaking on behalf of GRULAC, recognized the work and the achievements of the week. It recognized the work done by all delegations, through the informals and contact groups and in plenary, and the contribution of the *Ad Hoc* Expert Group. Many had worked in good faith with the view of having positive results to achieve the goals of the IGC. It would continue to participate. It thanked the Chair for his leadership and awaited with great interest his text, which should allow moving forward in an effective way. It recognized the participation of IPLCs whose voices were central to the fruitful outcome of the negotiations. It asked the members of WIPO to make contributions to the Voluntary Fund in order to assist their participation. It thanked the Secretariat for the organization of the meeting and its constant availability and support. It thanked the interpreters. In its national capacity, it thanked all GRULAC members for their support and the work accomplished together during the six-month period. The Delegation of Ecuador was concluding its work as the coordinator of GRULAC and had had the honor of representing the region in that important forum. It thanked the other RCs for their collegial attitudes in carrying out their coordination responsibilities, which sometimes was very difficult.

253. The Chair said that the Voluntary Fund was exhausted. It went to the credibility of the IGC to replenish it to ensure the participation of representatives of IPLCs.

254. The Chair closed the session.

Decision on Agenda Item 9:

255. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6 and 7 on June 29, 2018. 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 August 24, 2018. 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 Thirty-Eighth Session of the Committee.

[Annex follows]

**LISTE DES PARTICIPANTS/
LIST OF PARTICIPANTS**

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[End of Annex and of document]