

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

**Thirty-Seventh Session**  
**Geneva, August 27 to 31, 2018**

REPORT

*Adopted by the Committee*

1. Convened by the Director General of the World Intellectual Property Organization (“WIPO”), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “the IGC”) held its Thirty-Seventh Session (“IGC 37”) in Geneva, from August 27 to 31, 2018.
2. The following States were represented: Albania, Algeria, Argentina, Australia, Austria, Belarus, Benin, Bolivia (Plurinational State of), Bosnia and Herzegovina, Brazil, Bulgaria, Cambodia, Canada, Chile, China, Colombia, Costa Rica, Côte d’Ivoire, Croatia, Denmark, Democratic People’s Republic of Korea, Ecuador, Egypt, El Salvador, Eswatini, Ethiopia, Finland, France, the Former Yugoslav Republic of Macedonia, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Holy See, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Jamaica, Japan, Kazakhstan, Kenya, Kuwait, Latvia, Lebanon, Lithuania, Malaysia, Malawi, Mexico, Mongolia, Morocco, Nepal, Netherland, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Paraguay, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Senegal, Slovakia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Thailand, Togo, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States of America, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia and Zimbabwe (95). 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: Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC Patent Office); and South Centre (SC) (2).
5. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: Arts Law Centre of Australia; Assembly of Armenians of Western Armenia; Assembly of First Nations; Civil Society Coalition (CSC); *Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos* (CAPAJ); CropLife International (CROPLIFE); Foundation for Aboriginal and Islander Research Action (FAIRA); France Freedoms - Danielle Mitterrand Foundation; Health and Environment Program (HEP); Indigenous Information Network (IIN); Indian Movement - Tupaj Amaru; Indigenous Peoples’ Center for Documentation, Research and Information (Docip); International Indian Treaty Council (IITC); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Law Association (ILA); International Trade Center for Development (CECIDE); International Trademark Association (INTA); Knowledge Ecology International, Inc. (KEI); MALOCA Internationale; MARQUES - The Association of European Trademark Owners; Native American Rights Fund (NARF); SAAMI Council; Tebtebba Foundation - Indigenous Peoples’ International Centre for Policy Research and Education; Traditions for Tomorrow; and World Trade Institute (WTI) (25).
6. The list of participants is annexed to this report.
7. Document WIPO/GRTKF/IC/37/INF/2 provided an overview of the documents distributed for IGC 37.
8. The Secretariat noted the interventions made, and the proceedings of the session were communicated and recorded on webcast. This report summarizes the discussions and provides the essence of interventions, without reflecting all the observations made in detail or necessarily following the chronological order of interventions.

9. Mr. Wend Wendland of WIPO was Secretary to IGC 37.

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

10. The IGC Chair, Mr. Ian Goss, opened the session and invited the Assistant Director General to take the floor.

11. The Assistant Director General, Mr. Minelik Alemu Getahun, on behalf of the Director General, Mr. Francis Gurry, delivered opening remarks. He recalled the IGC's mandate adopted by the General Assembly ("GA") in October 2017 and the agreement reached on the work program for the biennium. He recognized the preparatory work that the Chair had done in collaboration with the two Vice-Chairs. He acknowledged the effort done by the Regional Coordinators ("RCs") and all Member States during the preparatory process in providing guidance. IGC 37 was the first session under the renewed mandate to address traditional knowledge ("TK") and traditional cultural expressions ("TCEs"). According to the mandate, IGC 37 should undertake negotiations on TK/TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s). He recalled that delegations at IGC 32 in December 2016 had reviewed an indicative list of outstanding pending issues on TK in advance of their work on draft articles on an international legal instrument for the protection of TK and that delegations at IGC 34 in June 2017 had reviewed an indicative list of outstanding and pending issues on TCEs in advance of their work on draft articles on an international legal instrument for the protection of TCEs. The texts of the draft articles were included in documents WIPO/GRTKF/IC/37/4 and WIPO/GRTKF/IC/37/5 on TK and TCEs, respectively. Much work was needed by negotiators to create further convergence on unresolved issues. The IGC's mandate requested the Secretariat to update the 2008 Draft Gap Analyses (available as documents WIPO/GRTKF/IC/37/6 and WIPO/GRTKF/IC/37/7, on TK and TCEs, respectively). The mandate also requested the Secretariat to produce a "Report on the Compilation of Materials on Databases Relating to Genetic Resources and Associated Traditional Knowledge" (WIPO/GRTKF/IC/37/8 Rev.) and a "Report on the Compilation of Materials on Disclosure Regimes Relating to Genetic Resources and Associated Traditional Knowledge" (WIPO/GRTKF/IC/37/9). He called upon all delegates to show flexibility and pragmatism and urged them to make extra efforts in the spirit of compromise. He acknowledged the contributions that the representatives of indigenous peoples and local communities ("IPLCs") made to the process and their wish to participate as directly and effectively as possible. It was unfortunate that the WIPO Voluntary Fund had run out of money. It had not been possible to fund participants at that session. He reminded delegations of the need to ensure the participation of IPLCs within the IGC's negotiations and the importance of the Fund in facilitating that. The theme for the Indigenous Panel was "The Differences and/or Similarities between Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions – Indigenous Peoples' and Local Communities' Perspectives". He welcomed the three speakers, Ms. Lucy Mullenkei, Executive Director, Indigenous Information Network (IIN), Kenya, Mr. Mattias Åhrén, Professor, UiT-The Arctic University of Norway, Norway, and Ms. Patricia Adjei, First Nations Arts and Culture Practice Director, Australia Council for the Arts, Australia.

12. The Chair said that IGC 36 had been a very extensive and heavy session. He hoped to put back together the plate that had been broken at IGC 36 and wished it would be more beautiful than before. He thanked the Vice-Chairs, Mr. Jukka Liedes and Mr. Chery Faizal Sidharta, for their assistance, support and valuable contributions. They worked together as a team, and he took their advice and considered their views. He was very ably assisted by the Secretariat, which did a significant amount of work behind the scenes, including updating the Gap Analyses for the IGC's review. He had consulted with RCs in advance of the session and he thanked them for their support and constructive guidance. He trusted that they would help build a constructive working atmosphere for IGC 37. 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 and the meeting was to be conducted in the spirit of constructive debate and discussion which all participants were to take part in with due respect for the order, fairness and decorum governing the meeting. As the Chair, he reserved the right, where applicable, to call to order any participant that might fail to observe the WIPO General Rules of Procedure and the usual rules of good conduct or whose statements were not relevant to the issue. Under Agenda Item 2, opening statements of three minutes would be allowed by regional groups, the EU, the Like-Minded Countries and the Indigenous Caucus. Any other opening statements could be handed to the Secretariat in writing or sent by email to [grtkf@wipo.int](mailto:grtkf@wipo.int). They would be reflected in the report as in past sessions. Observers' statements and proposals would be interspersed with Member States' statements as in the past. Member States and observers were strongly encouraged to interact with each other informally as that increased the chance that Member States would be aware of and perhaps support observers' proposals. 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. Each decision would be gavelled at the end of each agenda item. On Friday, August 31, 2018, 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 comment. It would be presented in all six languages for adoption at IGC 38 in December 2018. He asked that any statement made during the session be sent to [grtkf@wipo.int](mailto:grtkf@wipo.int) to assist the Secretariat in finalizing the report. He recalled that due to the short time period between IGCs 36 and 37, as agreed at IGC 36, the report of the IGC 36 would be adopted at IGC 38 in December.

## **AGENDA ITEM 2: ADOPTION OF THE AGENDA**

### *Decision on Agenda Item 2:*

13. *The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/37/1 Prov. 2 for adoption and it was adopted.*

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 and of the documents.]

15. The Delegation of Indonesia, speaking on behalf of the Asia and the Pacific Group ("APG"), said that the Asian region was characterized by growth, diversity and progress. It supported the working methodology and the work program proposed by the Chair. With regard to the draft articles on TK and TCEs, it favored discussions on the core issues in order to arrive at common landing zones, namely on the issues of objectives, beneficiaries, subject matter, scope of protection and exceptions and limitations. How one defined TK and TCEs would lay down the foundation of the IGC's work. Most of the members of the APG believed that the definition of TK/TCEs should be inclusive and capture the unique characteristics of TCEs and TK and should be a comprehensive definition that could not require separate eligibility criteria. Most members were in favor of a differential level of protection for TK and TCEs and believed such an approach offered an opportunity to reflect the balance referred to in the IGC's mandate and the relationship with the public domain, as well as balance in the rights and interests of owners, users and the wider public interest. However, some members of the APG had a different position. Establishing a level of rights based on the characteristics of TK and TCEs should be a way forward towards narrowing the existing gaps with the ultimate objective of

reaching agreement on international instruments, which would ensure their balanced and effective protection in addition to the protection of genetic resources (“GRs”) and associated TK. On the issue of beneficiaries, it agreed that the main beneficiaries of the instrument were IPLCs. Some members had a different position; however most of the members were of the view that it was pertinent to address the role of other beneficiaries in accordance with national law, as there were certain circumstances in which TK or TCEs could not be specifically attributable to a particular community. On the scope of protection, most of the APG was in favor of providing maximal protection, depending on the nature or characteristics of TK and TCEs. That offered an opportunity to reflect the balance referred to in the mandate and the relationship with the public domain, as well as the rights and interests of owners and users; yet some members had a different position. On exceptions and limitations, it was of fundamental importance to ensure that the provisions should be considered in a balanced way between the specific situations of each Member State and the substantive interests of TK and TCEs holders. Given differing national circumstances, there should be flexibility for Member States to decide on appropriate limitations and exceptions. Some members had a different position, but most of the members of the APG reiterated there was a need for a legally binding instrument. It remained committed to engaging constructively in negotiating a mutually acceptable outcome. It was hopeful that the discussions in the session would lead to visible progress in the IGC’s work.

16. The Delegation of El Salvador, speaking on behalf of the Group of Latin American and Caribbean Countries (“GRULAC”), supported the methodology for the meeting. It reiterated its interest in advancing the work of the IGC, with a view to obtaining effective and balanced protection of GRs, TK and TCEs, as reflected in the mandate. For the first time, the IGC would deal simultaneously with two issues, namely TK and TCEs, which until then had been addressed separately. That new approach presented a challenge that had to be addressed with openness and flexibility from Member States, to achieve agreements on cross-cutting issues and thus leave solid foundations for the road ahead in the biennium, with a view to achieving a text(s) that represented a balance between the interests of users and holders of TK and TCEs. It was important that, during the session, enough time be allocated to possible recommendations to the 2018 GA. It was confident that under the Chair’s leadership, that issue would be addressed well in advance and the time would be allowed for informal discussions if necessary. It was grateful for the participation of IPLCs, who contributed in an important way with information about their experiences and views. It hoped that IGC 37 would be productive and invited all Member States to be flexible and constructive.

17. The Delegation of Morocco, speaking on behalf the African Group, said that TK and TCEs helped to empower communities and nations worldwide. Developing countries, in particular those in the African Group, were therefore strongly attached to those topics. They had engaged actively and constructively in the discussions over the years. An international legally binding instrument had to be put in place to ensure that TCEs, TK and GRs were effectively protected, as they were still easily misappropriated because no such instrument was in force. The appeal for TCEs and TK to be protected was tantamount to an appeal to improve the current IP system in order to make it more inclusive by incorporating other knowledge systems, thus enriching the existing IP system and enhancing its transparency and effectiveness. Pursuant to the new mandate, the IGC would continue to expedite its work in order to reach an agreement on one or more international legal instruments that would effectively protect TK and TCEs. Against that background, Member States should reaffirm their good faith in pursuing the ongoing negotiations by displaying full and open commitment to accomplishing the IGC’s mandate. As a result, the IGC should, at the end of the 2018/2019 biennium, take a decision to finish the work that had long been in progress by convening a diplomatic conference. There were cross-cutting issues in the draft articles on TK and TCEs, and the Chairs’ Information Note, proposing cross-cutting matters for discussion, was a useful contribution. It hoped that the cross-cutting exercise would help build consistency in the treatment of similar concepts, and it remained open to a process designed to ensure that both texts would achieve significant maturity with a view to

concluding the ongoing work and convening a diplomatic conference at an earliest date. With regard to the establishment of an *ad hoc* expert group, the *ad hoc* expert group on GRs had proven its worth, because it had expedited the IGC's work on GRs in terms of substance. Accordingly, while supporting the establishment of an expert group for issues relating to TK and TCEs, it remained aware that good faith, flexibility, pragmatism and constructive commitment were principles that had to prevail during the remaining four sessions of the 2018/2019 biennium. Political will was of the essence in the process. With regard to Agenda Item 7, the IGC was requested to submit to the 2018 GA a factual report, together with the most recent texts available on its work, and recommendations. The IGC had to, therefore, devote sufficient time to discussing that agenda item, which deserved particular attention, given the progress achieved at IGCs 35 and 36. Owing to the major accomplishments made, it hoped that the IGC would make great strides forwards. During a negotiation process, a compromise could be achieved only through constructive debate and commitment by all. It reaffirmed its determination to participate in fruitful debates and to contribute effectively and constructively so that IGC 37 would be crowned with the success for which it yearned.

18. The Delegation of Switzerland, speaking on behalf of Group B, said it was confident that the IGC would continue to make progress under the Chair's leadership on the two remaining subjects, namely TK and TCEs, in the framework of the IGC's mandate. It acknowledged the progress made by the IGC. More work needed to be done to narrow existing gaps to reach a common understanding on core issues. It reiterated its firm belief that protection should be designed in a manner that both supported innovation and creativity and recognized the unique nature and importance of those three subjects. IGC 37 was the first session under the mandate and work program for the 2018-2019 biennium focusing on TK and TCEs. It took note of the possibility foreseen in the work program to address TK and TCEs together at the upcoming four sessions. As there were some overlapping aspects to those two subjects, that should lead to an efficient use of time. It was critical that the IGC make meaningful advancements, using sound working methods, supported by an evidence-based and inclusive approach that took into account contributions of all Member States. Consistent with its mandate, the IGC should build on the existing work with a focus on narrowing gaps and reaching a common understanding on core issues in a manner that included discussions in a broader context and of the practical application and implications of proposals. The Updated Draft Gap Analyses showed that the variety of IP tools that already existed provided useful protection for certain forms or types of TK and TCEs. It welcomed the Secretariat's compilations of materials on database and disclosure regimes, which would help enhance the IGC's work. It looked forward to the active participation of IPLCs as well as other stakeholders. It acknowledged the valuable and essential role of all stakeholders for the work of the IGC. It remained committed to contributing constructively towards achieving mutually acceptable results.

19. The Delegation of Lithuania, speaking on behalf of the Central European and Baltic States Group ("CEBS Group"), said that at IGCs 35 and 36, the IGC had held meaningful discussions on GRs. It looked forward to actively engaging in discussions on the two remaining subject matters, namely TK and TCEs. It found the Chair's Information Note very useful, particularly to look at cross-cutting issues, and said the Updated Draft Gap Analyses would serve as sources of reference in future discussions. It paid great importance to well-balanced IP protection regimes, which stimulate innovation and creativity and supported economic and social development as well as welfare of all groups of populations. It favored an evidence-based approach. It was important to draw lessons from the experience and discussions that had taken place in various Member States while elaborating their national legislation for the protection of TCEs and TK. Such crucial aspects as legal certainty, economic, social and cultural impacts, should be carefully considered before reaching an agreement on any particular outcome. Therefore, it thanked the Delegation of the EU, on behalf of the EU and its Member States, for re-tabling its proposals for studies on TK and TCEs that aimed to analyze the existing legislation in relation to TK and TCEs. As to the most appropriate working method for the remaining four

IGC sessions under the mandate, it trusted the Chair's intuition. However, it recognized the limitations of certain restricted formats, such as the *ad hoc* expert group. It thus favored more inclusive and open formats. Though the mandate allowed for cross-cutting discussions during all remaining four sessions, in fact, in the majority of the CEBS Group, TK and TCEs were dealt with by different institutions and by different experts. It was important for the Group to know in advance of the particular IGC session if and when matters of substance relevant to the specific topic would be discussed so as to ensure the participation of competent experts. It welcomed the continuous engagement of IPLCs as well as of other stakeholders in the work of the IGC, and would pay the greatest attention to their contributions. It assured of its positive, constructive and realistic engagement in the IGC's work.

20. The Delegation of China said it had always supported the IGC's work in the hope of achieving substantive results and reaching international binding instruments on the protection of TK, TCEs and GRs as soon as possible. In recognizing some overlaps between TK and TCEs, it would like to have further discussions and information sharing on many unsolved and cross-cutting problems under these issues. It attached great importance to protecting TCEs. In September 2014, the Draft Provisional Regulations on Copyright Protection of Folk Literary and Artistic Works had been drafted after soliciting public comments. Further research was being conducted to improve the Regulations. However, it should also be noted that TK and TCEs were different with featured characteristics, which required adequate consideration while discussing. For example, regarding the issue of beneficiaries, the Delegation believed that different situations of different countries and regions should be taken into due consideration, so as to provide sufficient protection for proper subject matters. It believed that the methodology proposed by the Chair would help to generate great results for this meeting. It would engage in the discussion in an active and practical manner, with a view to reaching consensus and achieving fruitful results.

21. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that IGC 36 had made some positive advances and it commended the spirit of cooperation at the session, to which it endeavored to contribute. It recalled with disappointment that the Rev. 2 document could not be accepted by all IGC participants as a basis for future work on GRs. Following its work program, the IGC would proceed to discuss the other two topics that were of equal importance to its work. It remained committed to making further progress in all three areas of discussion in the IGC. It hoped to pave the way towards mutually acceptable outcomes at IGC 37. Rev. 2 from IGC 32 containing Draft Articles on TK and Rev. 2 from IGC 34 containing Draft Articles on TCEs had both been transmitted to IGC 37 as a basis for further discussion (as documents WIPO/GRTKF/IC/37/4 and WIPO/GRTKF/IC/37/5, respectively). Despite the improvement made at previous sessions, there were still considerable gaps among diverging options in most articles. The IGC should try to focus discussions on realistic and achievable outcomes to reap tangible results. In accordance with the IGC's work program for the biennium, it had come prepared to discuss TK/TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s). Regarding methodology, transparency and inclusiveness remained a priority. 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. It recalled that it had previously submitted two proposals for the IGC to consider: the proposal for a study relating to TCEs (previously document WIPO/GRTKF/IC/33/6 and re-issued as document WIPO/GRTKF/IC/37/11) and the proposal for a study relating to TK (previously document WIPO/GRTKF/IC/32/9 and re-issued as document WIPO/GRTKF/IC/37/10). It was crucial to have mutual understanding about how the IP system could, or could not, assist in serving the interests of the holders of TK and TCEs. It looked forward to the introduction of the Updated Draft Gap Analyses by the Secretariat. It looked forward to participating constructively in discussing TK and TCEs.

22. The Delegation of Indonesia, speaking on behalf of the Like-Minded Countries (“the LMCs”), said the issue faced by the IGC was important, not only for all Member States but also more importantly for the IPLCs that had developed and generated tradition-based knowledge and innovation long before the modern IP system had first been in place. All members of the IGC were both users and holders of GRs, TK and TCEs. All communities had the right to maintain, control, protect and develop IP over their cultural heritage. The IGC needed to push for a greater recognition of both economic and moral rights in traditional and cultural heritage, including TK, TCEs and GRs. Progress had been made relating to GRs at IGCs 35 and 36. It was confident that IGC 37 and future sessions would progress as well. It hoped to see respect for and full commitment to the process in order to achieve progress. TK and TCEs were products of human minds and ideas that interacted with culture and society and deserved protection. That was in line with the mission of WIPO to create a fair and balanced global IP system for everyone, including IPLCs, as well as national and cultural expressions that were unique and close to the characters and identity of different nations. Unfortunately, TK and TCEs had been used without authorization or any benefit-sharing. It urged members to finalize the two texts on TK and TCEs. Discussions had to focus on the most important aspects of the cross-cutting issues. The IGC had to minimize distractions and use its valuable time efficiently by not following discussion on issues where positions were already well laid out and understood by all participants. On the issue of beneficiaries, there was no dispute that the main beneficiaries of the instrument were IPLCs. Yet there were certain circumstances in which TK and TCEs could not be attributable to any community, when TK and TCEs were not specifically confined to an IPLC or it was not possible to identify the community that had generated them. Under those circumstances, the provision on beneficiaries should address that concern and include other beneficiaries. Furthermore, discussions on beneficiaries had to be closely related to those on the administration of rights in order to reach a common understanding. With regard to the scope of protection, there seemed to be converging views that emphasized the need to safeguard the economic and moral interests of the beneficiaries. For that purpose, the IGC had to determine standards or levels of rights, for both TK and TCEs, based on their nature and characteristics and on the types of use. In that regard, it recommended continuing the discussions on that cross-cutting issue. Regarding exceptions and limitations, it was essential to ensure that those provisions were not too extensive so as not to compromise the scope of protection. Noting the importance of effective protection of TK, GRs and TCEs, the IGC should take the next step of convening a diplomatic conference on GRs, TK, and TCEs. At the conclusion of IGC 37, the IGC would have completed half of its work program under the mandate for 2018-2019 biennium. Noting the significant progress achieved in particular on the GRs text at IGCs 35 and 36, it was optimistic to soon reach the finish line and the IGC should show political commitment. It hoped that the IGC would be able to come up with recommendations to the GA that would guide its future work and indicate how it should move forward on the GRs text, based on the progress made under the mandate. It preferred to discuss Agenda Item 7 as early as possible and in an informal, open and transparent manner. The IGC should guide the GA for a work program that outlined key deliverables for future work, including especially the possibility of convening a diplomatic conference on GRs. It expressed its confidence in the Chair and Vice-Chairs in guiding the discussion to make progress.

23. The representative of NARF, speaking on behalf of the Indigenous Caucus, highlighted some of the fundamental concepts in the process. Pursuant to the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”), the International Labour Organization Convention No. 169 and other international, domestic and indigenous instruments, indigenous peoples enjoyed peoplehood and self-determination, and the right to maintain indigenous cosmologies and life ways. Member States had widespread commitments, including treaties, to recognize and respect indigenous peoples’ rights, as recently advised by the UN Expert Mechanism on the Rights of Indigenous Peoples: “in the negotiation and drafting of these instruments, WIPO and Member States should reference the UNDRIP, and especially the norm of free, prior, and informed consent, with respect to the ownership, use, and protection of indigenous peoples’



intellectual property and other resources.” Concerning the scope of protection being negotiated in those instruments, the tiered approach could be helpful as it nuanced the different types of TK/TCEs and the levels of protection according to each type. However, the concept of “balance” worked against their fundamental rights. The use and protection of TK/TCEs required a very different understanding of balance in which the physical, mental, emotional and spiritual aspects had to achieve balance. Given that understanding, balance as expressed by Member States was actually imbalance in those negotiations. Balance could not be achieved through inequity, legitimatizing past misappropriation, or where balance was not appropriate or proportional. He could not agree on any of those instruments until everything was agreed upon. He reminded Member States that the legitimacy of that process in the eyes of indigenous peoples and the world depended in large part on the full and effective participation of indigenous peoples. He continued to call upon Member States and WIPO to support the Voluntary Fund, which was depleted, in order to ensure continued participation of indigenous peoples. He thanked those states that had contributed in the past. To those countries presently considering the funding of case studies, he believed the money would be better spent by ensuring indigenous peoples’ participation. It supported those states that believed that the GA should reconsider its earlier decision and include funding from the core funding of WIPO to support their participation. He sincerely hoped that the days in which their fundamental rights would be negotiated without their full consent were a thing of the past. He 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 Japan said that the IGC had made good progress so far under its work program. Nevertheless, even after many years of discussion, the IGC had not been able to find a common understanding on the fundamental issues, namely, the policy objectives, beneficiaries, subject matter, and definition of misappropriation. In addition, many gaps still remained in terms of the Member States’ understanding on those issues. Sharing domestic experiences and practices was useful for everyone to gain a better understanding on those issues. In fact, IGC 36 had been able to hold valuable discussions based on presentations given by some Member States. Therefore, it was critical for the IGC to hold discussions using sound working methods, supported by an evidence-based and inclusive approach that took into account the contributions of all Member States. Regarding TK, IGC 37 should focus on finding the importance of preventing the erroneous granting of patents. That could be done by establishing and utilizing databases stored with non-secret TK. In that context, the Delegation of Japan, together with the Delegations of Canada, the Republic of Korea, and the United States of America (“USA”), had resubmitted the document titled “Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources.” The discussion on that recommendation could complement and even facilitate the text-based negotiations. Sharing concrete examples of national experiences and practices on TCEs could help draw a line between “traditional” cultural expressions on the one hand and “contemporary” cultural expressions on the other. It supported the proposals made by the Delegation of the EU, on behalf of the EU and its Member States. That kind of studies could complement and facilitate the text-based negotiations. It stood ready to engage at IGC 37 with a constructive spirit.

25. The Delegation of Nigeria aligned itself with the statement delivered by the Delegation of Morocco, on behalf of the African Group. It was committed to working together with all stakeholders to ensure that the IGC would build upon the progress made in the textual work of the past two sessions. As it was the first deliberation on TK/TCEs in the biennium, it was an opportunity to bridge the gap on those conceptual issues that had posed immense difficulties in the course of the negotiations. A rights-based approach remained critical for the effective protection of TK/TCEs. It emphasized the need to focus on closing existing gaps and therefore encouraged the flexibility and good faith approach of all participants. It supported the value of *Ad Hoc* Expert Groups to progress negotiations in the IGC. Such groups had proven helpful in

narrowing gaps and building trust among delegates. While balanced regional representation in the group was a given, it was open to exploring the inclusion of other relevant stakeholders that served to enhance the process. On Agenda Item 7, it saw the merit in making a factual report to the GA that reflected the most recent documents of the IGC leading up to the GA. It hoped that IGC 37 would agree, in principle, on the nature of such a report and its recommendation(s) to the GA. In that context, sufficient progress had been made in the IGC negotiations, in particular with the GRs text, to make meaningful recommendation(s) to the GA.

26. The Delegation of the Republic of Korea believed in the importance of protecting TK and TCEs, but their protection should be designed in a manner that did not create adverse effects on innovation and creativity. Regarding the definition or scope of TK and TCEs, the treatment of those that were publicly available or in the public domain was very important. The definition had to be concise and clear-cut to prevent future ambiguous interpretation in the process of implementation because those were closely related to the subject matter, limitations and exceptions, and the level of protection. TK and TCEs that belonged to the public, i.e. in the “public domain” and those used in areas of public health and welfare, should be considered under an exception clause. As to TK databases, building and utilizing databases was a very efficient way to prevent erroneously granted patents or a means of protecting TK. The database in the Republic of Korea contained vast amount of published information, and had been used very successfully as prior art documents for patent examination as well as other purposes. Further discussion over the scope of information, security measures, and access control would provide a better idea to improve the usefulness of database. With regard to the disclosure requirement, when it came to the process of granting rights for inventions, it was worried that, due to the legal uncertainties caused by the obligations of disclosure, people might ultimately avoid utilizing patent systems, and instead bypass IP regimes altogether. Regarding the form of the outcome of the IGC, it preferred non-legally binding instruments from the perspective that the many issues discussed in the IGC had to be under the private domain. Securing rights for providing parties and user parties could also be achieved through other means outside of the patent system, such as private contracts, rather than by revoking rights or imposing sanctions through the office. In that context, it was necessary to have deep discussions, giving consideration to users’ opinions and the potential ripple effect on industry and other related areas.

27. The Chair recalled the objective of the IGC’s work as detailed in the mandate. Three tasks laid before IGC 37: (1) to undertake negotiations on TK/TCEs with a focus on addressing unresolved and cross-cutting issues and consider options for a draft legal instrument(s); (2) to consider possible recommendations to the 2018 GA, and; (3) to consider the establishment of an *Ad Hoc* Expert Group. In relation to the first task, IGC 37 was the first of four meetings on TK and TCEs. At the end of the week, the IGC would need to consider the focus for IGC 38, based on the progress made. He referred to the Chair’s Information Note, which had been prepared by him and was without prejudice to any Member States’ position. It had no status and was simply provided for reflection. There were also the Updated Draft Gap Analyses and the documents presented by a number of Member States for consideration by the IGC, which would be introduced later on. Concerning the methodology, he had briefed the RCs and interested Member States and had issued a paper on the working method, where he advised a non-exhaustive list of cross-cutting issues to be focused on. Should the IGC complete its work on cross-cutting issues, focus would then be on issues specific to the protection of TK. He had also included a proposal for an *Ad Hoc* Expert Group before IGC 38. That proposal replicated the proposal discussed at IGC 35 and he invited members to review it. Regarding Agenda Item 7, he would open the item for statements only, and determine next steps based on the statements made, i.e., whether to move into an informal consultation process or to have further plenary discussions. At the end of IGC 36, there was a general agreement around the approach and methodology used, notwithstanding the number of participants at the contact groups. He had asked the RCs for any feedback on the methodology, and as he had received

none and as reflected by the statements of the regional groups, he understood that the methodology was agreed. Transparency and inclusiveness should guide the IGC's work. The plenary was the decision-making body. Members should, as far as practical, conduct negotiations in a respectful and open manner, particularly when discussions challenged long-held views. Negotiations should be conducted in good faith and balance the interests of Member States and key stakeholders. In accord with the mandate, the IGC should focus on narrowing existing gaps on unresolved issues, but not enlarge the number of options. The IGC had to find some common understanding to reach compromise. In terms of revisions of the consolidated working documents, it was important to protect the integrity of Member States' positions. Without clarity of positions, the IGC could not take the next step in finding solutions that bridged the different positions. Members should present their proposals and suggestions for consideration with a clear explanation of how they would enhance the text. He intended to continue with the use of plenary, informals and contact groups with the aim of developing two revised working documents. Observers could make interventions but they had to be supported by a Member State. Any new proposals put forward by the Facilitators also had to be supported by a Member State. The Facilitators, Mr. Paul Kuruk from Ghana and Ms. Lilyclaire Bellamy from Jamaica, worked in their personal capacity. Their role was to capture interventions and produce a text, which brought the negotiation forward, in particular by narrowing gaps and merging similar concepts and ideas. Regarding informals and contact groups, if established, the Indigenous Caucus, as in past practice, would participate in both. The final revision would only be corrected for errors or omissions, with additional interventions placed on the record. The consolidated working documents had no status until the plenary agreed that they were appropriate documents to go forward to IGC 38. He recognized the concerns raised regarding the working method, especially regarding ensuring that proposals were accurately included in the revised text. The Facilitators read all the transcripts and tried to meet everyone's needs. If a Member State wanted its verbatim text included, the Facilitators would do that. He would attempt to provide sufficient time for discussion in plenary.

### **AGENDA ITEM 3: ACCREDITATION OF CERTAIN ORGANIZATIONS**

#### *Decision on Agenda Item 3:*

28. *The Committee unanimously approved the accreditation of the following nine organizations as ad hoc observers: Cross River Biodiversity, Marine Protection and Conservation (CRBMPC); ILEX-Acción Jurídica; Indo-OIC Islamic Chamber of Commerce and Industry (IICCI); Inspiración Colombia; Red Mujeres Indígenas sobre Biodiversidad (RMIB); Regroupement des mamans de kamituga (REMAK); San Youth Network; University of Rosario; and Union des peuples autochtones pour le réveil au développement (UPARED).*

#### **AGENDA ITEM 4: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES**

29. The Chair said that the Voluntary Fund was depleted. He called upon delegations to consult internally and contribute to the Fund. It had already been stated how important that Fund was to the credibility of the IGC, which had repeatedly committed itself to supporting indigenous participation. The IGC had to ensure that observers were present in order to understand their perspective. He drew attention to document WIPO/GRTKF/IC/37/INF/4, which provided information on the current state of contributions and applications for support. He requested the Vice-Chair, Mr. Chery Faizal Sidharta to take the responsibility of chairing the Advisory Board. The outcomes of the Advisory Board's deliberations would be reported in document WIPO/GRTKF/IC/37/INF/6. He urged members to seek opportunities to replenish the Fund. He mentioned the Indigenous Caucus's idea of proposing to the 2018 GA that the IGC use the WIPO budget to fund indigenous participation. That idea needed one Member State support to go forward. All recommendations to the GA would need consensus across the Member States.

30. The representative of Tupaj Amaru stated that there was no UN regulation or procedure to exclude certain participants from a meeting. The GA had recommended taking into account all indigenous peoples' substantive contributions. Indigenous peoples had been trying for years and nothing had been achieved. He was opposed to funding international organizations, which had never contributed anything to the IGC, through the Voluntary Fund.

31. [Note from the Secretariat]: The Indigenous Panel at IGC 37 addressed the following topic: "The Differences and/or Similarities between Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions – Indigenous Peoples' and Local Communities' Perspectives." The three panelists were: Ms. Lucy Mullenkei, Executive Director, Indigenous Information Network (IIN), Kenya, Mr. Mattias Åhrén, Professor, UiT-The Arctic University of Norway, Norway, and Ms. Patricia Adjei, First Nations Arts and Culture Practice Director, Australia Council for the Arts, Australia. The Chair of the Panel was Mr. Preston Hardison from the Tebtebba Foundation. The presentations were made according to the program (WIPO/GRTKF/IC/37/INF/5) and are available on the TK website as received. The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat which is reproduced, as summarized, below:

"Ms. Patricia Adjei introduced the work of the Australia Council as an Australian Government agency for arts funding. She also introduced the indigenous art protocols, which included nine principles for respecting TK and TCEs. She highlighted the differences in the IP law and customary law on TK and TCEs. TCEs and TK should be protected as a right of culture and protected as long as they were relevant to that particular indigenous community. The term of protection should be unlimited. The TCEs should be protected and maintained by indigenous peoples as a collective right, such as Law No. 20 on the Special System for the Collective Intellectual Property Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge in Panama. Regarding exceptions and limitations, the current text was problematic as exceptions and limitations could lead to potential further misappropriation or misuse of TCEs and TK. Exceptions should be limited, defined and formulated in compliance with IPLCs' consent and consultations. She believed that it was important to recognize customary laws of IPLCs to assist in the development of international instruments. She also emphasized the importance of the participation of IPLCs in the IGC.

Mr. Mattias Åhrén suggested that the objective of the international instrument must be reasonably be guided by the situation without instrument(s), noting that IP sought

appropriate balance between rights of creators, and interest of access by public. Beneficiaries should be those who created TK and TCEs. Other stakeholders' interests could be addressed through 'Administration of rights' provisions. Eligibility for protection was somehow defined by beneficiaries. He believed that TK and TCEs were those that had been created by the beneficiaries in a traditional or cultural context. Regarding exceptions and limitations, he stated that possible concerns with regard to access could be addressed. He also briefly talked about the Terra Nullius Doctrine and the notion of the public domain.

Ms. Lucy Mulenkei pointed out that sacred and/or secret TK and TCEs needed to be treated differently. It was important to ensure the full and effective participation of IPLCs when their TK and TCEs were used. Some protocols and guidelines on this had been developed slowly in Africa. It was also very important to ensure the participation of IPLCs in the IGC process. The negotiation in the IGC should also take in account other international instruments and processes, such as UNDRIP, the Convention on Biological Diversity, and the work of the UN Permanent Forum. At the same time, there was a need for awareness raising and capacity-building activities. She called upon Member States to contribute to the Voluntary Fund so that more IPLCs could participate in the IGC and discuss the critical issues that were important for IPLCs."

32. [Note from the Secretariat]: The Advisory Board of the WIPO Voluntary Fund met on August 29, 2018 to select and nominate a number of participants representing indigenous and local communities to receive funding for their participation at the next session of the IGC. The Board's recommendations were reported in document WIPO/GRTKF/IC/37/INF/6 which was issued before the end of the session.

33. The Chair called upon delegations to consult internally and contribute to the Fund. The importance of the Fund for the credibility of the IGC could not be overstated. It was critical to the credibility of the IGC's work that IPLCs be present at the meetings. He mentioned the recommendation proposed in relation to the Fund. He said the Fund would need, for a year, about 50,000 Swiss francs. A number of countries had regularly provided in the past, and it was time for other countries to share the burden.

34. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, said that the IGC was approaching the end of the negotiations. He supported getting towards a diplomatic conference. To that end, the IGC needed full and effective participation of IPLCs. One of the worst things that could happen would be that the instrument was adopted and ratified and that the indigenous peoples rose up against it. He was extremely frustrated by the lack of money. Without money, they could not participate. He wondered if Member States understood the poverty in which many indigenous peoples lived. Good participation was enabled through funding. Having five, seven or eight indigenous representatives was not enough. He urged delegates to make the IGC a legitimate process and to find the resources to support indigenous peoples' participation.

35. The Delegation of Brazil said that it would not be desirable to continue without the participation or contributions of IPLCs. It was conducting internal consultations in Brazil to explore alternatives. It had heard the possible proposals on the table. It was trying to find a mechanism to facilitate the participation of IPLCs in a way that provided comfort to the membership, as some Member States had expressed concerns about setting a precedent. It would come back with some more information about that at a later stage.

36. The Delegation of South Africa had made a contribution to the Fund in the past. It was committed to seeing more participation of IPLCs. In the African context, there were indigenous peoples. It was in its interest to see more other indigenous groups from different parts of the

world. It supported the request by the Indigenous Caucus to recommend to the GA to consider funding the participation of IPLCs through the regular WIPO budget.

*Decisions on Agenda Item 4:*

37. *The Committee took note of documents WIPO/GRTKF/IC/37/3, WIPO/GRTKF/IC/37/INF/4 and WIPO/GRTKF/IC/37/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. Patricia Adjei, Representative, Arts Law Centre, Australia; Mr. Martin Devlin, Assistant Director, International Policy and Cooperation, IP Australia, Australia; Ms. María del Pilar Escobar Bautista, Counsellor, Permanent Mission of Mexico, Geneva; Mr. Frank Ettawageshik, Representative, Native American Rights Fund, United States of America; Mr. Ashish Kumar, Senior Development Officer, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, India; Mr. Evžen Martínek, Lawyer, International Department, Industrial Property Office, Czech Republic; Mr. Lamine Ka Mbaye, First Secretary, Permanent Mission of Senegal, Geneva; and Mr. Manuel Orantes, Representative, CAPAJ, Peru.*

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 5: TRADITIONAL KNOWLEDGE/TRADITIONAL CULTURAL EXPRESSIONS

41. The Chair said that there was a wealth of materials produced by the Secretariat, such as reports, studies, field studies, draft gap analyses, etc. The fact that the IGC had been operating for such a long period, the international landscape had changed quite significantly in relation to indigenous peoples' rights and the protection of TK and TCEs. At a multilateral level, there was UNDRIP, which almost all members had signed with a few exceptions. It was principle-based and guided Member States on how they should support the rights of indigenous peoples. In a way, the work of the IGC was about operationalizing the aspirations of indigenous peoples in that declaratory statement. He recalled Article 31 which was an unambiguous statement. There were also two UNESCO Conventions: the 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions and the 2003 Convention for the Safeguarding of Intangible Cultural Heritage. There were also the Convention on Biological Diversity ("CBD") and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity ("Nagoya Protocol"), which dealt with GRs and associated TK. In addition to those multilateral instruments, there were free trade agreements, in which TK and TCEs were considered. Since the IGC had commenced its work, a growing number of countries and regions had implemented or were considering laws in those areas, e.g., the 2010 ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, the Andean Community Decision No. 391 Establishing the Common Regime on Access to Genetic Resources, and the Melanesian Spearhead Group Framework Treaty on the Protection of Traditional Knowledge and Traditional Cultural Expressions, to name a few regional examples only. A number of countries were conducting domestic consultation in those areas. For example, the New Zealand government was conducting consultations in relation to the Waitangi tribunals and Australia had a parliamentary committee looking at fake indigenous art products and crafts. The IGC had to expedite its work or it risked being overtaken by domestic and regional efforts, with the potential for a fragmented international policy and regulatory environment. There was an extremely variable environment within which those issues had been considered within Member States and regions. The IGC needed to balance the divergent interests of all key stakeholders, such as the IPLCs and all Member States. Whatever form the instrument would take, it would need to ensure flexibility for implementation at a national level and provide policy space. One size was not going to fit all. The IGC needed to focus on a principle-based policy framework, with which principles and standards would be operationalized at a national level. If the IGC tried to be overly prescriptive, it would fail. There was a fundamental, conceptual and legal divide in how IPLCs' belief systems, customary laws, and practices interacted with western cultural norms and laws. For IPLCs, the very concept of ownership in the IP system was incompatible with notions of responsibility and custodianship under customary laws and systems. Indigenous peoples themselves recognized that they lived in two worlds. That was well reflected in the "Uluru Statement from the Heart", produced in 2017 by indigenous Australians as part of the process of recognizing indigenous peoples in the Australian constitution. At a meeting in Uluru, all the key leaders of indigenous peoples in Australia had produced a statement of what they wanted to achieve. They recognized that they had to compromise in how they moved forward in constitutional recognition because they walked and lived in two worlds. If they could do that, so could the IGC. The IGC was not there to maintain the *status quo*. In relation to the cross-cutting issues, there were two consolidated working documents. The Chair's Information Note put side-by-side in a table the two sets of draft articles to assist the Facilitators in capturing the changes. There would be no live drafting. Ultimately, if the IGC accepted the final revision on Friday, both consolidated working documents would be modified. The IGC was not merging the consolidated working documents, and they would remain separate. The Chair highlighted that the Updated Draft Gap Analyses were a very important piece of work completed by the Secretariat. As to the Preamble, he

asked if the Facilitators could look at it to refine it and come up with a clearer and more concise text that gave better clarity across both sets of articles. Their work would have no status until the IGC agreed.

42. The Delegation of the USA thanked the Chair for his proposal to allow the Facilitators to draft a proposed set of preambular language for the consideration of the IGC. Although it supported such an approach, it was also valuable to allow members to comment on the existing Preamble, which could give additional ideas to the Facilitators when they created their own proposal.

43. The Delegation of Lithuania, speaking on behalf of the CEBS Group, thanked the Chair for the thorough and interesting introduction and for setting the scene by giving good examples of national laws and of the issues at stake. It looked forward to the constructive discussions on TK and TCEs based on a number of documents, including the Draft Articles on TK and TCEs. It said that the divergent positions regarding core issues did not yet allow for outcomes. It was prepared to actively engage in the IGC's work under the Chair's able guidance, with a view to achieving progress towards realistic results and fulfilling the IGC's mandate. It had studied the documents prepared by the Secretariat; however, both the Updated Draft Gap Analyses still lacked practical examples that would illustrate perceptible gaps. It would particularly appreciate concrete examples that would help better understand which practical issues were not yet sufficiently addressed at the international level. Studies on national experiences would allow a better understanding of how the issues at stake were addressed in different countries. It supported the proposals contained in documents WIPO/GRTKF/IC/37/10 and WIPO/GRTKF/IC/37/11. It thanked the members who had tabled the proposals, noting that those generally related to GRs, which were not among the topics of the session. It looked forward to discussing them at a proper time in the future.

44. The Delegation of the EU, speaking on behalf of the EU and its Member States, looked forward to a constructive debate at IGC 37. After a two-year pause, there was an opportunity to look again at TK and TCEs in the framework of the IGC's mandate agreed at the 2017 GA. If the discussions at IGC 37 were to be fruitful, they had to focus on core issues, as identified in the mandate. Those core issues included definitions, beneficiaries, subject matter, objectives, scope of protection, and what TK/TCEs subject matter was entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain. Discussions on those core issues were to take place without prejudging the nature of the outcome, as stipulated in the mandate. A practical perspective using existing IP frameworks to protect TK/TCEs could offer many advantages. At the same time, it took note of documents WIPO/GRTKF/IC/37/6 and WIPO/GRTKF/IC/37/7. It was crucial to have a common understanding about how the IP system could, or could not, assist in serving the interests of the holders of TK/TCEs. Any further discussion of the Updated Draft Gap Analyses should focus on practical aspects and illustrate existing gaps, to the extent possible, with specific examples, as referred to in point 1(b) of documents WIPO/GRTKF/IC/37/6 and WIPO/GRTKF/IC/37/7. To that end, any further discussion on that topic would benefit from building upon national experiences accumulated in addressing issues relating to gaps as perceived. On the question of working methods, it would continue to advocate solid and evidence-based discussions that considered real-world implications and feasibility in social, economic and legal terms. Effects on stakeholders at large, including the public domain, should be thoroughly examined. In that context, it recalled its proposal for a study relating to TK (previously issued as working document WIPO/GRTKF/IC/32/9 and re-issued as document WIPO/GRTKF/IC/37/10) and its proposal for a study relating to TCEs (previously circulated as document WIPO/GRTKF/IC/33/6 and re-issued as document WIPO/GRTKF/IC/37/11). The Secretariat should undertake studies of national experiences and domestic legislation in relation to the protection of TK and TCEs. To inform discussion at the IGC, the studies should analyze domestic legislation and concrete examples of protectable subject matter and subject matter that was not intended to be



protected, and take into account the variety of measures that could be taken, some of which could be measures-based, while others could be rights-based.

45. The Delegation of Egypt looked forward to ending up with a legally binding instrument that fulfilled the aspirations of Member States for the protection of GRs, TK and TCEs, after almost twenty years. It looked forward to linking the instrument(s) up with the CBD and the Nagoya Protocol and benefiting from a greater amount of transparency, based on prior informed consent ("PIC"), benefit-sharing, and technology and knowledge transfer. The IGC had to come up with a *sui generis* IP system to protect TK and TCEs. The international IP system had already acknowledged the *sui generis* aspect, as illustrated by the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement"). Under Agenda Item 5, the unprecedented number of documents to be discussed could not lead to appropriate solutions. Out of the thirteen documents, the first five or six documents were the most needed. After twenty years on, the IGC was not supposed to receive and consider joint recommendations. The IGC had to fulfill its mandate and work on the texts. Delegations could no longer be surprised at every session with a new set of texts. That only implied that there was no willingness to conclude the IGC's work. The Draft Articles had to take into consideration the exclusive rights of IPLCs and their PIC, and also guarantee the benefit of the use of knowledge. The texts also had to reflect the moral rights and a disclosure requirement. That was the case in the Egyptian IP legislation. With regard to databases, the text had to reflect that databases did not necessarily mean protection. The fact that TK was in a database did not mean that it was open for use or that it was in the public domain, as was stated in the current text; rather, there should be enforcement mechanisms to prevent such a loophole. Otherwise, that could lead to misappropriation. There had to be an international legal system to safeguard a period for protection. Without such a period of protection, the IGC could not discuss the matter of the public domain.

46. The Delegation of Ecuador said that IGC 37 was important, as it covered discussions on cross-cutting issues regarding the protection of TK and TCEs. The IGC was seeking to achieve an adequate understanding to allow achieving a legal binding instrument that provided international solutions to the misappropriation of TK, whether or not associated with TCEs and GRs. It was important to ensure the access to TK, whether or not associated with GRs, based on PIC. It was appropriate to have mutually agreed terms ("MAT") giving clear elements to ensure equitable benefit-sharing, as established in the CBD, the Nagoya Protocol and Article 31 of UNDRIP. Regarding TCEs, it was concerned about misappropriation, such as in certain fashion lines, which led to the loss of cultural value and identity of IPLCs. It was essential to strengthen international measures to allow the protection of TCEs.

47. The Chair opened the discussions on objectives. He said the first alternative was framed from the beneficiaries' perspective, while the second focused on balancing the interests of the beneficiaries and the protection of the public domain and artistic freedom. The IGC should be able to consolidate those objectives and come up with an agreed set of objectives. To do that, members had to compromise and to agree that that balance was appropriate and should be represented across the objectives. The objectives contained three key elements: (1) the prevention of misappropriation and misuse; (2) the promotion of innovation and creativity; and (3) the prevention of improper or erroneous grant of IP rights. It should not be hard for the IGC to find common language. The IGC had made progress in the sense that the objectives were clearly framed from an IP perspective, but it should be able to narrow them down and get the right language. The Facilitators could come up with concise and clear objectives relatively easily, but that required the IGC to recognize that a number of interests needed to be reflected in the operative texts. He opened the floor for comments.

48. The Delegation of Switzerland said it would be useful to consider the policy objectives from the perspectives of all interests, namely the interests of the beneficiaries, the users, and

the public. However, that did not mean just combining the different policy objectives currently contained in the different alternatives. In fact, the IGC should try to draft a policy objective in a simple, concise and positive way, as was currently the case in Alt 3 of both texts. Alt 3 did not prejudice the nature of any possible new instrument(s) for protecting TK and TCEs. At the same time, it allowed to take into consideration already existing IP tools relevant for the protection of specific types of TK and TCEs, while it recognized the rights of IPLCs. Therefore, in the TK text, it wished to see a reference to IPLCs, as was the case in the TCEs text in Alt 3. Alt 3 could be further improved once further progress on the operational provisions could be achieved. With regard to some of the policy objectives in the other alternatives, firstly, in Alt 1 of the TK and TCEs texts, the concept of PIC or approval and involvement for benefit-sharing was not clear. In existing related instruments, such as the Nagoya Protocol, benefit-sharing was based on MAT but not on PIC. It was actually access to TK associated with GRs that had to be with the PIC or the approval or involvement of IPLCs. Secondly, in connection with the concept of “misappropriation/misuse/unlawful appropriation/unauthorized use”, it was concerned that it might be very difficult to reach a common understanding on that concept at an international level. In fact, any attempt to reach a common understanding on that concept in other international fora had failed. Therefore, it doubted that it would be possible for the IGC to actually find a common understanding thereon. Finally, as regards the promotion of innovation and creativity, as well as the recognition of a vibrant public domain, it supported those objectives in general; however, those policy objectives seemed to be too general and not focused enough on the protection of TK and TCEs.

49. The representative of the Tebtebba Foundation had concerns with some of the concepts in the objectives. He did not have a concern about the general idea that creativity and innovation could be useful. In the Indigenous Panel, Ms. Patricia Adjei had given an example where artists in Australia were interested in innovation and creativity, but only when it was consistent with their customary laws and protocols. The problem with the text was that those principles were stated in a free-floating, ungrounded and unbound way. He gave the example of a family that had traditional songs that they had kept in their family since time immemorial and sung them in public (even where there were non-natives and non-indigenous peoples in the audience). Those songs were not protected as trade secrets, but everybody knew that those songs belonged to that family. He asked whether there was any principle of IP law that would allow citizens and publishers or others outside the community to have free access without free, prior and informed consent (“FPIC”) to those family songs. He said the natural order of things was that innovation and creativity had their own value and should be facilitated. Indigenous peoples had voiced that they could be interested in transferring, but they wanted to control the conditions under which that transfer would occur. The promotion of creation and innovation should always be limited by FPIC of those from whom that knowledge or those expressions came. That control came from having strong protection. Indigenous peoples should be in a position to make the decisions about what they wanted share and what they did not. The principles of fair use and freedom of expression were essentially trying to usurp property and the right to control the use of TK. He said the IGC could find convergence with appropriate limitations on those principles, which were phrased in a very open-ended manner.

50. The Delegation of South Africa said the objectives were cluttered with redundancies and the IGC had to clean them up before it could focus on substance. For example, both Alt 2 and Alt 4(c) referred to the prevention of the granting of erroneous IP rights. The IGC could find guidance about the context of the instruments in the two Updated Draft Gap Analyses and in the Chair’s Information Note. It suggested that the Facilitators try to eliminate those duplications and reduce them to the core issues. The IGC had made good progress since 2009, when the objectives had spanned six or seven pages.

51. The Delegation of the USA had three suggestions on the TK text. The first one applied to policy objectives but also globally: it asked to bracket each instance of “article” or “articles”

throughout the document, both in the title and in the text. It suggested replacing those with “section” or “sections”, so as not to prejudge the outcome of the negotiations. The second suggestion, which also applied both in the policy objectives and to the text as a whole, was to bracket each alternative or to insert a footnote in the text to reflect that the individual alternatives were not agreed. As such, anyone looking at the text would understand that those alternatives were not agreed. With respect to Article 1, Alt 3, it suggested replacing “recognizing the rights” with “respecting the values”. That was a more universal formulation that could apply to both the rights-based and the measures-based approach. On the TCEs text, it had suggestions aimed at reaching a common understanding on core issues. In Alt 1, paragraph 1.1(c), it said that the notion of equitable compensation and sharing of benefits was a relatively novel concept for TCEs. It was clearly drawn from instruments focused on GRs and it raised many complex issues in the area of TCEs. Just to name a few, the question of “regional folklore”, where more than one territory had a TCE, raised certain cross-border issues. It was interested in learning more about national experiences and regional experiences where there were overlapping claims. Until a common understanding on that core issue was reached, it suggested bracketing all of Alt 1, paragraph 1.1(c). It looked forward to further discussion thereon. Similarly, it referred to the intervention by the Delegation of Switzerland and said that the terms “misappropriation and misuse/offensive and derogatory use”, as found in Alt 1, paragraph 1.1(a) needed a deeper understanding and it asked to bracket that phrase. It looked forward to further clarification. The phrase also appears in Alt 4, and “prevent misappropriation, misuse, or offensive use” should also be put in brackets.

52. The Chair urged members to be pragmatic and flexible and to avoid putting any more brackets. He was keen to focus on getting a shared understanding of different positions regarding substance.

53. The Delegation of Japan proposed that the term “Policy” be deleted from the title of the article. Since that term had already been deleted from the GRs text, it was natural for the term to be deleted from the TK/TCEs texts, unless there was any clear necessity for it to remain. Consistency among the three texts would make it easier for Member States to interpret the terms’ meanings. Since it was inappropriate to associate the issues on ABS with the IP system, paragraph 1(c) of Alt 1 should not be included. It supported paragraph 2 of Alt 1 and subparagraph (c) of Alt 4 (in the TCEs text: paragraph (e) of Alt 2) because the concept of preventing the erroneous granting of patents was essential in the instrument.

54. The Delegation of Indonesia preferred the objectives reflected in Alt 1 in both texts. The policy objectives needed to be balanced and not just reflect one position. It could be flexible and go with the simpler language reflected in Alt 3 in both texts. However, in the TCEs text, there should be also the option of “ensure” in line with “support”, just like in the TK text. It agreed that the Facilitators could clean up the repetitions in the text.

55. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported Alt 2 in both texts, as a general approach. It could consider exploring further Alt 3 in both texts because, in principle, it could embrace the idea of clear, short and positive texts. It associated itself with the comments made by the Delegation of Switzerland on finding problematic the references to PIC, benefit-sharing and the concept of misappropriation.

56. The Delegation of the Islamic Republic of Iran said that all positions and perspectives were adequately reflected in the text. There were indeed redundancies and irrelevancies in the texts as the current alternatives tended to be framed from a single approach. It was not necessary to address the details in the policy objectives; rather the IGC should develop a compromise text that contained overarching policy and general principles from the perspective of all interests. It was definitely not an easy task, but if it was committed to making progress and narrowing the gaps, the IGC could undertake that exercise. It referred to the GRs text, and

supported the Facilitators in that direction. It was in favor of Alt 1. It said that just reiterating which alternative one was in favor of could not help make progress. Likewise, just bracketing specific expressions or alternative was a waste of time because everyone knew what was the state of play. It was committed to making progress and to try to develop a text that captured the different approaches and priorities.

57. The Delegation of India supported Alt 1 in both the TK and TCEs texts, with certain modifications. In paragraph 1(a), the use of the words “illegal appropriation” and “misuse” was not required as their essence was captured in the word “misappropriation”. Alt 2, although short, was not agreeable because it made the situation unpredictable. The IGC intended to establish clear laws and not to guide whether an action was lawful or not. Alt 3 was not good because it stated that TK was within the IP system. TK should not be equivalent to a patent; one needed to come up with broader language. In fact, Alt 2, Alt 3 and Alt 4 were all not acceptable.

58. The Delegation of South Africa, in relation to paragraph 1(c), referred to the statement by the Delegation of the USA. It recalled the case of Solomon Linda’s song, “The Lion Sleeps Tonight”, and said that the Warner Brothers had to settle that matter outside of court. That was definitely evidence. The onus should be on all IGC members to use the texts that the Secretariat had produced since 2000 to come up with the evidence. On the substantive issues and the mandate, the Chair also had a big role to play in the interpretation of the mandate and in guiding on where to narrow gaps. There was an unwritten rule, and maybe it was time to make it into an open rule, not to interfere with particular positions, which represented a perspective, either from *demandeurs* or others. To a certain extent, it was beginning to let its guard down and allow free flowing. That had led to a crisis at IGC 35. There was plenty of evidence, and the onus was not just on *demandeurs*, it was on everyone to draw on those documents and provide evidence.

59. The Delegation of Nigeria said that issues of TK/TCEs posed high-level, conceptual problems, particularly when one juxtaposed them within the IP system. Members were still digging in predictable positions, asking for brackets in, brackets out. That was not helpful. It was time to try and see what the point of that exercise was. It asked if all members’ interventions were documented. It asked if the Facilitators had the discretion to observe all interventions and work with those and present their work to the IGC. If that was the case, then the IGC could make progress. Some issues engaged TK but not TCEs and vice versa. The IGC had gotten itself into a problem when it had split those two concepts. From an indigenous peoples’ perspective, they could not be split. The IGC had gone past that debate, but one had to appreciate the complexity of the process. Every delegation had something to say about a specific word or phrase in the drafts, and if one allowed that to keep flowing, the IGC would not make progress. It was important to pause and reflect on how to make progress. The gaps were not narrowing. Problems were being created rather than solved. It was time to recalibrate that.

60. The Delegation of Italy supported the statement made by the Delegation of the EU, on behalf of the EU and its Member States. In the policy objectives, it was better to say as little as possible, because otherwise one got into very confusing definitions. The IGC was dealing with extremely difficult issues. The very definition of TK was a tricky problem, so it was better to have brief language that clearly indicated what the policy objectives were. The IGC could take a close look at Alt 3, which contained a number of significant elements, e.g. the reference to IP, because the IGC had to respect the limits and parameters of the IP system. The other important reference in Alt 3 was to national law, which made it clear to give national law its due. The IGC could not seek to regulate everything through international instruments. There was no need to refer to benefit-sharing specifically. That was not referred to in the Nagoya Protocol or in the Patent Cooperation Treaty (PCT) in relation to TK. In fact, it was only pertinent concerning TK associated with GRs.

61. The Delegation of Brazil supported the statement by the Delegation of the Islamic Republic of Iran to push for a more overarching approach in the policy objectives. Its views were largely reflected in Alt 1, in both the TK and TCEs texts. Recalling the interventions by the Delegations of Italy and the EU, on behalf of the EU and its Member States, the IGC could reach compromise by drawing on some of the language in the other alternatives. It was concerned that Alt 2 in the TK text mentioned “protected” TK, which presupposed a previous agreement on the meaning of “protection”, which was what the IGC was trying to reach. It was coming to the meeting mindful of its interests and positions but also in the spirit of dialogue and compromise, hoping that everyone engaged in the same constructive and transparent way towards meaningful outcomes.

62. The Delegation of Lithuania, speaking on behalf of the CEBS Group, said the IGC was at the very initial stage of discussion. It was premature to expect very radical changes in Member States’ positions. It looked forward to language that would avoid suggesting a legally binding instrument because it was not yet at a stage to prejudge the outcome of the discussion. Problematic were the term “misappropriation” and the reference to the access and benefit-sharing (“ABS”) system.

63. The Delegation of Colombia endorsed the statement by the Delegation of Brazil. Alt 1 covered many of the interests that it was pursuing, with some specific adjustments. It was ready to work on other alternatives, provided that those could be constructed jointly around what it was seeking. It looked positively on Alt 2, with the clarifications mentioned by the Delegation of Brazil.

64. The Chair closed the discussion on the objectives. He said that a number of the members that had indicated their preference for one alternative had also indicated that they were prepared to compromise and were supportive of an attempt by the Facilitators to craft a more balanced objective. The Facilitators would endeavor to draft nice and clear objectives, removing ambiguity and redundancies. He opened the discussion on beneficiaries. He said there was no agreement yet on that issue. The TK text included two alternatives, while the TCEs text included four. There was broad agreement that the primary beneficiaries were IPLCs. However, there were a number of significant divergences in national laws and environments where TK and TCEs could be found, and there might need to be flexible policy space to take account of those differences. The Delegation of China had raised issues concerning that policy space, to account for other beneficiaries, such as states and nations. Members might wish to consider the necessity of giving some latitude at the national level regarding the definition of “beneficiaries”. He opened the floor for comments. He urged members not to place any more brackets but to focus on substance.

65. The Delegation of Indonesia, speaking on behalf of the LMCs, said there was no dispute that the main beneficiaries of both the TK and TCEs instruments were IPLCs. However, there were certain circumstances in which one needed policy space, especially where TK or TCEs could not be specifically attributable to a particular IPLC. Under those circumstances, the provision on beneficiaries should address that concern and include “other beneficiaries, as defined by the national laws of Member States.” Discussions on beneficiaries were closely related to those on the administration of rights, so the provisions should be streamlined to avoid duplication of similar ideas.

66. The Delegation of Nigeria identified with the remark made by the Delegation of Indonesia, on behalf of the LMCs. In that part of the text, there was no significant divergence between TK and TCEs. The IGC might be able to settle with one simple text that was inclusive and accommodative of some of the divergences that the IGC had navigated over time. It said that, without question, the beneficiaries of the instrument should be IPLCs. Yet, there were places

where peoples were not recognized as indigenous. So as to accommodate those national contexts, the text had to comprise “and other beneficiaries, as may be determined under national law.” Alt 3, in the TCEs text, seemed to be the simplest way of capturing that. The tendency in Alt 4 to qualify IPLCs by adding “who hold, express, create, maintain, use, and develop protected TCEs” did not act in the interest of certain IPLCs in specific national contexts. For example, in Canada, some indigenous peoples had been pushed away from their ancestor homelands, and that did not disinherit them from being entitled to their TCEs that were traced to the ancestral origins. Those attempts to qualify the beneficiaries did not serve the purposes of inclusivity and balance.

67. The Delegation of India supported Alt 2 in the TK text and Alt 3 in the TCEs text. As regards Alt 2 of TK, it recognized that the main beneficiaries were IPLCs. India had developed a Traditional Knowledge Digital Library (TKDL) which had been a pioneering initiative in providing defensive protection to Indian TK, specifically related to traditional medicinal knowledge. All that knowledge was based on ancient scriptures and TK, where it was very difficult to determine which community owned it or was associated with it, so it was a national treasure. In that case, one had to include the one additional layer of beneficiary, i.e. “and other beneficiaries, such as states or nations, as may be determined by national law.” That could be refined, but the idea was that the beneficiaries were not limited to IPLCs, there was something more than that. As regards TCEs, it said there was overall consensus on Alt 3.

68. The Delegation of Japan proposed adding in the title of the TK text “/safeguarding” with brackets after the word “protection” also with brackets in the title, in order to ensure consistency with the TCEs text. In addition, beneficiaries should be specified in relation to individual TK (or TCEs), and it was necessary for beneficiaries to have a cultural and distinctive link with TK (or TCEs). Therefore, it was not appropriate to include “states” and “nations” as beneficiaries as indicated in Alt 2.

69. The Delegation of South Africa said that the issue of safeguarding seemed to be addressed quite adequately in the Updated Draft Gap Analyses in terms of separating what was IP and what was cultural heritage, and what appropriate words needed to be used. Instead of taking “safeguarding” to the TK text, the IGC should actually do away with it altogether, since it was not appropriate in an IP discussion. It related to heritage and cultural work. It supported having high-level principles that reflected a minimum standard approach to which all subscribed, and which would leave the details to national laws. It had a conceptual problem with Alt 1 on “protected” TK, since there was no evidence of an IP regime that already protected TK. It supported Alt 3 in TCEs as the common denominator that could speak to both TK and TCEs.

70. The Delegation of Egypt stood by Alt 2 with regard to TK, and by Alt 3 with regard to TCEs. It was necessary to remove all the brackets and clean up the text in order to make progress.

71. The Delegation of Morocco, speaking on behalf of the African Group, noted that there were a number of African countries that did not have IPLCs, and there was no separation between the peoples of a single country in Africa. It supported Alt 2 for TK, and Alt 3 for TCEs. Beneficiaries had to be defined as broadly as possible to avoid anyone falling through the net.

72. The Chair appreciated that many Member States were demonstrating flexibility and were focused on substance. However, some interventions continued to state some well-known positions and to reflect the divide rather than focus on narrowing the gaps and come to an understanding. He asked members to focus on substantive issues with the aim of developing a shared understanding of each other’s different perspectives. There should be a dialogue, not simply statements of non-support and requests for brackets or for removing brackets. The IGC should shift its understanding, lift itself above narrow views of how the copyright system or

patent system worked. Discussions should be on a principle-framework level and bridge the conceptual divide. Indigenous peoples themselves recognized they walked in two worlds; they understood the need for compromise in a fair and balanced way. Member States had to do the same. The majority had signed UNDRIP. He asked members to hear the voices of indigenous people, hear their aspirations and their thoughts from their perspective. He mentioned the “Uluru Statement from the Heart” and asked an indigenous Australian to read it out to give some inspiration for moving the IGC’s work forward. He invited an indigenous representative to read that statement.

73. The representative of the Arts Law Center read the “Uluru Statement from the Heart”:  
“We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make that statement from the heart: Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. That our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from ‘time immemorial’, and according to science more than 60,000 years ago. That sovereignty was a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. That link was the basis of the ownership of the soil, or better, of sovereignty. It had never been ceded or extinguished, and co-exists with the sovereignty of the Crown. How could it be otherwise? That peoples possessed a land for sixty millennia and that sacred link disappears from world history in merely the last two hundred years? With substantive constitutional change and structural reform, ancient sovereignty could shine through as a fuller expression of Australia’s nationhood. Proportionally, we were the most incarcerated people on the planet. We were not an innately criminal people. Our children were alienated from their families at unprecedented rates. That cannot be because we had no love for them. Our youth languish in detention in obscene numbers. They should be our hope for the future. Those dimensions of our crisis tell plainly the structural nature of our problem. That was the torment of our powerlessness. We seek constitutional reforms to empower our people and take a rightful place in our own country. When we had power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country. We call for the establishment of a First Nations Voice enshrined in the Constitution. Makarrata was the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination. We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history. In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across that vast country. We invite you to walk with us in a movement of the Australian people for a better future.”

74. The Chair opened the floor for continuing the discussion on beneficiaries.

75. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported Alt 1 as a general approach. As to nations or states as beneficiaries, it was not clear how the eligibility criteria, as contained in Article 3 that it supported, could be met if the beneficiaries were not those contained in Alt 1. It welcomed clarification in the informals.

76. The Delegation of the Islamic Republic of Iran recalled the significant divergences in national law and environments where TK and TCEs could be found. Hence, the language of that article should provide flexible policy space to take account of those differences. It shared the broad understanding that primary beneficiaries of the instrument should be IPLCs. Meanwhile, bearing in mind the different situations regarding TK and TCEs holders throughout

the world, policy space needed to be preserved for Member States to determine the beneficiaries within their jurisdiction. Alt 2 of the TK text and Alt 3 of the TCEs texts presented broad language that captured the priorities of all Member States. Those options addressed the concerns of some Member States on the need to include states and nations as beneficiaries. It expressed its reservation with regard to the term “nation,” whose use would create many legal questions and consequences that fell outside of the IGC’s mandate.

77. The Delegation of Switzerland made a few general observations on the issues of beneficiaries, with a view to facilitating the finding of a common understanding on that important issue. It shared the Chair’s view in the Information Note that greater clarity was still needed in the text as regards the relationship between the concepts of beneficiaries, rightholders and administrators of rights. To clarify that concept, it should also be clarified whether all members looked at the term “beneficiaries” from the same perspective. One could look at it from at least two different perspectives: (a) from the perspective of how the term “beneficiaries” had been used in existing IP instruments, in particular copyright agreements such as the Beijing Treaty on Audiovisual Performances or the WIPO Performances and Phonograms Treaty (WPPT). The term described those persons to whom protection should be accorded. The beneficiaries would be the same as the rightholders. Should that be the case, the IPLCs should be the beneficiaries, because they were the creators and holders of TK and TCEs; (b) if one stepped out of the copyright perspective and looked at the term “beneficiaries” from a broader perspective, the term could describe those persons or entities who would be benefitting from the provisions in the instruments in general. From that perspective, beneficiaries could indeed be more than just IPLCs, because the protection of the TK and TCEs of IPLCs might not only support the appropriate and legally-sound users of TK and TCEs, but also the preservation and safeguarding of TK and TCEs. Therefore, from that perspective, beneficiaries would be the entire society, including not only the IPLCs and states where such communities were located, but also users of TK and TCEs and states where users were located. Furthermore, not all existing IP or non-IP instruments that provided protection to subject matters of some individuals or entities contained an article on beneficiaries. Therefore, if it became sufficiently clear who would be the beneficiaries based on the specific provisions that would eventually be included in the instruments, there might be no need for a specific article on beneficiaries. Finally, the Delegation asked those delegations that were asking for policy space at the national level whether the term “local communities” did not already provide sufficient flexibility in cases where there were no indigenous peoples under national jurisdiction. Those observations were intended to stimulate discussions to find a solution and not intended to add more options in the text at that stage.

78. The Delegation of the USA supported Alt 1 of Article 4 in the TK text. IPLCs should be the beneficiaries of protection in a TK instrument. It suggested the insertion of the words “of protection under” before the words “that instrument” in order to clarify that article. In the TCEs text, it supported Alt 1. It recalled the intervention by the Delegation of Switzerland and said that Alt 1 would fit comfortably with the concept of the beneficiaries in IP systems, being society at large, with the advantages of promoting creativity and innovation. With respect to Alt 2, Alt 3 and Alt 4, it noted that there might be some disadvantages to those provisions inasmuch as the phrase “other beneficiaries as may be determined under national law” might result in creating beneficiaries for TCEs that were not specifically attributable to a specific community. It agreed with the Chair’s Information Note that on Article 4, the IGC still had to find a substantial agreement.

79. The Delegation of Italy supported the intervention by the Delegation of the EU, on behalf of the EU and its Member States. It recalled that UNDRIP only dealt with indigenous peoples, and there was no reference to local communities or to nations, states or whatever else. The definition of beneficiaries needed to be linked with the object of protection and with the definitions of TK and TCEs, otherwise one ran the risk of recognizing protection for everything.



The definition of TK included know-how, skills, innovation, practice, teachings and learnings. If one expanded the protection to states or nations, one would end up recognizing extremely broad protection for everything. It recalled the statement by the Delegation of India regarding the TKDL and said that each Member State could have databases. In Italy, one could include the way pizza (a form of Italian know-how or skills) was made in such a database. It wondered if that meant that anywhere in the world, if someone wanted to make pizza, he or she had to ask permission and pay compensation to Italy. The same could be said of any country. The IGC had to be very careful not to create something that was against the TRIPS Agreement and not to include a kind of "IP tax". TCEs were creations of authors (either a person or a collectivity) and in that case the Berne Convention already recognized such protection. It wondered if it could be possible that a state be considered the creator of a song or dance.

80. The Delegation of Mexico supported Alt 2 in the TK text and Alt 3 under TCEs. It suggested putting brackets around "peoples". The possibility should be left open at the national level for other beneficiaries to be defined. It was not necessary to be specific as to who those other beneficiaries were. The IGC would run the risk of omitting some by drawing a list. It should not go into details. The merit of including that language was that it created space and time for each country to decide what was most appropriate for itself internally.

81. The Delegation of Brazil supported Alt 2 with regard to TK. There should be flexibilities for different national systems. In the TCEs text, it supported Alt 3, but indicated some flexibility with regard to the final outcome in order to address the concerns raised by other members to make sure that "other beneficiaries as may be determined by national law" did not mean any kind of "free for all." It stood ready to discuss criteria in that respect.

82. The Delegation of Canada welcomed the open and constructive discussion and looked forward to hearing from Member States who had put in place the measures or policies being proposed. It had concerns about including a general provision that would leave discretion to recognize other beneficiaries without any qualification. There were different circumstances in Member States that might warrant the need for "other" beneficiaries. There were at least two situations: (1) when either TK or TCE was not distinctly associated with a particular IPLC or (2) where a Member State did not recognize the notion of IPLCs. Based on the different options of TK and TCE definitions, it might be necessary to qualify circumstances under which a Member State might designate other beneficiaries as opposed to leaving the discretion unqualified. It also queried whether in the instance that a Member State needed to recognize other beneficiaries, such as the state, whether it would even meet the working definitions of TK and TCEs. For example, the definition of TCEs talked about them being integral to the cultural or social identities of the IPLCs. For a beneficiary other than an IPLC, the subject matter arguably might not even meet the definition or criteria for a TCE and might not, therefore, be covered by the instrument. It was interested in hearing from Member States on the value of including a broad discretion to identify or designate "other beneficiaries" and how they saw the link between other beneficiaries and TK and TCEs. There was value in discussing what Member States meant or understood by "local communities" and at a very practical level who would qualify as a local community for the purposes of asserting the protection for TK and TCEs being considered in the IGC. It had been accepted elsewhere without being defined, but in the context of TCEs in particular for the purpose of that instrument, that could extend the scope of protection to communities not intended to be covered and create unintended consequences for the IP system in a similar way to the language providing for "other beneficiaries", for example, when members of a local community used and shared their TK and TCEs outside of the country of origin of that local community. It saw the potential of conflicts arising when a Member State defined or recognized local communities differently for the purpose of any instrument coming from the IGC. That warranted an open and transparent dialogue to reach a common understanding of what "local community" meant.

83. The representative of IWA, speaking on behalf of the Indigenous Caucus, expressed her concern about “peoples” being in brackets. By an overwhelming majority, the UN had adopted UNDRIP in 2007. Indigenous peoples were peoples and those brackets should be removed. Regarding the inclusion of nations or states in that article, she was grateful to have heard the ideas of the indigenous panelists. She had listened to other Member States speaking about policy space. While reserving her decision on whether that language was appropriate, she wished to hear more details on what “policy space” for other beneficiaries might mean, as well as the discussion of an “administration of rights” role.

84. The Republic of Korea supported Alt 1 with regard to beneficiaries. States were not appropriate as beneficiaries. The beneficiaries should be limited to those who had generated, preserved and handed down TK and TCEs from generation to generation. Including nations and states as beneficiaries might complicate the situation among Member States relating to ownership of TK and TCEs in cases where Member States shared TK and TCEs.

85. The Delegation of Colombia said that, to be consistent throughout the instruments and their objectives, protection of collective rights was essential, because it was the communities that had the ability to decide and determine when TK and TCEs could be shared or not. There needed to be consistency with other international instruments such as the CBD, which referred to IPLCs, on the understanding that local communities included different groups recognized at the national and international levels. It supported Alt 1. However, it was flexible with regard to Alt 2, as long as the reference to IPLCs was explicit.

86. The Delegation of China supported Alt 2 in the TK text. It recognized the rights of IPLCs, which should be fully protected and respected. There should be enough inclusiveness and flexibility for national laws, reflecting countries’ and regions’ existing practices and legislation. There should be a reference to “other beneficiaries”. A list to demonstrate states and nations was also very necessary. The IGC could also clearly define who the beneficiaries were, where necessary and possible. In the TK text, there were definitions in the protection, objectives and beneficiaries provisions. If one combined states and nations, that article could be more operative. Regarding the TCEs text, it supported Alt 2, which was more in line with the national context of China. “Chinese nation” was a common description of all Chinese people, which included 56 ethnic groups. That was very different from the definition of nation/state in the western world. In China there was no notion of “indigenous peoples”. Alt 2 stated that Member States could define other beneficiaries within their national law. That provision embodied the context of protection of specific nations and ethnic groups in China. The IGC could better meet the needs of those peoples to protect them by referring to “other beneficiaries,” which would help avoid conflicts regarding the definition of indigenous peoples in multilateral negotiations due to different national contexts.

87. The Delegation of Lithuania, speaking on behalf of the CEBS Group, supported Alt 1. It liked the idea that the instrument could create some positive advantages for most vulnerable IPLCs. The fact of including states and nations might create not only legal ambiguity but also create unintended disadvantages to the most vulnerable groups. It was very cautious about the phrase “other beneficiaries”, and it asked for more explanation, e.g., as to what kind of entity would be covered, in order to evaluate if it could have unintended consequences.

88. The Delegation of the Plurinational State of Bolivia said Alt 2 on TK would be acceptable, as there was no reference to “protected” TK. It would be good to allow the beneficiary issue to be decided according to the legislation of each country. For example, the central role of peasants and traditional communities was essential. That could be closed off with the reasonability and balance principles and not leave the protection aspect too far open.

89. The representative of Tupaj Amaru said that the states did not listen or understand what the indigenous representative of Australia was clamoring for. To understand who the beneficiaries were, one needed to keep in mind the definition of TK. He, on several occasions in the IGC, had put forward his concrete proposals with regard to the definition of the object of protection. Over time, the states had dropped the definition of the subject matter. He asked who had the right to decide who the beneficiaries were, whether indigenous peoples were indigenous peoples or tribes who had contributed to prior civilizations. He was happy to hear the statement by the Delegation of the Islamic Republic of Iran stating that the beneficiaries should be the indigenous peoples who were the creators of TK and TCEs. The Delegation of Switzerland had stated that the beneficiaries should be society as a whole; yet Switzerland did not have indigenous peoples. The multi-national companies were the ones that had looted all the TK and resources of indigenous peoples. Those were the lobbies that were present in the IGC to defend their voracious rights. With regard to the statement by the Delegation of Italy, one could not be so simplistic as to compare pizza to TK. TK was far deeper than that and it was much more historical. TK was not a good that was traded. Countries like Brazil and other Latin American countries had brought underfoot the indigenous peoples. The Plurinational State of Bolivia was a multi-ethnic country of indigenous peoples. He wondered why they did not recognize indigenous peoples. He presented, with regard to beneficiaries, a revised text from previous sessions that read: "For the purposes of this instrument, beneficiaries are to be understood as the collective title holders of creators, custodians, possessors of TK that are IPLCs and their descendants, that these peoples have had conferred upon them traditionally the custodianship, the safeguarding of TK in accordance with customary laws and traditions; those who conserve, develop, preserve, use and transmit TK from generation to generation, as authentic and genuine characteristics of their cultural identity and social and cultural heritage; those who hold and have that TK are entitled on equal terms to the benefits derived from their innovations, practices in conserving and protecting biological diversity and sustainable use of the components."

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

91. The Delegation of Uganda said that "other beneficiaries" was intended to guarantee policy space for Member States. In some Member States, there might be groups of people that were neither indigenous peoples nor local communities, such as settled migrants and refugees. All IPLCs were listed in the Constitution of the Republic of Uganda. But there were peoples, like migrants, who were not, for example, the Maragori who originally came from Kenya and more recently other refugees, who all practiced their TCEs. UNESCO had materials on the TCEs of certain refugee groups in Africa. Member States should therefore have flexibility to extend protection over the instrument to such groups.

92. The Delegation of India had a question regarding TK being restricted to a time period. It recalled that making pizza had been equated to the medicinal knowledge coming from Ayurveda and yoga scriptures in various languages, dating back to the middle of first millennium BC. It asked if the instrument would include that knowledge, and if it was considered TK. One needed to be very clear on the time span for TK: 100, 200, or 500 years, etc. India had compiled a database containing 34 million pages of formatted information on some 2.2 million formulations in multiple languages.

93. The Delegation of Ecuador preferred Alt 2 in the TK text, taking into account that the main beneficiaries of the instrument were indigenous peoples. However, when TK was linked to a GR, the state should also be considered as a beneficiary under "other beneficiaries".

94. The Chair closed the discussion on beneficiaries. There was a fair amount of material for the Facilitators to work with. The issue of beneficiaries was one where the IGC might not reach a conclusion until the end of the process. The discussion had come quite far in the past in

informals, but the plenary had opened it up again. He urged members to focus on substance rather than language. It was a healthy discussion and there were lots of good examples of different positions and their rationale. He asked to carefully consider those examples and to see how to progress the IGC's work. The Chair opened the discussion on subject matter, criteria for eligibility, scope of protection and exceptions and limitations. The conceptual issue was whether the criteria for eligibility should be in the definition or addressed within the scope of protection and exceptions and limitations. The TK text included three formulations of eligibility criteria, while the TCEs text included two. The definitions of TK and TCEs in "Use of Terms" also included some language regarding criteria for eligibility. The IGC might wish to consider the appropriate place to deal with the eligibility criteria. There were diverging views about what the substantive eligibility criteria should be. He opened the floor for comments.

95. The Delegation of Australia acknowledged that indigenous communities were diverse and that the text should leave space for national law to determine the IPLCs according to domestic circumstances. It considered the primary beneficiaries in Australia to be Australian indigenous peoples and communities who were the holders and the source of TK and TCEs. It would be difficult to develop a framework to protect TK and TCEs in the absence of an identifiable IPLC that satisfied its preference for the subject matter of protection (for example, the TK text which required knowledge to be distinctively associated with the cultural heritage of beneficiaries and intergenerational transmission). Where beneficiaries were not specifically attributable to a community or a regional grouping of communities, those national complexities required national-level solutions. Therefore, it preferred Option 1 as the narrow scope clearly enunciated the beneficiaries and left no ambiguity. Regarding eligibility, setting out the minimum key elements of TK/TCEs to be protected under the instrument rather than attempting to precisely define TK/TCEs could be a useful way forward. Ultimately, the level of protection afforded to a particular TK/TCE should be determined by the scope of protection under Article 5. However, a time period of use of a TK/TCE was not an appropriate criterion, as it did not account for the wide range of different indigenous populations of Member States and the variance in cultural practices. It supported an approach that left room in the future for new TCEs to be identified and potentially protected.

96. The Delegation of South Africa said that particular article had a lot of history to it, which explained all the clutter in the text. For a long time the IGC had debated where the definition should be. The text under "Use of Terms" provided a definition and the IGC had to find a mechanism of not reproducing the same definition under "Subject Matter". Article 1 would just be a simple statement to indicate that the subject matter of the instrument was TK, as TK was already defined in the "Use of Terms". In order to find a solution, the IGC should create a different, separate article on eligibility criteria for the sake of clarity. That way, there were clear terms that created legal certainty on the subject matter.

97. The Delegation of Egypt said that anybody who looked into the question of eligibility criteria and read them carefully would discover that that article was a repetition of the definition of TK. Concerning the 50-year period criteria, it asked why it was 50 years and not 500 years and wondered who would determine that period precisely. It wondered if an IPLC that only recently possessed TK (less than 50 years) could claim protection under the instrument. That criterion should be deleted.

98. The Delegation of the USA said it would try to bridge the conceptual divide and also address some of the other questions that had been raised. There were many definitions of TK that had been implemented in national laws. In fact, many of those definitions differed from each other in content and scope and it would not be appropriate for the IGC to tell those countries whether what they possessed was TK or not TK. The same concerns existed at the tribal level where each tribe would have its own way of defining TK. For those reasons, it had supported the broad definition of TK that was contained in the text. However, the text also

provided for protection under Article 5. Additional criteria were needed in order to define what TK would be subject to protection under the instrument. If everything in a broad definition of TK were subject to protection, it would become an unworkable instrument. It had proposed a definition of “protected TK” that referred to Articles 3 and 5 in order to narrow down that definition. In Article 3 there were criteria for eligibility, which contained a temporal component, which some had raised questions about. That temporal component was important in distinguishing protected TK from the large body of TK that existed. It was not the Delegation of the USA that had suggested the 50 years, but it had supported it because it was an important component of the definition and something that helped define a smaller subset of TK that could potentially be subject to protection under the agreement. Its proposed definition of “protected TK” also referred to the conditions of protection under Article 5. That was a step in the right direction to getting to a more meaningful instrument. It looked forward to working with others to come up with a system and an instrument that could potentially work. Concerning the TCEs text, it referred to Chair’s Information Note and the question as to whether criteria for eligibility were necessary and where they should be placed. The short answer was yes. They were necessary, subject to the following explanation. The IGC had worked for a number of sessions to put forward a broad definition of TCEs and then focus on those expressions that were protectable. In Alt 2 (essentially the end product of those careful deliberations) a broad definition of TCEs was set forward, subject to limitations, set forth in the clarifying criteria in paragraphs (a), (b), (c) and (d). They were helpful to bring clarity and certainty to a topic that otherwise suffered from uncertainty. In the TK text, in Alt 3 of Article 3, it suggested inserting the word “protected” before “TK.” As a grammatical matter in Alt 2 of Article 5, a closed bracket was missing. It suggested bracketing the entire Alt 2. Looking at Article 5, Alt 3, paragraph 5.1, it suggested replacing the word “ensure” with “encourage”. In subparagraph 5.1(a), after the word “beneficiaries”, it suggested inserting “that directly communicate protected TK to users”. It suggested replacing “exclusive and collective right” with “possibility under national law”. At the end of the sentence of subparagraph (a), it suggested the insertion of “by said users”. In subparagraph (b) after the word “users” it suggested replacing “attribute” with “identify clearly-discernible holders of”, and replacing “to the beneficiaries” with “when using said TK”. It also suggested bracketing from “as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the TK”. In paragraph 5.2, it suggested replacing “ensure” with “encourage as a best practice.” In subparagraph 5.2(a), it suggested inserting “that directly communicate protected TK to users” after the word “beneficiaries”, and inserting “by said users” after the words “arising from its use”. In subparagraph 5.2(b), after the words “clearly discernible holders of the”, it suggested inserting “protected” before TK, and suggested bracketing the last phrase of the sentence, starting with “as well as the inalienable”. In paragraph 5.3, it suggested replacing “protect the integrity of” with “archive and preserve”. In paragraph 5.1(a), it suggested inserting “that directly communicate protected TK to users” after “beneficiaries”.

99. The Chair invited the Delegation of the USA to respond to the copyright question raised by the Delegation of South Africa.

100. The Delegation of the USA said the Delegation of South Africa had mentioned the famous case of “The Lion Sleeps Tonight”. It had come up in the discussion in the IGC a number of years before. There was an interesting article in the WIPO Magazine (April 2006) written by a leading South African copyright expert, Dr. Owen Dean, who had actually directed the litigation in that case on behalf of the Solomon Linda family. Solomon Linda was a Zulu migrant worker whose wonderful song “The Lion Sleeps Tonight” became a worldwide success, under a slightly mistranslated “Uyimbube”. Over a hundred artists had recorded that song in languages from Dutch to Chinese. It would be tempting to tell that rich story as a David and Goliath tale of a large American corporation versus the heirs of an impoverished Zulu worker. The story was indeed rich, with many twists and turns. Even in South Africa, there had been unfortunate incidents of sharp practices by South African attorneys who not once but twice had been

instrumental in having the family heirs assign their worldwide rights to that song. It was fair to say that it was a copyright case, not a TCEs case. The 1911 British Imperial Act that was in place in South Africa at the time led to a happy ending. The Linda heirs continued to receive royalty payments for “The Lion Sleeps Tonight” and remuneration was ongoing. With that correction to the record, it asked to move on to other parts of the discussion.

101. The representative of Tupaj Amaru said there was confusion about understanding the content of the international instrument. There was no agreement or consensus on the definition of TK. That was very important in order to move forward. He was not going to talk about copyright, which did not have anything to do with that instrument. The definitions drawn up by Tupaj Amaru mentioned that TK would be interpreted as the cosmovision of the indigenous peoples of the world. He proposed the following definition: “TK is the cumulative process of ecological TK or traditional environmental knowledge closely linked to traditional life systems based on biological resources innovations, creative and practical language, spirituality, natural cycles, conservation, and sustainable use of biological diversity, as well as the very close relationship of indigenous peoples with land, cosmovision, the soil, the material aspects that were preserved by indigenous people and protected and had been since time immemorial, transmitted from generation to generation.” Over 15 years, that issue had been discussed. Unfortunately the states could not agree on that definition or on the eligibility criteria. He asked who was going to decide, in a binding international treaty, what the eligibility criteria were. It had to be on the basis of reality. He requested to drop the eligibility criteria. That was incompatible with international treaties. It was exclusive. His proposed definition should be the guide to making progress. The IGC should not be losing itself in confusing items. On the basis of that definition, nobody could say that the cosmovision of indigenous peoples depended on the politics of certain states. For those objective reasons and in accordance with the Vienna Convention, he requested to drop the eligibility criteria.

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

103. The Delegation of the Plurinational State of Bolivia, with regard to the eligibility criteria for TK or TCEs to be protected, said that the IGC could arrive at a fairly broad drafting. It was national legislation that would have to cover all of the different criteria to see what was TK or TCEs and what was not. The criteria should not be rigid, but coordinated with indigenous peoples of the different countries. It recalled its position on the possibility of including “protected”, a term closely linked to eligibility criteria. Such drafting would result in leaving out TK that in fact existed in the Plurinational State of Bolivia.

104. The Delegation of Nigeria aligned itself with the Chair in relation to his observation made earlier. It said the Delegation of Japan had proposed the idea of the 50-year period. It was glad to note that the Delegation of the USA was willing to step out of that box. Although most international instruments were described as framework instruments, there was no better description of what the IGC was doing than to raise a framework instrument that would leave robust policy space at the national level. It suggested eligibility criteria remaining within Article 3 and not to move around from one section to the other because it was confusing. It recalled the Chair’s point about eligibility criteria in the TK definition and the tiered and differentiated approach. They all converged. The whole idea of having “protected” TK was preemptive. If there were protected TK, the IGC had no business meeting. It recalled the mandate. It claimed that to say that there was predetermined protected TK was as much as saying that the IGC had been meeting for 20 years for nothing. The IGC had to be sensitive to IPLCs and in fact, by extension, to the national states whose interests were critically engaged by TK, TCEs and GRs. The idea of 50 years was anachronistic. The IGC could resolve three major issues using one strategy. The IGC had to make a choice whether to go back to a robust definition of TK and with eligibility criteria for protection or to look at a tiered and differentiated approach to protection. Therein, one could also determine criteria for protection. It would be more effective

and efficient to file away those conceptual issues and concentrate on those texts instead of moving around from one section to the other, recognizing that not all members had that kind of a skill to meander around in a consistent manner.

105. The Delegation of South Africa stated that at the conceptual level, there were two approaches. The one representing mostly developed countries was to narrow the definition so that much of the TK could get out and be exploited. TK owners should not allow that kind of situation to happen. It asked how the IGC would bridge those conflicting interests in the text. The issue was not a knowledge issue but an economic issue. The IGC had a moral obligation towards the IPLCs. It called upon a better and more appropriate human approach to that issue. One could not negotiate international instruments using maximalist standards. The approach was to get a minimum standard to which all could agree and then implement it at the national level. It called for a reasonable and balanced approach, avoiding going to extremes of pushing for one's own economic interests only. Both knowledge users and holders had to be winners.

106. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported in general that the eligibility criteria be included in the text of Article 3. It supported Alt 2 as a general approach in both texts, with particular preferences or concerns as regards some bracketed elements, which would be addressed in the informals.

107. The Delegation of Lithuania, speaking on behalf of the CEBS Group, said that the two articles on eligibility and scope of protection were fundamental. On the conceptual side, it could support a tiered approach, but not as a three-tier approach. A two-tier approach, secret versus non-secret, would create less ambiguity. It was unclear who would decide if and how narrowly or widely diffused TK or TCEs were. As regards protected TK, its fundamental conceptual issue was to exclude TK and TCEs that were in the public domain.

108. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, aligned himself with the Delegations of South Africa and Nigeria on the issue of general principles. On Article 5, he said that those members who were putting in text to consider had to very carefully think about the purpose of the negotiations. TK was not simply a copyright, trademark or any other IP issue. It was a matter of fundamental rights of culture. The Indigenous Caucus had talked about the cultural dimensions of indigenous peoples' understanding of balance, which differed from that reflected in the current copyright system. The IGC was trying to move forward and change that. There had been a proposed change to include "record and archive". The IGC had spent many years talking about safeguarding and had it removed from the text, and yet it had been put back in. Likewise, the terms like "recording" and "archiving" were entering the text. The IP system had nothing to do with recording and archiving. The archiving and safeguarding functions were dealt with under UNESCO and other related conventions. Also, from the indigenous peoples' perspective, it was time for states to stop assigning themselves functions to collect, store and facilitate the transfer of their TK or TCEs without their FPIC. Safeguarding, recording and archiving had no place at all in any of those instruments. All of those principles should refer back to what IPLCs wanted. The new standard was to ask the people from where the knowledge came from, who had generated that knowledge and maintained it over many millennia or time immemorial, what they wanted to have done with their knowledge. On the issue of 50 years, he said that it was not a meaningful criterion. Indigenous elders might get their knowledge overnight in a dream. In the Western system, he recalled the example of a chemist who had come up with the structure of benzene in a dream. He said that those sorts of knowledge came in different manners. Indigenous peoples often did not believe that TK was just a product of creativity or innovation or of the mind. What made TK traditional was not how recent or old it was, but how it fit in the cultural and traditional contexts. It was time to start moving beyond that and make a set of instruments that could fit with the subject matter.

109. The Chair asked the proponents of the term “safeguarding” to reconsider their position.

110. The Delegation of Niger said the issue of eligibility criteria was very important. He was surprised that that topic and the issue of 50 years were coming back on the table. It had been recognized that it was not the duration of TK that made it traditional. What made it traditional was its method of creation: TK was created each and every day. Every generation that inherited knowledge did not keep it as it had been handed down. Sometimes TK could be handed down not via parents, but via others. If one took into account the 50-year criterion, TK was an antiquity. That was not the case because it was living knowledge. The Indigenous Panel had mentioned that. The IP system was not adapted to the needs of TK and the IGC had to create a *sui generis* system. To sum up, it was not the age or duration of the knowledge that was really important. It was the method in which the knowledge had been created, passed on and recreated over the generations. TK was not an antiquity *per se*.

111. The Delegation of Japan, in response to the statement made by the Delegation of Nigeria, was reconsidering its original proposal of “not less than for 50 years”. The background of the proposal was based on the view that the criteria of the term “traditional” should be further clarified in order to ensure certain predictability, and “50 years” was one of the example of time element. It would consider more flexibly how many years should be appropriate. It could show a flexible attitude as to the period of time as long as concise and objective criteria were set forth.

112. The Delegation of the Philippines agreed with the views expressed that the provisions limiting the coverage of TK and TCEs to 50 years could pose problems, not just conceptually but also in the actual implementation of any possible future instrument. For any instrument about TK and TCEs to be relevant, the perspective of IPLCs should be taken into account. As it was, indigenous peoples did not necessarily rely on a calendar system, or at least use a calendar system similar to the one most people were using. It was happy to hear that the Delegation of Japan was willing to reconsider the proposal but nevertheless warned against setting arbitrary periods of time when it came to TK and TCEs. It was open to more discussions that could address the issue of eligibility but believed that a temporal solution might ultimately present a very challenging, if not problematic and untenable, way forward. It was pleased that some references to PIC had been revised to add the word “free”. The use of the phrase “free, prior and informed consent” was consistent with international principles and standards recognizing the freedom and the right of indigenous peoples to self-determination and should be a vital component of any instrument on TK and TCEs. It reiterated its earlier proposal for the phrase “free, prior and informed consent” to be universally reflected in the drafts wherever applicable, in particular the draft articles for TK which used “free” in some parts and only “prior informed consent” in others.

113. The Delegation of Italy endorsed the statement by the Delegation of the EU, on behalf of the EU and its Member States. With regard to the period of time covering five generations or 50 years, it was linked to the other alternative that made a reference to transmission through generations. It was important to bear in mind that TCEs were protected by copyright as artistic works, and the protection of such works started at the point where they were created, as stated in the Berne Convention. In accordance with the draft instruments under discussion, at the outset, there was no protection because the protection started after a period of 50 years, or at the very least, after a certain period when it had been passed on from one generation to the next. However, those works were protected by copyright from the time when they were created, thus one needed to give some thought to that. The IGC was talking about IP and it needed to consider international laws and standards that already covered some of those issues. Therefore, one needed to clarify the relationship between copyright protection, which started when the work was created, and the time when protection for TCEs began. All of that fell inevitably into the public domain. It agreed with the points made by the Delegation of South



Africa that the eligibility criteria had to be coordinated with the definitions because there could not be such repetition in an international text.

114. The Delegation of India supported Alt 1 of Article 3, because the IGC had already defined TK and TCEs in “Use of Terms”, which took care of all other criteria. The IGC should extend the definition of TK and give the conditions in the eligibility criteria. It supported Alt 2 of Article 5 for both TK and TCEs.

115. The Delegation of the Republic of Korea supported Alt 3 in the TK text and Alt 2 in the TCEs text, with regard to subject matter and eligibility criteria. The definitions of TK and TCEs should be concise and clear-cut in order to prevent future ambiguous interpretations of the subject matter. TK and TCEs had different characteristics compared with general IP rights. Therefore, in order to protect TK and safeguard TCEs under the current IP system, there should be clear eligibility criteria for TK and TCEs in order to avoid possible conflicts with the general IP rights. It stood ready to constructively take part in the discussion of “50 years”.

116. The Delegation of Indonesia, speaking on behalf of the LMCs, supported, with regard to subject matter, Alt 1, and suggested to simply mention TK or TCEs. It referred to the intervention by the Delegation of India and said that should there be a need to tweak the eligibility criteria, it could be taken care of it in the definition. That position was in conjunction with its position on the tiered approach under the scope of protection.

117. The Delegation of the Islamic Republic of Iran said that with regard to subject matter, it was weird that after years of negotiation there was no agreement on the very basic issue. There was consensus that the subject matter was TK and TCEs; no one objected to that. Alt 1 in both texts was simple and concise and could bring everybody onboard. With regard to the criteria for eligibility, the concerns raised by some delegations could be easily addressed in the definition or in the scope of protection. The IGC was not mandated to solve all differences in an international instrument. Some of the rules would be left to national legislation. It was better to create a general, minimum international standard and leave some room for national legislation. With regard to “safeguarding”, it was not convinced of the added value of including such a word in the subject matter.

118. The Chair ended the plenary discussion.

119. [Note from the Secretariat: This part of the session took place on the following day, August 29, 2018] The Chair invited the Member States to introduce their proposals and opened up for discussion.

120. The Delegation of the EU, speaking on behalf of the EU and its Member States, gave a very brief introduction to documents WIPO/GRTKF/IC/37/10 and WIPO/GRTKF/IC/37/11, as those proposals were not new. Those documents had been reissued for IGC 37 almost unchanged, except for a few changes in relation to the IGC’s mandate. The references to the mandate had been updated in view of the current mandate, which had become distinctly stronger on the evidence-based approach. Its proposals were thus more relevant than when they had initially been submitted.

121. The Delegation of Lithuania, speaking on behalf of the CEBS Group, supported the proposals by the Delegation of the EU, on behalf of the EU and its Member States. Looking at national experiences was very important.

122. The Delegation of the USA thanked the Delegation of the EU, on behalf of the EU and its Member States, for introducing its proposals. It appreciated the focus on recently adopted

legislation and initiatives on TK and TCEs. It saw value in making that information available to the IGC. It looked forward to further discussions on that proposal.

123. The Delegation of Japan thanked the Delegation of the EU, on behalf of the EU and its Member States, for its proposals contained in documents WIPO/GRTKF/IC/37/10 and WIPO/GRTKF/IC/37/11, which suggested the necessity to conduct studies on national experiences, as well as domestic legislation and initiatives in relation to the protection of TK/TCEs. It supported the proposals because they formed a good basis for the discussion on the issues regarding IP and TK/TCEs, especially from the evidence-based approach. It looked forward to continuing discussions on those proposals.

124. The Delegation of India congratulated the Delegation of the EU, on behalf of the EU and its Member States, for coming up with the proposals. However, it asked what the relevance of those studies were, with so many studies already in place, either done by WIPO itself, compiled by WIPO or carried out by various other institutions and individuals. It asked if it was not going to delay the entire decision-making process in the IGC. Under the circumstances, those proposals were not acceptable.

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

126. The Delegation of Morocco, speaking on behalf of the African Group, said that adopting those proposals would simply delay the work of the IGC under the ongoing text-based approach. It would simply make the differences of opinion even more evident.

127. The Delegation of South Africa supported the interventions made by the Delegation of Morocco, on behalf of the African Group, and the Delegation of India. It was carefully looking at the questions raised by the Delegation of the EU, on behalf of the EU and its Member States. Many of those had already been addressed in the WIPO Updated Draft Gap Analyses. Countries had filled many questionnaires and submitted them to WIPO in the CDIP explaining in full detail the national processes, key definitions and domestic legislation.

128. The Delegation of Egypt said that studies would be submerging the IGC with a great amount of work. Discussions should focus on the basic documents. The IGC had spent 20 years dealing with that topic. It did not need new documents. Those documents reflected what they represented and who represented them.

129. The Delegation of the USA introduced document WIPO/GRTKF/IC/37/12 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 it in IGC 36 as document WIPO/GRTKF/IC/36/7. That document could be used as a confidence building measure to help the IGC move forward on key issues concerning GRs and associated TK. The cosponsors had re-tabled that document based on the discussions in the past IGC sessions where some delegations had expressed their 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. It would promote the use of opposition systems to allow third parties to speed up 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 invention 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 a concise description of the

asserted relevance of each document submitted. That provision had been introduced in 2012 under the America Invents Act. Such submissions must 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 2013 were filed in technology centers as well as those related to food and chemical engineering. With respect to voluntary codes of conduct, a number of pharmaceutical and biotechnology inventions, bio fuels and agricultural products, utilized compounds and processes that existed in nature and some of those included associated TK. Many companies had established guidelines and rules for proper bioprospecting. It continued that discussion on proposed joint recommendation because it believed it captured key objectives and facilitated the establishment of effective mechanisms for the protection of TK associated with GRs. It invited other delegations to express their support for that proposal and welcomed any further cosponsors.

130. The Delegation of Japan thanked the Delegation of the USA for its explanation. As cosponsor, it supported document WIPO/GRTKF/IC/37/12. That recommendation was a good basis for the discussion on the issues regarding IP and GRs, especially on preventing the erroneous granting of patents. It looked forward to continuing discussion.

131. The Delegation of the Republic of Korea, as a cosponsor, supported document WIPO/GRTKF/IC/37/12 introduced by the Delegation of the USA. 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 protection of GRs and TK associated with GRs in the patent system. It emphasized the importance of protecting TK and associated GRs in the phase of erroneously granted patent rights. In that regard, the most effective form of protection was the establishment and use of database systems. The Korean Intellectual Property Office (KIPO) had established a TK and associated GRs database. The database was presented online through the Korean TK Portal, making the database publically accessible. Patent examiners at KIPO were obligated to search the database for prior art. That method had been used to successfully and efficiently in the protection of TK and associated GRs. That would be a very practical and feasible method for reducing the number of erroneously granted patents in each Member State.

132. The Delegation of Morocco, speaking on behalf of the African Group, thanked the cosponsors of that proposal. It had always called upon Member States to concentrate on substantive work and appealed once again to others to do that. Recommendations or proposals could only further hold up progress in the IGC's work.

133. The Delegation of India congratulated the Delegation of the USA for the proposal. However, it needed to study the implications of the proposal in detail and so it wished to put it on hold. It did not support it.

134. The Delegation of Japan, together with the Delegations of Canada, the Republic of Korea and the USA, reintroduced document WIPO/GRTKF/IC/37/13, entitled "Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources". Paragraph 18 laid out several key issues, including the contents to be stored in databases and the allowable format for the content. Those were important aspects in terms of understanding the function and benefit of the databases. Paragraph 19 referred to the necessity of the WIPO Secretariat conducting feasibility studies. Particularly, a prototype of the proposed WIPO portal site would greatly help to see all aspects of the database and define future steps. Most of the Member States shared a common recognition in terms of the importance of establishing databases as a defensive measure to prevent the erroneous granting of patents for inventions dealing with TK and

associated GRs. Based on that recognition, it had been contributing to the discussions at the IGC and other fora. It would be more appropriate to establish databases that provided information required by examiners to conduct prior art searches and judge novelty and inventive steps in patent claims, rather than introducing a mandatory disclosure requirement. The use of the proposed databases during the patent examination process would improve the quality of patent examination in the area of TK and ensure the appropriate protection of TK. It looked forward to continuing discussions on the joint recommendation with Member States.

135. The Delegation of the USA supported the comments made by the Delegation of Japan regarding document WIPO/GRTKF/IC/37/13. As cosponsor of the proposed joint recommendation on the WIPO portal, it viewed that proposal as a valuable contribution to the work of the IGC that aimed to provide an international legal instrument(s) for the effective protection of TK. In particular, the proposal helped to address the 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. Some of the questions that had been raised in the IGC included (1) what was the value added of a new GRs database, given that there were already excellent databases of GRs as well as databases of scientific literature in existence; (2) if information that was placed in databases was not intended to be in the public domain, what, if anything, could be done to ensure that GRs or TK did not fall into the public domain once in the database; and (3) which databases relating to GRs and TK associated with GRs were searched by national patent offices. Through the IGC's work, it had learned that there were a variety of approaches to databases at the national level. Although the joint recommendation would not be prescriptive on many of the questions raised, it would provide a response from the US perspective. In response to the first question, having a centralized database would help simplify research procedures by making it easier to conduct more systematic searches that covered the content of several databases. In response to the second question, if a database was made available to patent examiners as well as to the public, it should only contain information that was eligible to be prior art. Regarding the third question about which databases relating to GRs and associated TK were searched by national patent offices, USPTO patent examiner searched a wide variety of databases, including the Korean IP Portal, the Indian TKDL, the Northern Ontario Plant Database, the South African Traditional Medicines Database, and the US Department of Agriculture Plants Database, among others. It looked forward to discussing the WIPO Portal and welcomed suggestions for improving the proposal.

136. The Delegation of India welcomed the proposal. However, there were certain issues, such as the use of databases in place of a mandatory disclosure requirement. That still had to be studied. It would be better if they were complementary. As regards the databases' availability to the public, they should be open to the IP offices only for prior art searches.

137. The Delegation of the Republic of Korea, as a cosponsor, supported document WIPO/GRTKF/IC/37/13. 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 system, a WIPO portal system would effectively and efficiently enhance the protection of GRs and associated TK.

138. The Delegation of Brazil thanked the cosponsors of that proposal. The objective of preventing the granting of erroneous patents was an essential goal for Brazil. It was one of the main reasons for the existence of the IGC itself, which was trying to find a solution to those IP issues. Databases were valuable tools. Indeed, India had created a wonderful database of TK and its use should be encouraged. They could not however be considered as the single instrument for assessing prior art in the field of TK and GRs. New GRs and associated TK were being discovered all the time in very large numbers. No database would be expected to cover

such riches given their dynamic character. It thanked the cosponsors of the proposal and remained open for discussions with all of them and with the rest of the membership.

139. The representative of the Arts Law Center said there were a number of case studies published by WIPO, including a number by indigenous lawyers such as Ms. Terri Janke. Her case studies, entitled “Minding Culture: Case studies on Intellectual Property and Traditional Cultural Expressions”, were still relevant to the issues on existing IP rights regimes. She also had concerns about the onerous nature of TK databases for indigenous peoples. Many indigenous peoples lived in remote places and would not have access to government databases or even the Internet or a computer. That would be detrimental to indigenous peoples and lead to further misappropriation. Non-Indigenous users could also use any registered TK to the detriment of indigenous peoples.

140. The Delegation of Nigeria thanked the proponents for the proposal on databases. It aligned itself with the Delegation of India and the observation made. The idea of a one-click database system was an oversimplification of TK and TCEs. It did not, in principle, oppose the role that databases could play in that process and for the purpose of IGC’s mandate. Yet, databases should not be over-advertised, neither should they be over-celebrated. They were only supplementary instruments, and could only complement a rights-based approach. India’s success with the use of the TKDL was limited, context-specific, and was suitable to India’s specific national context. It did not apply and was not scalable in many national contexts. As to the role of nations/states as beneficiaries or stakeholders in TK/TCEs, India’s national interest engaged that specific question, differently from other countries where IPLCs were bottled in nations/states, i.e. alien to their own political organization. In those contexts, sensitivities were different. The use of all of those supplementary instruments, studies and proposals should be handled with care so as not to derail the assignment for which the IGC was meeting, after almost two decades of negotiations. A lot of studies had been done and a lot of proposals had been taken into record. At that point in time, any attempt to clutter or bombard the process with so much of that would not serve the interest of closing the gaps and making progress.

141. The Delegation of Egypt said its position was of principle and related to the number of proposals being put forward. While databases might be important, they should nonetheless not distract the IGC from doing its work in accordance with its mandate. All of those who had proposed the joint recommendation could simply refer to documents that they had submitted in the past. There was no point in going on submitting more and more documents year after year. That was just submerging the IGC in paper and meant the IGC’s work would go on forever. That was certainly not its objective.

142. The Delegation of Indonesia thanked the Delegations of Canada, Japan, the Republic of Korea and the USA for the joint recommendation (document WIPO/GRTKF/IC/37/13). It highlighted that the use of databases was a complementary measure towards the protection of GRs and associated TK. In document WIPO/GRTKF/IC/37/13, the focus was actually on the need to prevent the erroneously granting of patents based on GRs, which was not something wrong. However, there was a big disconnection with the title of the joint recommendation itself, which related to the use of database for defensive protection. The Delegation was still not convinced that the joint recommendation was aiming for the protection for GRs and associated TK. It recalled the IGC’s mandate and said that such a proposal would delay progress because it did not have anything to do with the negotiation process.

143. The representative of NARF said that while she could support measures to prevent the erroneous grant of patents, the creation and use of databases posed concerns and risks for indigenous peoples. Any such databases had to be designed, developed and populated in conjunction with indigenous peoples and take into account their customary laws and protocols. Certain principles would need to underlie the development of any such databases, including:

FPIC; that the database did no harm to the rights of indigenous peoples; that information included in the databases not be considered to become public domain; that indigenous peoples had to have access to any such databases to remove and correct information included inappropriately or in an unauthorized manner in the database; and that databases should not be publicly available.

144. The Delegation of Canada reintroduced the “Proposal for the Terms of Reference for the Study by the WIPO Secretariat on Measures related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing Access and Benefit-Sharing Systems” (document WIPO/GRTKF/IC/37/14). It co-sponsored that proposal together with the Delegations of Japan, Norway, the Republic of Korea, the Russian Federation and the USA. Up-to-date information on the issues outlined in the proposal would help inform and advance the work of the IGC in respect of both a GR and a TK instrument. The proposed study would provide up-to-date information on existing national laws, as well as concrete information on practices and experiences. That was consistent with and supported the IGC’s mandate, which called for an evidence-based approach and reaching a common understanding on core issues. That study would provide a highly valuable corpus of information that would have benefits not only for the IGC, but also more generally, providing a useful reference including for Member States considering the introduction of a disclosure system. It welcomed the Secretariat’s continued work in compiling and making available information on existing disclosure laws and measures, such as the 2004 Technical Study on Disclosure Requirements in Patent Systems Relate to Genetic Resources and Traditional Knowledge, and the 2017 Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge. However, those materials did not provide a comprehensive, comparative overview and analysis on how those laws and measures operated in practice. For example, some important questions remained unaddressed such as how the provisions were not only applied and interpreted by administrative and judicial bodies and what the impacts were, but also how they were perceived by IPLCs, the user community (including academia and industry), and by the public in general. Overall, the IGC would benefit from detailed information on concrete Member State’s practice on GRs and TK but also TCEs and could draw on those studies to identify the most appropriate way forward. It welcomed a further discussion of that proposal, whether formally in plenary or informally. That proposal was complemented by other proposals on studies on TK and TCEs. Such studies, which could be undertaken in parallel to the IGC meetings, informed and enriched the text-based work and enhanced the IGC’s efforts to reach a common understanding on core issues which were the foundation to and a pre-requisite to reaching consensus on any instrument regarding GRs, TK and TCEs. It invited other Member States to seriously consider the merits and value of the proposed studies and to be open to contributing to and supporting such proposals.

145. The Delegation of the USA, as a cosponsor, supported the proposal made by the Delegation of Canada on document WIPO/GRTKF/IC/37/14. It recalled the mandate and its reference to studies of national experiences. In past sessions, the IGC had held constructive discussions about national laws and how disclosure requirements and ABS systems functioned. Questions in the study explored issues such as the impact that national disclosure requirements had in securing compliance with ABS systems and the penalties associated with noncompliance. The study was intended to generate important information to support the IGC’s work. It was not intended to slow down the work of the IGC. It invited other delegations to express their support for that proposal and welcomed any additional questions or improvements upon the study that other members might have.

146. The Delegation of Japan thanked the Delegation of Canada for the explanation. As a cosponsor, it supported the proposal. 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.

147. The Delegation of India welcomed the proposal but said that there were certain issues that deserved attention. It wondered what the timeframe for that study would be, what the relationship with the other proposed studies would be, and what the regional spread of the study would be. Although the study's intention was good, it did not have direct bearing on the IGC process for finalizing the documents. Thus, it did not support the proposal.

148. The Delegation of the Republic of Korea, as a cosponsor, supported the proposal contained in document WIPO/GRTKF/IC/37/14. It did not fully comprehend the impact of disclosure requirements in the patent system. The proposed study would provide fact and evidence-based information on current national experiences. Through that study, one could hear diverse opinions or experiences, not only from GRs providers but also from patent examiners and patent users who would be directly influenced by the introduction of a disclosure requirement. That study would help reflect the views from various stakeholders in a balanced manner and contribute to assessing the possible impact of a disclosure requirement in the patent system and understand core issues in the IGC better.

149. The Delegation of Morocco, speaking on behalf of the African Group, thanked the cosponsors of the proposal. Any proposal at that stage was taking the IGC further away from its objective and was minimizing the scope of the work achieved thus far. It urged Member States to make the best possible use of the time and focus on the texts currently under negotiation.

150. The Delegation of Egypt supported the statements by the Delegations of India and of Morocco, on behalf of the African Group.

151. The Delegation of the USA introduced document WIPO/GRTKF/IC/37/15 entitled "The Economic Impact of Patent Delays and Uncertainty: US Concerns about Proposals for New Patent Disclosure Requirements". That document was relevant to disclosure requirements in the IGC's mandate to use an evidence-based approach in its consideration of national experiences with IP and GRs. That document had been introduced at IGC 36 and remained the same since that time. That paper was based on recent peer reviewed economic studies, including one conducted by a USPTO Edison scholar in collaboration with other economists. The paper analyzed the impact that disclosure requirements would have on research and development in the field of biotechnology and pharmaceuticals, due to uncertainties they would introduce into the patent system. Importantly, that paper considered the effect of patent review delays on employment and sales growth for startups. Among those findings were that a single year of patent review delays would reduce employment growth for a startup by an average of 19.3 percent over five years. A single year of patent review delay would also reduce sales growth for startups over five years by an average 28.4 percent. The paper 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. Those findings were consistent with the conclusions reached by a report commissioned by IFPMA and CropLife, introduced at an IGC side event in June 2018. A new disclosure requirement could lead to legal uncertainty in granted patents, which could affect a firm's overall market competitiveness, including negative effects on licensing, research and development, investment and litigation. It had significant, economic-based concerns about proposals for new disclosure requirements that were under consideration in the consolidated document and it invited the IGC to exercise caution when considering those proposals. It invited the IGC to give careful consideration to that paper.

152. The Delegation of Japan expressed its appreciation to the Delegation of the USA for providing document WIPO/GRTKF/IC/37/15. As indicated in the document, the mandatory

disclosure requirement would result in delaying the patent granting process and create uncertainty for patent applicants. In addition, 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 a common, grave concern about the mandatory disclosure requirement, as stated at IGC 36. The analysis based on the objective data shown in that 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 terms of patent rights were limited, basically 20 years from the filing date, both panel A and panel B shown in figure 4 in the document were very persuasive. In addition, that document, in particular, shed light on the effect of the disclosure requirement on startup companies. Since supporting startup companies was critical for emerging, developing and developed countries, it also offered all Member States valuable insight for that highly important aspect. It remained committed to contributing to constructive discussions in the IGC in an evidence-based manner, based on the valuable lessons obtained from the detailed analysis shown in the document.

153. The Delegation of the USA clarified which specific national disclosure requirements had been focused on in the paper. The paper looked at the economic impacts of patent granting delays and legal uncertainty, and explained how they related to a disclosure requirement. It did not single out any individual national patent disclosure requirements but that information was available in the literature, such as the IFPMA and CropLife paper that looked at individual patent disclosure requirements and talked about the significant effects of delays and legal uncertainty created by those national disclosure requirements. It said it would not single out any particular office.

154. The Delegation of the Republic of Korea supported document WIPO/GRTKF/IC/37/15, as proposed by the Delegation of the USA. It shared the concern that the new disclosure requirements could cause delays in the patent examination process and put a burden on inventors or applicants, eventually hindering the development of GR-related inventions. In April 2018, it had held a meeting with GRs users and stakeholders and had a chance to hear their opinions on the possible impacts of introducing disclosure requirements in the patent system. The participants had expressed their concerns that the patent filing date could be significantly delayed when they attempted to meet the disclosure requirements for each GR used in the invention. Also, they were concerned that the disclosure requirement could prolong the patent examination procedure. As the proposed document mentioned, KIPO had spent six months figuring out what kinds of GRs were used in the Korean patent applications. The scope of the study was restricted to biotechnology according to the IPC. In the past two years, most of the GRs in patent applications had been disclosed in several ways, including academic terms in Latin, typical names, and even terms used by local communities. Thus, patent examiners needed to search more than 5,000 GRs one by one to clarify which specific GRs were used. The origins of the used GRs were usually unclear, with some coming from traditional markets, mountains or companies. Even with the restrictions, the study required lots of resources from KIPO to figure out the type of the used GRs. From that study, it appeared that if disclosure requirements were introduced, additional search and review time could be required to examine submissions, thus placing an additional financial and human resources burden on patent offices. That might lead to a delay in the examination and granting process. It stood ready to constructively discuss that document.

155. The Delegation of India said the study was a good initiative. However, it questioned the relevance and validity of the study, i.e. whether it satisfied all the validity criteria, like content and constructive validity of research. It said it needed to go through it and would then express any conclusion on it.

156. The Delegation of Brazil thanked the Delegation of the USA for presenting the study. IP offices were meant to play the role of checkpoints. There was nothing mandating them to verify



the truthfulness of the disclosure requirement in the patent application. It was just as concerned as the Delegation of the USA, indeed as everyone in the IGC, about legal certainty. That was why Brazil and many other Member States were exploring the possibility of limiting the revocation of patents to cases of patent fraud. That was not new. The USPTO regulations determined that a finding of fraud, inequitable conduct or violation of duty of disclosure with respect to any claim in a patent application rendered all claims unpatentable or invalid. As a US court had stated: “once a court concludes that inequitable conduct occurred, all the claims, not just the particular claims in which the inequitable conduct is directly connected, are unenforceable.” Lack of such a provision would contribute to legal uncertainty.

157. The Delegation of South Africa thanked the Delegation of the USA for the presentation. The study reflected a particular interest group. It would have been nice to try and balance it by looking at what the impact of misappropriation had been over the years and the cost to the IPLCs for the loss of economic income as a result of the biopiracy. It called for balanced perspectives in that approach. That should not be used to scare Member States around disclosure. The IGC had legitimacy to discuss disclosure requirements. It was as much vested in the discussion of disclosure requirements from its economic perspective, i.e. the protection of IPLCs and their knowledge in terms of economic exploitation by the industry.

158. The Delegation of Indonesia thanked the Delegation of the USA for introducing document WIPO/GRTKF/IC/37/15. It recalled the interventions by the Delegations of India and Brazil. It remained unconvinced that assumptions and conclusion of that document reflected a balanced perspective of introducing a new disclosure requirement, especially the kind of disclosure requirement that the IGC had been discussing at IGCs 35 and 36. The IGC had to consider the full picture of cost and benefits. The analysis should not just focus on economic and monetary impacts but focus on other impacts. A full and balanced cost and benefit calculation should not come from one particular stakeholder only. As a nation, it had a lot of different stakeholders, and they should all be reflected.

159. The Delegation of Egypt said anyone who came up with an initiative had to be thanked, whether it agreed with the initiative or not. Those who had conducted the study could rely on it to provide ideas when the IGC would discuss disclosure requirements. The IGC should not discuss any new documents outside the approved documents.

160. The Delegation of the USA introduced for the first time the “Proposal for the Terms of Reference for a Study on Existing *Sui Generis* Systems for the Protection of Traditional Knowledge” (document WIPO/GRTKF/IC/37/16). The proposal was intended to provide a valuable contribution to the IGC’s work on reaching an agreement on an international legal instrument(s) for the effective protection of TK. The IGC’s mandated work included conducting and updating studies that included domestic legislation. Tasks facing the IGC involved a balancing of a complex set of issues and included responding to the concerns of IPLCs over the unauthorized use of TK, especially in a commercial context, while allowing active exploitation of the TK by the originating community itself, and also safeguarding the interests of other stakeholders such as industry, museums, archives and libraries. Over the past 20 years, a number of WIPO members had introduced international law provisions to protect TK. The IGC would benefit from a better understanding of the scope of those laws, the nature and effectiveness of their implementation and their overall impact. The proposed study aimed to build upon the body of work developed in the IGC and gather further information to provide the IGC with a better understanding of *sui generis* systems for the protection of TK. The proposal included questions relating to the nature of existing TK systems, the extent to which countries had implemented and enforced such laws and regulations, examples of how such laws and regulations had been applied, whether those laws would apply to subject matter used by the public, and any exceptions and limitations that might apply. The study was different than other studies and indeed was a next step to build on existing studies. The IGC was not there to write

an aspirational statement but to develop an instrument that worked in practice, with clear parameters that could be implemented domestically and used by IPLCs, governments and the public. The new study proposal was to look beyond the language of the laws and agreements covered in the existing studies and other reference materials and to look at how those laws and agreements worked in practice, how they were implemented and how they effected those involved. The proposed study would not delay progress or establish any preconditions for negotiations. Rather, it reflected a good faith effort to gather more specific and relevant information than envisioned under previous studies and capture updates from those Member States that had recently passed TK laws. Thus, the study was intended to generate important information to inform the IGC and support its mandated work. It invited the IGC's support for that proposal.

161. The Delegation of Japan thanked the Delegation of the USA for explaining the new "Proposal for the Terms of Reference for a Study on Existing *Sui Generis* Systems for the Protection of Traditional Knowledge". Taking into account the evidence-based approach mentioned in paragraph (c) of the 2018/2019 mandate, with particular reference to paragraph (d) of that mandate setting out such evidence-based approach and expressly mentioning the conducting/updating of studies covering, *inter alia*, examples of national experiences, including domestic legislation, the Delegation, as a co-sponsor of the proposal, proposed that the WIPO Secretariat invite the WIPO Member States that had a *sui generis* national law for the protection of TK to respond to the questions contained in the Annex of the document. Compilation of the responses obtained through the study would undoubtedly contribute to the effective discussion in the IGC.

162. The Delegation of the Republic of Korea supported the proposal made by the Delegation of the USA, because the proposal could also provide a useful basis for Member States to discuss TK issues in a more effective and efficient way.

163. The Delegation of India said that any proposal for a study had academic relevance but it was questionable whether it had any practical relevance. There could be a hundred other proposals on various aspects of the articles of the IGC framework. It wondered if the IGC was going to take up all those studies first and then decide what would be the legal framework on TK, TCEs and GRs.

164. The Delegation of Brazil recalled the terms of the mandate. If Member States concluded that the study or fact-finding exercise proposed by the Delegation of the USA would in fact not delay or be considered as a precondition for further negotiations, and also to the extent that that study focused mostly on updates to what had been done before, it might be a useful exercise for further thought in the forthcoming sessions.

165. [Note from the Secretariat: The informals took place on the afternoon of August 28, 2018. This part of the session took place after the distribution of Rev. 1 dated August 29, 2018 prepared by the Facilitators.] The Chair asked members to listen to the Facilitators very carefully when they explained the rationale behind the changes made. It was a particularly difficult task for the Facilitators because they were trying to deal with two texts. It was a significant task for the Facilitators. As a result, the Facilitators had only completed their work up to Article 4. He emphasized that Rev. 1 was a working document, work in progress, and it had no status. The Facilitators were trying to narrow the gap and come up with a compromised position. There was significant support and flexibility in trying to achieve that. He invited the Facilitators to present their work.

166. Mr. Kuruk, speaking on behalf of the Facilitators, said that the Facilitators had been called upon to review the draft texts on TK and TCEs and to propose texts for the IGC's consideration that were concise, narrowed gaps, eliminated repetition and redundancies, and preserved the

integrity of the proposals of Member States. In line with that mandate, the Facilitators proposed a set of revisions for the preamble and Articles 1, 2, 3, and 4 of both the draft texts on TK and TCEs. The revisions took into account interventions made in plenary and the informal session. Essentially, they had deleted Article 3 on eligibility criteria, cleaned up the definitions of TK and TCEs in Article 2, revised Article 1 to state three main objectives, and come up with a simpler description of beneficiaries in Article 4. They had faced challenges because of the need to work on two separate texts simultaneously and to incorporate two additional sections reflecting the proposals of the Facilitators. For the sake of legibility, the information was presented in a table of two columns that showed only the changes made by the Facilitators, in two versions: track changed and clean versions. Because the Facilitators' proposals had been prepared using the original draft articles and the changes were tracked, it was easy to identify in the Facilitators' text the nature of the revisions made. In Article 1, in the draft text on TK, they had deleted the reference to "policy" in the title. The change was to accommodate the request made by some Member States. They had also reduced the number of objectives in the draft text to three. The proposed new text read as follows: "This instrument should provide beneficiaries with the means to: (a) prevent the misappropriation, misuse, and unauthorized use of their traditional knowledge; (b) encourage and protect creation and innovation, whether or not commercialized; and (c) prevent the erroneous grant or assertion of intellectual property rights over traditional knowledge." With regard to the first objective on prevention of misappropriation, misuse and unauthorized use, they had used those terms in a comprehensive manner to incorporate the views of all Member States, as they determined that some delegations had expressed a preference for "misappropriation" while others wanted to use the terms "misuse and/or unauthorized use." They had deleted the reference to illegal appropriation found in the previous Alt 1, finding that term to be included in a reference to misappropriation, misuse and unauthorized use. Likewise, they had deleted the part about "controlling ways". Those ideas were also captured in the reference to misappropriation, misuse and unauthorized use. The objective about achieving equitable and fair benefit-sharing had been moved to the preamble, in response to a request of some Member States. It was deemed of sufficient importance and was supportive of the work in other instruments to warrant placement in the preamble. They had deleted the remaining provisions in Alt 1 on TK as they were found to be repetitive and adequately covered in the three objectives. They had deleted Alt 2, Alt 3 and Alt 4. In the TCEs text, they had made similar changes. There were the same three objectives that were found in the previous Alt 1 of the TCEs text. The only change that was really different from the TK text was regarding subject matter, i.e. using "TCEs" instead of "TK." In Article 2, regarding the use of terms, they had worked on the definitions of TK and TCEs in both documents. The goal was to incorporate in the definitions the criteria for protection found in Article 3 regarding subject matter, with the aim of eliminating excessive repetition. That action was taken to accommodate the request of the delegations for a clearer statement for eligibility criteria in the definitions section. As a result of the revisions, prior Article 3 on subject matter had become redundant and had been deleted. The definition of TK was as follows: "Traditional knowledge for the purposes of this instrument, is knowledge that is created, maintained, and developed by indigenous peoples, local communities, and other beneficiaries, and that is linked with, or is an integral part of, the national or social identity and/or cultural heritage of indigenous peoples and local communities; that is transmitted between or from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving, and may take the form of know-how, skills, innovations, practices, teachings or learnings." They had deleted the prior reference to nations or states and substituted with the term "beneficiaries". That provided greater clarity because of the revision of the Article 4 description of beneficiaries, which included nations and states. They had also taken out the reference to the 50-year term because TK was dynamic and evolving and flexibility was introduced in that context in the reference to "generation to generation". That gave policy space for Member States to place time limitations as they might deem fit under their respective legislation. With the reference to the link, it recognized that they had proposed a lower threshold than would be captured with reference to "directly linked". They were satisfied

that would provide adequate policy space for Member States to set higher thresholds in their legislation. They had discussed whether to insert as a criterion for TK that it be “created or maintained in a collective context”. They had finally decided against including it, as they determined it would not be appropriate for some types of TK that could be individually held. An individual could come by aspects of TK in dreaming and there were numerous instances of individual indigenous medicine practitioners having rights to TK that would not be held in a collective sense. The term TCEs was defined as follows: “Traditional cultural expression means any form of creative or spiritual expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, or verbal forms as well as their adaptations, which may subsist in written/codified, oral or other form, that is created, generated, expressed or maintained in a collective context by indigenous peoples and local communities; that is the unique product of and/or linked with the cultural and/or social identity and cultural heritage of indigenous peoples and local communities; that may be dynamic and evolving; and that is transmitted from generation to generation, whether consecutively or not.” They had deleted the references to “literary and artistic” in the definition of TCEs, because those terms simply constituted narrowed examples of creativity and were therefore included in the definition of the general term in the context of creativity. They had taken out the reference for the 50-year term for the same reasons as in the definition of TK. They had deleted the reference to “directly linked” and substituted the term “link” for the same reasons. However, when it came to the criterion that called for TCEs to be created or maintained in a collective context, it was deemed prudent to retain it, as it was more relevant for TCEs than for TK. In Article 3, in the TK text, they had deleted the eligibility criteria, essentially moving them to the relevant parts of the definition. They had debated whether to leave in Article 4 the simple reference to TK as the subject matter, such as was found in Alt 1. However, it was determined that to the extent that the title of the instruments would refer to such subject matter, Alt 3 did not add anything new and there was no need to retain it as a separate article. Alt 2 was deleted as it simply restated the criteria of eligibility. In Alt 3, the referenced to protected TK was also deleted as redundant, since it aimed to identify subject matter to be protected in accordance with the instrument, which objective was achieved under the criteria of eligibility in the section on definitions. It would be achieved in the section on the description of beneficiaries, where a Member State had requested insertion of language that the protection of the rights of the beneficiaries would only be as provided under the instrument. Similar changes had been made to the text on TCEs, based on the same reasons.

167. Ms. Bellamy, speaking on behalf of the Facilitators, said it was hard for the Facilitators to arrive at something that all IGC members could be happy with, because there were many different opinions. She said a preamble was supposed to address the purpose and considerations that led to the document. The first paragraph acknowledged UNDRIP, which formed the basis for some IGC’s discussions. Paragraph 2 recognized the rights of IPLCs. The third paragraph recognized the regional differences in terms of how IPLCs dealt with different issues. There was intrinsic value in those communities and it was important for all to recognize that intrinsic value of TK and TCEs systems, which should be taken into consideration in the WIPO framework. Paragraph 6 recognized customary use, which had been around for time immemorial. Paragraph 7 stressed the need to respect TK systems. Paragraph 8 acknowledged the promotion of creativity and innovation. Paragraph 9 referred to mutually agreed terms. Paragraph 10 spoke to mutual supportiveness and the need to work together. Paragraph 11 spoke to the promotion of innovation and the recognition of the knowledge and economic development associated therewith. Paragraph 12 acknowledged the value of a vibrant public domain. Paragraph 13 recognized that one needed new rules, because the IGC did not have all the answers yet. Those concepts were very well articulated in the documents prepared by the Secretariat over the decades, and she encouraged members to read documents WIPO/GRTKF/IC/37/6 and WIPO/GRTKF/IC/37/7. The preamble closed with the usual preambular statement that nothing in the instrument might be construed as diminishing or extinguishing the rights that IPLCs had or might acquire in the future. In Article 4 of both the TK

and TCEs texts, the Facilitators had removed “of protection” from the title and inserted the term “protection” in the actual paragraph, which read: “The beneficiaries of protection under this instrument are indigenous peoples, local communities, and other beneficiaries, as may be determined under national law.” The footnotes spoke to the fact that the term “other beneficiaries” might include states or nations.

168. [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.

169. [Note from the Secretariat: All speakers thanked the Facilitators for their work.] The Delegation of Indonesia, speaking on behalf of the APG, recognized that Rev. 1 was still work-in-progress. It said that individual members of the APG would deliver detailed comments.

170. The Delegation of El Salvador, speaking on behalf of GRULAC, said that Rev. 1 was very good, considering the fact that it was referring to two different topics in two separate texts. It recognized that it was still work-in-progress, which could be refined. It saw improvement in the integration of the two texts. The work carried out on the preamble covered the main issues that need to be highlighted. It supported the new definitions for TCEs and TK, which took into account the members’ comments throughout the session on specific points. GRULAC members would speak in their national capacity on specific issues. It stated its intention to work constructively on the basis of Rev. 1.

171. The Delegation of China said that the texts had been greatly streamlined and that was very helpful to focus the discussions. With regard to the contents of the texts, some of the concerns of Member States were not fully reflected. It would make further observations on specific points.

172. The Delegation of Morocco, speaking on behalf of the African Group, said there had been major changes to the first part of Rev. 1, which meant that progress had been made. It supported the exercise and methodology used. The first part of Rev. 1 was a good basis for the IGC’s discussion. Individual members of the Group would take the floor on specific points at the right time to raise their concerns. Each legal text could only be appreciated on the basis of a whole text, so discussions needed to take place on the second part of the text too.

173. The Delegation of Lithuania, speaking on behalf of the CEBS Group, said that the two preambles from the two texts had been merged. Because it supported having two separate instruments, it was confused that there was one single preamble. Also, it said that some interesting concepts and alternatives that had been supported by the CEBS Group had been dropped out. It would make more detailed comments on the text later on.

174. The Delegation of Indonesia, speaking on behalf of the LMCs, saw value in the methodology and approach used. With regard to the document itself, it had some concerns and observations. For example, the concept of rights was still missing. However, with regard to the whole text of Rev. 1, it reserved its positions with regard to the different articles in the document, taking into account that its position was in conjunction with the way the other articles would be drafted.

175. The Delegation of the EU, speaking on behalf of the EU and its Member States, recalled the Chair’s introductory remarks and took note of the comment that the Facilitators had tried to put one proposal on the table, trying to consider all interests in a fair and balanced way. Nevertheless, it was concerned by the loss of alternatives and on several occasions, the loss of its preferred language in Rev. 1. It preferred that its concepts and preferred language as

highlighted in previous interventions be retained in the text that served as a basis for further discussions. One example of such unfortunate loss of its preferred version was previous Article 4 on beneficiaries, where there was no Alt 1. Another example concerned the connection between the term and the eligibility criteria in Articles 2 and 3, which had been deleted. It recalled that the Chair had asked for ideas on how to approach that in Rev. 1. That was an example of how Rev. 1 was going too far away from what it wished to see retained. It stressed the importance of the eligibility criteria to appear in a subject matter article. It acknowledged that the aim of the Facilitators in producing Rev. 1 was to have an overall approach of the definitions and eligibility of criteria merged together, and it understood the underlying technical concerns; however, the new text left out its preferred alternative. It was hopeful that those concepts and alternatives would find their way back into Rev. 2. As the Delegation of Lithuania, on behalf of the CEBS Group, had stated and as the Chair had clearly indicated that it was not the intention to create a merged text, there seemed to be a tendency to merge the two texts, which it did not support. If that was just a work-in-progress and interim state, it had no substantive problem with it. It would come back with more detailed comments during the article-by-article discussion.

176. The representative of NARF, speaking on behalf of the Indigenous Caucus, could not agree on parts of the document without having the full document in hand. He noted with appreciation the removal of brackets around the word “peoples”, which, along with the reference to UNDRIP in the first line of the preamble, was a step forward toward bringing those instruments into line with contemporary human rights norms. He reserved further specific comments for the discussion on each section.

177. The Delegation of the Philippines recalled its own intervention about the consistent use of FPIC throughout the document and noted the effort made to ensure such consistency in the current draft. However, Article 2 appeared to have missed that. While understanding the constraints on global revisions articulated by the Chair, it requested that future drafts reflect its intervention in all applicable provisions.

178. The Delegation of Thailand aligned itself with the Delegation of Indonesia, on behalf of the LMCs. Rev. 1 was concise, very readable and maintained the integrity of the diverse positions. Having carefully read Rev. 1 and having listened to the explanations provided on the details and rationale for the changes made, it believed that Rev. 1 reflected good work thus far. Rev. 1 was only the first and indeed an integral part of the whole text. Though it appreciated that Rev. 1 reflected the spirit of flexibility as emphasized in the plenary and in the informals, it was still work-in-progress and, as such, the Delegation reserved its comments on individual articles until it saw the remaining articles. It thanked the Chair and all the Member States for their spirit of cooperation and patience in working together on that draft text.

179. The Delegation of Switzerland welcomed the fact that Rev. 1 was more concise and less repetitive, while also recognizing that it was a work-in-progress that should be further improved. Regarding the objectives, it regretted that the positive approach contained in Alt 3 had not been retained in that version. In fact, the objectives (a) and (c) described negatively what should be prevented, and both objectives contained concepts that were not entirely clear in the context of TK and TCEs. Objective (b) was too general and not focused on issues specific to TK and TCEs. With regard to the “Use of Terms” and the way the Facilitators had addressed the eligibility criteria, it could support that approach, with the understanding that more clarity should be achieved in elaborating the scope and other operational provisions of the instruments. However, it had reservations on the inclusion of the term “beneficiaries” in the TK definition in combining it with Article 3, connecting TK to the creators and holders of TK. Finally, regarding Article 3, if the beneficiaries were equal to the right holders, it saw IPLCs as the beneficiaries. It hoped that could be included in Rev. 2 as an alternative.

180. The Delegation of France said its statement was in line with the one made by the Delegation of the EU, on behalf of the EU and its Member States. Under the French approach, with all due respect for indigenous peoples, the use of the term “indigenous peoples” and the reference to rights of those peoples was an issue that it had to address. Indeed, the constitutional principles of the indivisibility of the French people and the equality of the citizens before the law resulted in the fact that only the French people as a whole could benefit from rights. The fact that they could not be divided and the concept of non-discrimination in the Constitution prevented the recognition within the French people of several peoples or communities defined by a common origin or cultural specificities and also prevented the recognition of collective rights to those peoples or communities defined by their origin, culture, language or beliefs. Rights were on an individual basis in France. It had been the case for indigenous peoples in New Caledonia, for example. There were several texts where it had accepted to use the terms “indigenous peoples” and “rights of indigenous peoples” due to the importance of the text. That was the case for the text of UNDRIP. However, that was a political declaration and not a legally binding instrument. At its adoption, the Delegation of France had made an interpretive statement to recall its Constitution. That was the case for non-legally binding texts, decisions and resolutions of the UN Security Council, Human Rights Council, or the CBD, among others. For legally binding texts, if it was stated in the preamble like, for example, in the Nagoya Protocol, it was only through reference to UNDRIP. It requested that the brackets be retained around the word “peoples” as mentioned in a previous session of the IGC. That would be decided at the diplomatic conference.

181. The Delegation of Australia said the Facilitators’ work added to the readability of the text. While it had some problems with some words in the revised text such as “other beneficiaries” as touched on by the Delegation of Switzerland, it recognized that it was work in progress, thus it would keep its comments to a high level. It welcomed the addition of the eligibility criteria into the definition, as it helped define TK and TCEs, recognizing that the scope of protection afforded to particular TK and TCEs would be dealt with in the article pertaining to scope of protection. That work was helpful in moving forward. There might be further opportunities to clean up the text in other areas.

182. The representative of CAPAJ said, in response to those who claimed that there were no indigenous peoples in their territory and that states/nations should be mentioned, that the concept of local communities could address those requirements, and so the term “other beneficiaries” was not necessary.

183. The Delegation of the USA pointed out that some of its text-based suggestions had been captured whereas others had not. The new language added by the Facilitators raised some new issues. Firstly, the global edits that it had suggested on the record earlier were not in Rev. 1. Secondly, in the TK text, with respect to the first paragraph of the new preamble, it had some concerns with respect to the language related to UNDRIP, for, in particular, that Declaration provided rights to indigenous peoples but not to local communities. In the way that particular element was structured, it needed some work. It suggested putting a comma after “indigenous peoples” and to bracket the word “therein” to address that particular issue. In the second paragraph of the preamble, that language was pulled straight out of Article 31 of UNDRIP but mentioned local communities and, since the preceding line mentioned that and the language came out of that, it suggested bracketing that language and to replace it with: “Recognizing the rights of indigenous peoples and the interests of local communities to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions”. With respect to the fourth paragraph of the preamble, there was a typographical error in the word “has” and the second line should be “have”. It suggested bracketing “intrinsic” because that was not perfectly clear in that context. In paragraph 5, it suggested bracketing “intrinsically” for the same reason. In Paragraph 9, it suggested replacing “promote” with “promoting” and suggested bracketing

“based on mutually-agreed terms...nations/beneficiaries” because that language came out of the CBD and it was not sure about the relevance and the context of that particular instrument. With respect to paragraph 10, it was not clear that one would be able to ensure mutual supportiveness, so it suggested bracketing that whole paragraph. In paragraph 12, some modifications might be needed to make it consistent with the language in the original preamble, which it had supported, so it suggested bracketing “and” and inserting, after “innovation”: “,and the need to protect and preserve the public domain”. In paragraph 13, the previous version was bracketed and it suggested bracketing that one as well, as it presupposed that rights existed under the instrument and it might prejudice the outcome of the negotiation. With respect to the merging of the preamble of the TK and TCEs texts, its engagement on that particular merged preamble was without prejudice. It believed that two separate texts might be appropriate. With respect to Article 1 on policy objectives, it asked to reinsert Alt 4 from document WIPO/GRTKF/IC/37/4, because the new option was a looser formulation that did not capture all of the elements of the original alternative. Turning to Article 2, it had suggested previously on the record to incorporate all of the criteria for eligibility into the definition of “protected TK”. The proposed definition would read: “Protected traditional knowledge is traditional knowledge that is distinctively associated with the cultural heritage of beneficiaries as defined in Article 4 [renumbered as Article 3], and is created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation for a term as had been determined by each Member State, but not less than for 50 years or a period of five generations, and satisfies the scope and conditions for protection under Article 5 [renumbered as Article 4].” As to the definition of “secret TK”, it had offered some suggestions to improve the definition and those were on the record. Finally, with respect to the new Article 4 on beneficiaries, it requested the reinsertion of Alt 1, which was its preferred alternative. It had previously suggested adding the words “of protection under” after the word “beneficiaries” and it wished to see that language captured as well. It understood that all of the other statements made on the record with respect to the text in Article 5 or other parts of the text would be captured in the text. In the TCEs text, on principles and preamble, it had taken note with approval that there was no intent to merge the two documents and that a set of principles would be forthcoming ultimately through the deliberations of the IGC on principles for protection of TCEs. It would be studying closely the principles in a preamble session for TK to see which, if any, were applicable to TCEs. More broadly, guiding principles had been discussed from the inception of the IGC and not only were they important historically but they might well be important as the IGC moved forward in its work, either as an element of a larger document or a set of meaningful, free-standing principles for the protection of TCEs. Regarding Article 1, it agreed with the Delegation of Switzerland that it wished to see a positive statement of objectives. It found that expression in Alt 3 of the previous text, and it requested that that alternative be reflected as well as an alternative. Regarding the definition of TCEs, on a preliminary basis, it was encouraged by the possibilities of incorporating those eligibility criteria into the definition of TCEs. It wished to replace “creative or spiritual” with “artistic or literary”. The important concepts of spirituality as the kind of genesis for important TCEs were already expressed in preamble 4 and 7 so that was an appropriate acknowledgment and expression for that document. At that point, the document was however moving beyond the origin of that expression. “Artistic and literary” continued to add value and the text would be protecting in essence a form of expression rather than the source of that expression. It had taken note that the qualifier “directly” had been removed before the word “linked.” It had listened carefully to the explanation of that removal. Nonetheless, it wished to see it reinserted. It pointed to a particular functional aspect. Indeed, throughout the document, the IGC talked about the possibility of an attribution issue, but it wondered whether there was not a close relationship, a direct link, whether the administration of any attribution interest would be practical. For those reasons it requested that it be restored. It also noted that the temporal dimension had been deleted. That was an important part of the IGC’s discussion, and it wished the temporal dimension, in paragraph (d) of Alt 2, to remain in the text, until that issue was resolved. In Article 3, the text that the Facilitators had included might have a certain disadvantage resulting



in identifying beneficiaries for TCEs that were not specifically attributable to a particular indigenous community. It requested that the old Alt 1 of Article 4 be restored to the text.

184. The Delegation of Italy expressed support for the statement delivered by the Delegation of the EU, on behalf of the EU and its Member States. There had been deletion in the TCEs preamble. It did not agree with that deletion. TK and TCEs were totally different subjects and they required different regulations. TCEs were already covered by laws and treaties on copyright, to a very large extent. It called for the deleted preamble under TCEs to be reinstated. In paragraph 2 of the preamble, it was not in favor of the indication of a right for IPLCs. In paragraph 9, it did not agree with the PIC/MAT principles as they were described. It did not agree with the idea of referring to new legislation on enforcement in that area. Concerning paragraph 14, it said that at the international level, there were no recognized rights for IPLCs as such. The reference in paragraph 14 was not at all correct. As to the body of the text, its position echoed the views put forward by the Delegation of the EU, on behalf of the EU and its Member States. The text should take into account everything that was on the table. The IGC was trying to ensure that what was being said was couched in appropriate terminology and in the appropriate format, but the content should remain exactly as it had been reflected. That had simply not happened. The Facilitators had made a choice, but it was not a choice that actually got the IGC to where it wanted to be in plenary. Everything that had been deleted or added should be looked at again. Everything that had been added should be put into square brackets and everything that had been deleted should be reintroduced either into the text *per se* or as an alternative. For instance, in Article 1, various proposals had been deleted. It was interested in Alt 3. On Article 1 of the TCEs text, Article 1(a) used the word “misappropriation”, which it did not support being included. It also had doubts about Article 1(c) on preventing the erroneous grant or assertion of IP rights. When it came to TCEs, copyright already universally recognized rights, no matter who the right holder might be. In the definition of TK, the words “other beneficiaries” did not reflect what had been in previous texts. As to the 50 years or five generations temporal element, it was still being discussed; yet it had been deleted. It should be put back in because everything that had been discussed should be reflected in the text.

185. The Chair said that Rev. 1 was a working document meant to help Member States come to a shared understanding. The Facilitators were trying to put ideas forward for IGC members to think about. There remained a conceptual divide about the IGC’s work, which focused on the narrow IP system rather than lifting up from it and trying to look at the conceptual issues. He referred to the Updated Draft Gap Analyses and said the IGC was meant to fill those gaps. All interventions needed to be appropriately and faithfully reflected in the text. He closed the discussion on general statements and opened the article-by-article discussion.

186. The Delegation of Canada recognized that the Facilitators’ task was challenging. With respect to the preamble, while it saw merit in trying to streamline the text, some of the elements in that draft contained text of concern. However, it remained open to engaging on the basis of the Facilitators’ draft, and appreciated the assurance by the Chair that it was a work in progress. It reserved the opportunity to comment on the individual constituent elements, many of which related back to, for example, the scope of protection, at a later time. On objectives, the proposed new objectives formulation did significantly streamline the text and narrow the focus. However, streamlining the text had created new issues with the formulation of the article. The three elements did not all share a clear link to the beneficiaries. It would not be the beneficiaries themselves that would, for example, protect innovation or prevent the erroneous grant of IP rights, although beneficiaries would benefit from the realization of those objectives. Moreover, the instrument could not achieve those objectives alone. The word “aim to” was useful in conveying the fact that the instrument would contribute to those ends, but would not in and of itself be able to, for example, prevent misappropriation or prevent the erroneous grant of IP rights. Deleting the phrase “provide beneficiaries with the means to” and leaving the chapeau “the instrument should” would eliminate that issue and improve the

corresponding language in both the TK and TCEs texts. In addition, some Member States, including Canada, continued to grapple with the best formulation and accompanying definitions for the actions the instrument was trying to prevent, namely, misappropriation, misuse and unauthorized use. In its view, unauthorized use most closely related to the IP context. However, all of those terms needed to be considered in the context of the scope of protection provision. Regarding beneficiaries, it continued to have significant concerns about that article, which were amplified in the Facilitators' proposal. In order to consider including a discretion for a Member State to designate "other" beneficiaries such as itself, there needed, at the very least, to be some consideration of whether or not the TK or the TCE, as the case might be, was linked to the indigenous peoples or local communities. It did not believe that other beneficiaries should be designated when the TK or TCE could be linked, directly or otherwise, to one or more identifiable indigenous or local community. If the IGC were to consider allowing the designation of "other beneficiaries", it would seek for the text to define that notion very clearly, and to equally clearly define the likely rare circumstances in which "other beneficiaries" might be determined. On a related note, the use of the passive voice in that provision did not make it clear who exactly would make any determination to designate "other beneficiaries". The IGC would therefore collectively need to establish who would make any such determination. It also saw it as premature to start adding references to "other beneficiaries" such as in the TK definition, before it was resolved in the beneficiary clause. It continued to have strong reservations regarding the designation of Member States or nations as beneficiaries, and remained to be convinced. It reiterated its interest in discussing the meaning of a "local community" and in considering a definition that could set a minimum standard for what all could agree would qualify as a "local community" in the context of instruments on TK or TCEs, respectively. It took comfort that it was a work in progress and appreciated the idea of having an intervening text with other articles such as scope of protection, for review prior to Rev. 2 with respect to which there was typically limited opportunity to comment.

187. The Delegation of Nigeria said that it would have preferred that the IGC accept that document and work with it and move down to talking about other articles that it had not broached thus far, so that at the end of the week, the IGC would be able to have everything in a holistic context, because everything was interlinked. Since that was not the case, it took the liberty to make a few observations. The remark by the Delegation of the USA to distinguish between indigenous peoples as having rights and local communities as having interests was unsettling. It was jurisprudence. In most cases, indigenous peoples overlapped with local communities and that was specific to national context. The idea of distinguishing who had rights and who had interests should be looked at by the Facilitators. As to "protected" TK and the rationale provided for inserting that term (so as not to prejudge the negotiations' outcome), it suggested placing "protected" in brackets because it was inconsistent with prejudging the outcome. The idea of putting temporal elements around TK and TCEs had been discussed and there was a compromised language in relation to "generation and generation". The IGC should take another look at that restriction, and the position had not been effectively persuasive. The phrase "beneficiaries of protection" should be left open to capture new options in addition to existing beneficiaries (IPLCs), such as nations or states. The IGC could not afford to omit a situation where TCEs and TK engaged individual rights or individual claims. Those were not effectively captured in the definitions. It would send its drafting suggestions to the Facilitators, particularly with regard to definitions.

188. The Delegation of the EU, speaking on behalf of the EU and its Member States, acknowledged and appreciated the explanation by the Facilitators had not intended to merge the two texts. It appreciated the general approach of the Facilitators in trying to improve and streamline the language in the preamble. However, there were problematic points. First, it feared that there was a connection between paragraph 2 of the preamble (dealing with recognizing that IPLCs had the right to maintain, control, protect, etc.) and the scope of protection article. It supported the measures-based approach, whereas that preamble article

seemed to be more in the framework of a rights-based approach. Using the word “right” in the preamble was problematic. The tiered approach had some more complex elements in that regard, which the IGC could explore. The Delegation was not ready to go along with any close associations with the rights-based approach. Regarding paragraph 9 (the reference to MAT and fair and equitable sharing of benefits, subject to FPIC), it had concerns with linking the instrument to elements dealt with in the Nagoya Protocol. Within the framework of that article, the Facilitators had taken note of its concerns on that point. Finally, in paragraph 13, it saw a connection with the rights-based approach. When it came to recognizing the need for new rules, it saw it in a more nuanced manner, as it still had issues about where gaps existed. The whole paragraph was problematic. It wished to work further on that and have its concerns documented. Regarding Article 1, in general, it welcomed the attempt by the Facilitators to reduce the number of objectives and to produce a clearer, streamlined language. Even though it had expressed its openness to explore Alt 3 further, it had tried to look at those paragraph (a) (b) and (c). It requested that Alt 3 be retained because it saw some merits in Alt 3, especially in view its significant concerns about the concept of misappropriation in objective (a). It was not completely unproblematic to list misappropriation, misuse, and unauthorized use in trying to lift the problematic that way. It did not find it a very promising way to handle that issue. Whereas with Alt 3, there was a more successful attempt at trying to handle the issue by creating positive language. It said that the exact meaning of “appropriate use” could be further explored and discussed. That would be a better way to try to pave consensus on that issue. On paragraph (b), in general it supported that objective. However, it welcomed further discussions on the last element “whether or not commercialized”. Paragraph (c) was not problematic. Regarding Article 2, combined with the deletion of Article 3, it reiterated its preference for the eligibility criteria to be included in Article 3. At the same time, it acknowledged that the attempt by the Facilitators in creating Rev. 1 was to look at the terms of TK and TCEs on the one hand and the eligibility criteria on the other, and to try to reduce duplications, overlaps and redundancies. It supported that attempt to try to eliminate similar language in various articles, but organizing and moving various elements contained in two separate articles was a different issue. It requested that the article including the eligibility criteria in subject matter should be retained. As to the substantive analysis of what was in a possible merged unified text on the definition and the eligibility criteria, it would address the criteria themselves in more detail. That was not its initial approach and it had not been able to let go of its initial approach. As regards the beneficiaries, the alternative that it had systematically supported was Alt 1, limiting beneficiaries to IPLCs, with some reservations as regards the use of the term “people”. The main issue was not to extend that scope to further beneficiaries, such as nations or states. It requested that Alt 1 be retained in Rev. 2 because that reflected its position and it did not want to lose that concept.

189. The Delegation of Lithuania, speaking on behalf of the CEBS Group, aligned itself with the specific remarks delivered by the Delegation of the EU, on behalf of the EU and its Member States.

190. The Delegation of India said Rev. 1 was going in the right direction. However, it needed to see the entire draft in order to provide its comments, as all articles were related to each other. It reserved its right to give comments on each article. Nevertheless, there should be separate preambles for TK and TCEs. It would revert to the substance of the preamble, after looking into the other articles. As regards the objective, the Facilitators had done a very appreciable job to make it concise, but some elements were missing, particularly the concept of the protection to be extended to TK and their holders. It said the explanation by the Delegation of EU, on behalf of the EU and its Member States, was very valid from its own perspective. However, TK-based innovations done by a third party without giving due share and due recognition to the TK holder were acts of misappropriation. The IGC had to create and give rights to TK holders. Benefit-sharing was the basis of the Nagoya Protocol and the CBD. If there had been no Nagoya Protocol or CBD, and if the IGC was trying to build a legal framework for TK and TCEs, it was pertinent to see that TK holders should get due benefit when their TK was used for further

innovation. Alt 1(c) should be retained. Regarding beneficiaries, it was correct to state that the beneficiaries should be IPLCs, but one also needed to recognize that there was no compendium of the TK of IPLCs thus far. Efforts had been made in India with the TKDL to document thousand-years old knowledge in the scriptures. It was not possible to associate that TK with the actual local communities, as they were extinct. However, it was still TK. It was pertinent that the State took care of such TK, because there were innovations based on that knowledge. In that perspective, there was a very strong case that a State, which was making efforts to bring all TK in one place, should act as a beneficiary. Whatever benefits being shared by the third party based on the commercialization of TK would be taken by the government and shared with the people of that nation equally on education, health and for all the IPLCs. Including states as beneficiaries was a must.

191. The Delegation of Brazil said that even though in one or two cases the wording that it would have preferred was not contemplated in Rev. 1, the Facilitators had worked very hard to accommodate the differing interests and needs of the whole IGC membership. It reserved its right to comment further in the following discussions. On Article 1, it agreed with other delegations that wished to clarify that item (b) was meant to encourage and protect tradition-based creation and innovation, to keep it in line with the purpose of the instrument. In Article 2, the definitions were important, but the public domain was such a complicated term to define (even the TRIPS Agreement did not define the public domain) that the IGC would be wasting a very long time trying to find a common definition for “public domain.” In Article 3, it agreed with the basic wording. It could come up with some final compromise, but “other beneficiaries as might be determined under national law” seemed very reasonable and sensible.

192. The Delegation of the Islamic Republic of Iran said that the development of the text was one thing and the spirit and goodwill of the negotiators for taking that text and being ready to bridge the gaps was another. It encouraged and appealed to everyone, after so long, to work closely in bridging the gaps, to work with flexibility and compromise. Rev. 1 was not at a stage where it could receive detailed comments, as the full picture was not yet clear. The articles were relevant to each other in the whole picture. It reserved the right to making detailed comments after having seen the full picture. Nevertheless, in the preamble, it saw the efforts in recognizing the rights of TK and TCEs holders. That set a tone but when it came to the operational part of the instrument, although there were just three articles, the trend was to forget the right recognized in the preamble and to focus on other things. Specifically, in Article 1, the objective should be in line with the right recognized in the preamble. Article 1 shied away from declaring the objective of the instrument. The objectives should be clearly set out to enhance the transparency of the IP system with regard to TK and TCEs. Article 1 was short of that. Instead, it put the responsibility of developing such a system and preventing the misappropriation solely on beneficiaries. It seemed that those who were not beneficiaries had no responsibility. It was not the responsibility of just a group of beneficiaries, but of everyone. That problem was also in the previous text. The Facilitators were trying to streamline the existing text, rather than paying attention to important issues. In Article 2, specifically in the definition of some terms, there was consecutive referral from one term to another term in another article and that was not a good way to do it. That consecutive referral was just circling around and not going anywhere. That was one of the problems with regard to protected TK, for example. There was also an inherent problem with dividing the TK into protected and unprotected. That was not a good approach. It referred to the intervention by the Delegation of the EU, on behalf of the EU and its Member States, and said that the IGC needed to clearly state out eligibility criteria for protection of TK. It was not satisfactory to put that into either definitions or subject matter. In an article, one should solely focus on eligibility criteria, what kind of TK, when and where it could be protected. In the “Use of Terms”, there were also attempts to shy away from the article because it was difficult to tackle and to bring some important issues into the “Use of Terms” and to make a remedy through definition. It sympathized with the Facilitators, but that was not helping that much. There were some terms

that could not be defined as terms but rather had to be dealt with in the operative part of the text. The article on beneficiaries should be kept short and to a minimum and the attempts of the Facilitators were acceptable in providing an environment for national law to define the beneficiaries according to their national system.

193. The representative of NARF, speaking on behalf of the Indigenous Caucus, said that he was examining with interest the definitions in Article 2, which incorporated the tiered approach to TK and TCEs. However, he reserved his comments on that article until he saw Article 5. He considered all TK to be sacred and he was concerned about the insertion of “protected” before TK. He could not agree to any provisions because he needed to have the full document in order to get the full picture.

194. The Delegation of South Africa said that the general context in which TK and TCEs were discussed was marked by centuries of domination and marginalization. The quest was to redress past injustices. There had not been any precedence in which TK and TCEs had ever been protected. From its perspective, domination and conquest were too fresh. It remembered those that stood on the one side and those that stood on the other side and unfortunately that seemed to be reproduced in the nature of the debates in the IGC. Around the rules of engagement, the IGC had been urged by the mandate to use a particular approach. The Chair encouraged flexibility and balance and to move away from historical positions. There had been expressions of goodwill on the eligibility criteria by some members. Also on the temporal element, there had also been some expression of goodwill, as some countries had moved away from that. However, that failed to go through the whole discussion. Delegations reverted back to invoking the past and insisting that their positions must be reinstated. If one took, for example, the issue of the objectives and the question of Alt 3, it asked how one could include everyone’s interests in the so-called “positive approach”. That approach did not only speak to the measures-based approach but to both rights and measures-based approaches. It asked those insisting on Alt 3 to drop their insistence of invoking other sections to be placed in there and look at how the IGC might improve that alternative on the objectives and make it contain all options. On the methodology, it recalled the issue of global insertions by some delegations that did not give other delegations a chance to consider those. Since 2006, the same technique was used in order to cause more division and confusion. The members were not able to follow what was happening. The text at the end of the day created a divide. The IGC needed to find a way of managing rapid, global and voluminous insertions that were flashed without others being able to engage with them. As a way forward, it suggested that a minimum standards approach was the road to follow. Members should not continue to keep to maximum positions. The IGC needed to seek a position where all could win. There should not be any losers. The cost of delaying that process, the cost of not having an agreement and the consequences of damage were high. It was in the interest of all parties to find a solution immediately that could enable industry and IPLCs to proceed and achieve their goals. In the preamble, the IGC was being taken back on paths that had not been productive. The IGC had spent six years on objectives and had not moved on any substantive issue until 2010, when the IGC had begun to engage in negotiations. It said that a preamble was a statement of principles. It was aspirational, not necessarily actual. A preamble spoke to principles that one aspired to achieve. In that context, even paragraph 2 was an expression of statement. One could even just insert “recognizing the aspirations of IPLCs to have the rights...”. There was also the question of PIC and MAT that the Delegation of India had addressed. Even if that were not there, the IGC would have to invent something that had to do with benefit-sharing and a legal form of handling the transfer of knowledge from one community to another. Yet PIC and MAT happened to be there and it was not merely coincidence. That required the IGC to come up with methods. The Delegation of India had addressed that issue quite well. The Delegation of Brazil had mentioned the issue of the public domain. Each one of the WIPO instruments had different definitions of public domain. The public domain in copyright could be found differently in patents. The principle around enforcement in the preamble was more about protection, from its perspective.

Enforcement was down the line of the value chain. The IGC should consider improving the “positive” objective to cover every interest, as long as it covered the mischief to redress. It had to refer to that which had been wronged and had to be corrected. It called upon considering the aspirations of indigenous peoples. That was not the only vehicle that could be used by IPLCs and other countries to ratify their own agreement around that issue. That would lead to discrediting WIPO. On the issue of definitions, the Delegation of the Islamic Republic of Iran had addressed the issue of one of the definitions referring to the same entity, which was not even concluded. It was in progress as stating “protected” TK. Consequently, that affected others. There was also an insertion where there was the “sacred TK” definition and the changes that accumulated. It was an oversight and could be deleted. On the issue of beneficiaries, the Delegation of India had pointed out the use of the TKDL to those members that objected to the role of the states. The TKDL was used in patent offices in Europe, America, Japan and many others. It was a product of the role of the state in the protection and promotion under the development of TK. The IGC had to be realistic and find a formula and recognize all genuine beneficiaries. No developing country had objected to that particular clause by saying it allowed third parties as beneficiaries. That definition gave room for users of TK in certain contexts to be recognized as beneficiaries. That was the win-win situation, to recognize the different rights involved in that protection. That allowed moving away from rigid positions.

195. The Delegation of Egypt was surprised to see that certain members wanted to run the risk of going back to square one, despite the fact that the IGC wanted to reach an agreement on a text. Rev. 1 could be perfected and that was why it accepted the remarks of others, but it reserved the right to express more comments. It expected to become familiar with the revised text and that the comments of the Delegation of the EU, on behalf of the EU and its Member States, and other delegations would be included. Everything was interleaved. It would make some comments with the objective of strengthening the contents of the text, in a constructive spirit and with a precise methodology. Concerning the preamble, paragraph 14 made reference to the rights acquired by IPLCs, which should not be questioned. It was a paragraph that bore on the rights that one should protect. Regarding the order of the articles, the “Use of Terms” article should come right after the preamble. In Article 1, the objective of that instrument(s) was to protect TK and TCEs. It proposed to insert, at beginning of that article: “This instrument has the objective to provide the beneficiaries with the following means to protect TK...”. Paragraphs (a) and (b) were not a matter of protecting the scientific object *per se*, but trying to protect everything that had to deal with innovation or creativity. It was trying to encourage, promote, foster and protect the very results of that innovation, whether it was copyright, patents, etc. What it was encouraging and promoting was one thing and what it wished to protect was something else. It proposed to get rid of the word “protect” in paragraph (b). It reserved the right to come back to the wording, after having read the revised text in detail.

196. The Delegation of Japan shared the same general concern as expressed by the Delegation of Lithuania, on behalf of the CEBS Group, the Delegation of the EU, on behalf of the EU and its Member States, and the Delegations of the USA and Italy. It had not been given an opportunity to state its own preference in plenary. As a result, its preferred alternative had disappeared. Rev. 1 had no status and it would have status only if Member States agreed. With that understanding, it hoped that any future texts in the IGC would be produced in a transparent manner in order to avoid deplorable situations. There were many changes in Rev. 1, which had not been proposed nor discussed at IGC 37. Precisely reflecting the discussion of the IGC on the text was important for moving forward. Regarding paragraph 9 of the “Preamble/Introduction”, the words “fair and equitable sharing of benefits” and “prior informed consent” were newly specified. “Sharing of benefits” and “prior informed consent” pertained specifically to the ABS system. On the basis of that understanding, it did not support paragraph 9, as it was inappropriate to associate the issues on ABS with the IP system. Paragraph 9 should be put in brackets. Regarding the objective of Article 1, one should bear in mind that the public domain was fundamental for creativity and innovation of the world.

Therefore, it wished to propose the addition of the wording “recognizing the value of a vibrant public domain and the need to protect, preserve and enhance the public domain” at the end of paragraphs (b) of both the TK and TCEs texts. In addition, taking into account the different nature of TK and TCEs, the wording “or assertion” should be bracketed in paragraph (c) of the TK text. With regard to the reorganization of the definitions of the old Article 3 and the eligibility criteria, it did not have any objections. However, it was concerned that the old text of criteria for eligibility had disappeared. Concise and objective criteria should be set forth as the definition of TK and TCEs. Although it had mentioned in its previous statement that it could consider more flexibly as to how many years should be appropriate, the criteria of the term “traditional” should be further clarified in order to ensure legal certainty and predictability. Therefore, it suggested that the “50 years” or “XX years” be included with brackets in the both TK and TCEs texts. Regarding Article 3, beneficiaries should be specified in terms of individual TK or TCEs. It was necessary to have a distinctive link with each TK or TCE. The beneficiaries should be limited only to IPLCs and should not include states and nations.

197. The Delegation of the Republic of Korea addressed two points, reserving its positions for the details in Rev. 1. First, compared to the previous text, there seemed to be no significant difference in the “Use of Terms” of TK and TCEs in Rev. 1, while from several sessions the IGC had discussed that the new Article 2 should include “eligibility/subject matter”. The definition of protected TK remained the same, even though the eligibility criteria had been removed from Rev. 1. If the eligibility/subject matter clause were to remain deleted, as in Article 2, it would be better to define separately the general concept of TK and TCEs under “Use of Terms” and that of protected TK and TCEs under criteria of eligibility, for the sake of clarity. Second, with regard to Article 3, “other beneficiaries” had been newly inserted in Rev. 1, but its scope and concept were ambiguous and needed to be discussed further.

198. The Delegation of the Russian Federation supported the text of Rev. 1 even if it had a few comments on it. Without any doubt, the most important aspect in that new format of the document was the need for flexibility. With flexibility, the document could be translated into national legislation. The third paragraph of the preamble was in line with its national legislation and gave Member States flexibility for protecting TK based on their national situation. It hoped that the document would be improved and that language referring to national legislation would be included.

199. The Delegation of France addressed the questions raised with regard to the definition of indigenous communities and the issues of beneficiaries. From a strict legal position, there was no internationally recognized definition of “indigenous peoples”. The only legally binding international text that had a definition was the ILO 169 Convention, and it was only ratified by 22 countries in the world, only three from the EU, which demonstrated the lack of international consensus on that issue. The notion of indigenous populations or communities could designate any descendant from any groups of population present on a territory, for example, during the colonial period, which had taken place in different areas around the world, and as distinguished from the general population, due to their specific customs. That definition also raised the issue of decision, i.e., how one decided whether one was part of that group or not —it wondered if it was self-designation or self-recognition (without any objective criteria) — and how one identified that or that individual as belonging to those communities or not. All those elements made a definition very fragile and made it difficult to give those populations rights on that basis. It was a political and sensitive issue. It would be a good idea to have a legal consolidated approach on that notion in Article 2 when the IGC defined the terms.

200. The Delegation of the USA said, from the TCEs perspective, that it was pleased to participate in the exploratory exercise of thinking about the possibility of bringing the eligibility criteria into the definition. It had listened to a number of interventions about the merits of

retaining eligibility criteria within a separate article. It continued to reflect on that issue. Moving forward, it was open to further discussion of the many good ideas advanced.

201. The Delegation of the Plurinational State of Bolivia said there were many positive aspects in the text. There was some flexibility given to national legislation that would allow states, depending on their specific circumstances, to define the criteria they wanted to apply or how they wanted to move forward. Obviously the text had some sensitive issues, especially for the Plurinational State of Bolivia. It would be advisable to consider the divergences between countries. In the Plurinational State of Bolivia, there was an important number of indigenous populations. It would be a good idea to include eligibility criteria without too much specification because it was barely aware of the importance of that as a country and it needed to consult with those peoples at the national level to define what the criteria might be, and if there were going to be any criteria at all. When looking at the term “creativity”, in the past it had said that creation of TK could not be part of its Constitution or national legislation. Indigenous communities often said that their knowledge was not always the fruit of a creative process. It shared many of the views expressed by other delegations with regard to protected TK and yet that raised the level of confusion. It would be irresponsible to exclude certain types of knowledge. It was important to have that document in order to pursue the IGC’s work.

202. The Delegation of Niger said the Facilitators had really tried to reduce the divergences, in line with the mandate. If the IGC followed them in that effort, it would be able to move forward and indeed reduce all the divergences. It regretted that the temporal criteria had come back on the table. It quoted the WIPO document, entitled “Elements of a Sui Generis System for the Protection of Traditional Knowledge” (WIPO/GRTKF/IC/3/8), dated March 29, 2002, page 14, paragraph 25, which demonstrated the irrelevance of the temporal criteria: “the idea behind the perceived limitation that traditional knowledge is inherently in the public domain results from the concept that traditional knowledge, being traditional, is ‘old’, and thus it cannot be recaptured.” The report highlighted that the term “traditional” referred to the way that TK was elaborated and not to its date of creation. It was difficult to understand that criteria, as even the Delegation of Japan, which had proposed it before, had said that it would be flexible. It was happy to hear that it had put its proposal in brackets. Other delegations were more royalist than the king and were insisting on that temporal aspect, which was not relevant. That WIPO report was related to the public domain. The Delegation said that the IGC discussions, instead of allaying divisions, were in fact making them worse over the years. It was unfortunate. Concerning the issue of the public domain, for example, some wanted to impose the definition of the public domain and wanted a universal international instrument, and yet no such text existed thus far. All those conceptual problems were at work and so long as some members were chained to those problems, the IGC would not be able to reduce divergences and different viewpoints. IP aimed to create new things, but unfortunately, many partners did not agree with that logic, since they seemed to be chained to the conceptual IP framework. Looking at the Updated Draft Gap Analyses, the IGC had to make a creative effort in that area. During the colonial period, the colonists thought that TK and TCEs were something in suspense, but TK had managed to live on during the colonial and the post-colonial periods. TK was living. If members really wanted to reduce the divergences, the IGC had to make a creative effort and get outside of the box of the current concepts of IP. Unfortunately, as time had gone on, one had only seen divergences of opinion increase rather than decrease.

203. The Delegation of China said that that the preamble should not mention only IPLCs as beneficiaries. Beneficiaries should include, but not be limited to, IPLCs. China had rich resources of TK and TCEs and it had huge amounts of specific groups of TK and TCE holders, which were quite similar to the IPLCs. The TCEs text should include other beneficiaries. In the TK text, in Article 3, the footnote included states and nations. That reflected the Chinese context and the need for TK and TCEs protection in China. For the sake of coherence within the text, the preamble should refer to other TK and TCE holders apart from IPLCs, as might be



determined by national law. That way it could accommodate and balance the needs of various Member States.

204. The Delegation of the UK aligned itself with the general and specific interventions made by the Delegation of the EU, on behalf of the EU and its Member States, and supported the statements made by the Delegations of Italy and Canada. It was concerned by the number of deletions of text, which it had preferred. It was concerned by the amalgamation of a number of differing perspectives, as that did not give a clear representation of all positions, as had been its understanding of the goal of the streamlining exercise. In Article 3, it approved the change of the title, which was simple and clear. It was concerned about the terms “and other beneficiaries”, which was too broad and could not only include states or nations, as highlighted in the footnote, but could also include any other party. Not only was that too all-encompassing but also lacked legal clarity and common understanding. It was important that the instrument be clear on who was intended to be the beneficiaries of any protection afforded by the instrument. The beneficiaries of the instrument should be limited to the IPLCs that held and developed TK and TCEs. It welcomed explanations and real world examples of protectable TK and TCEs in which nations were considered beneficiaries. It also welcomed additional explanation of how TK or TCE had been protected at the national level, addressing questions along the lines of those set out in the proposal by the Delegations of the USA and Japan (document WIPO/GRTKF/IC/37/16), to which the Delegation offered its support.

205. [Note from the Secretariat: The informals took place on the afternoon of August 30, 2018. This part of the session took place after the distribution of Rev. 2 on August 31, 2018.] The Chair invited the Facilitators to introduce Rev. 2 for consideration by Member States. There were three more meetings to discuss TK and TCEs. IGC 37 had highlighted key areas where work would continue at IGC 38. The IGC had to carefully think how to construct a working document that gave clarity and moved the process forward.

206. Mr. Kuruk, speaking on behalf of the Facilitators, said that the Facilitators had worked on the preamble and Articles 1, 2, 3, 4, 5 and 9 of the draft text on TK, and the preamble and Articles 1, 2, 3, 4, 5 and 7 of the draft text on TCEs. They had taken into account interventions made in plenary and during the informals. Essentially, the proposed preamble in the TCEs text was substantially the same as that for the TK text, with some minor changes. They had also reinserted the previously deleted article on eligibility criteria. They had cleaned up some of the definitions, added a fourth objective for the instruments, and revised the description of beneficiaries. Responding to the requests of various delegations, they had reinserted some alternatives that had been omitted from Rev. 1. They had swapped the placement of the articles on definitions and objectives, with the article of definitions immediately coming after the preamble in both texts, followed by the article on objectives. They had made three global changes based on the requested of some delegations. First, they had added the word “free” to all references to “prior informed consent”. Second, they had placed brackets around “protected” in all references to “protected TK” or “protected TCEs”. Third, they had placed brackets around every provision presented as an Alt or alternative proposal in the draft articles. In Article 1, definitions in the TK text, there was a proposal by a Member State for a definition of “protected TK”. With regard to the definition of “publicly available”, also responding to a concern of a Member State, they had had placed brackets around the words that focused on “distinctive association” with indigenous communities, the rationale being that TK was still available in some places although it had not lost its distinctive association with a group. They had looked at other definitions such as secret TK, and he invited members to have a look at the changes made, which had all been made at the request of delegations. Similar changes had been made to the TCEs text. Under objectives, responding to the requests by Member States, in Alt 1 they had had added as a fourth objective, objective (d), which stated: “achieve the fair and equitable sharing of benefits arising from the use of their traditional knowledge”. They had had placed brackets, in the first sentence of the objectives, around “[should provide] [aims at protecting

traditional knowledge by providing]” based on requests of some members. In objective (a), they had placed brackets around “misappropriations, misuse and unauthorized use”. In objective (b), they had placed brackets around the word “tradition-based”. They had reinserted Alts 2 and 3 from the original draft texts, which were not reflected in Rev. 1. Lastly, responding to an intervention by a Member State to amend objective (b) in Alt 1, it was determined that it would have affected the integrity of the original proposals, so to include all views by Member States, they had provided, as an Alt 4, a revision of the previous Alt 1 that took into account that member’s intervention. Similar changes had been made with regard to the TCEs text. Article 3 was the previously deleted article on criteria. Alt 1 simply restated, based on member requests. However, some Member States’ interventions called for a set of qualifiers on the subject matter of protection that were not captured fully in the definitions. To accommodate that request, Alt 2 provided: “This instrument applies to traditional knowledge (a) that is distinctively associated with the cultural heritage of beneficiaries as defined in Article 4; and (b) that has been used for a term as has been determined by each Member State, but not less than 50 years.” In Articles 5 and 9, rather minor changes had been made. In Article 5, responding to the request of Member States, in Alt 1, they had placed brackets around the words “safeguard” and “protect” and around “taking into consideration exceptions and limitations, as defined in Article 9, and in a manner consistent with Article 14.” Other delegations had requested changes to Alt 3 by including words to the effect of “encourage”, “ensure”, “that directly communicate traditional knowledge to users” and so on. That was obvious from the tracked changes and the IGC needed not go into those additions in any detail. In Article 9, on exceptions and limitation, there were minor textual changes, just adding a few brackets here and there.

207. Ms. Bellamy, speaking on behalf of the Facilitators, said in the preamble of the TK and TCEs texts, they had taken all of the considerations into account and had made the necessary changes. In the article on beneficiaries, they had replicated the original documents, as requested, and had put in what they had dealt with in Rev. 1.

208. The Chair opened the floor for comments on Rev. 2. Member States could make comments for the record. Any errors or omissions identified would be corrected. The text would be issued at IGC 38, the second of four meetings on TK/TCEs.

209. [Note from the Secretariat: All speakers thanked the Facilitators for their work.] The Delegation of Indonesia, speaking on behalf of the APG, said that both texts, recognizing they were a work-in-progress, reflected better the different positions of Member States. It supported the two documents as the basis for further discussion at IGC 38.

210. The Delegation of El Salvador, speaking on behalf of GRULAC, considered that Rev. 2 had been produced on an inclusive basis, incorporating the different viewpoints expressed by all delegations throughout the session, both in plenary and in informals. It highlighted its satisfaction at having a document that not only incorporated the members’ viewpoints but also the important attempts by the Facilitators to reconcile the standpoints of all members. Those documents could serve as a basis in upcoming meetings. It supported the documents to be transferred as working documents for IGC 38.

211. The Delegation of Lithuania, speaking on behalf of the CEBS Group, recognized that IGC 37 was the start of the process on TK and TCEs over the course of the mandate. It appreciated that its preferred alternatives had been taken on board, but recognized that more work needed to be done on the texts. Nonetheless, it accepted them as a basis for further discussion.

212. The Delegation of the EU, speaking on behalf of the EU and its Member States, appreciated that the Facilitators had taken on board its requests. It could accept Rev. 2 (a

work-in-progress) as a basis for further work at IGC 38. It would certainly have some comments on specific points.

213. The Delegation of Morocco, speaking on behalf of the African Group, said that some progress had been made in Rev. 2, even though it did not entirely reflect its concerns. Given that IGC 37 was the first session on TK and TCEs, in the spirit of compromise, it did not have any objection to considering those documents as working documents for IGC 38. It insisted on improving the methodology to ensure that the IGC could make progress in the future.

214. The Delegation of India said that a lot of issues and comments had been incorporated in the revised draft. However, since the IGC had discussed only a few articles at IGC 37, and the new documents were all-inclusive, which were very positive development, it needed to study them further. It would give its comments at IGC 38.

215. The Delegation of Egypt said that Rev. 2 was an excellent basis for further discussion at upcoming sessions. The Facilitators had expressed with clarity all of the concerns raised by delegations and all of its concerns were expressed in that document. In paragraph 14 of the preamble, it supported the text. That paragraph should be an operative provision of the instrument, rather than just in the preamble, because it had to do with the rights of IPLCs, who had to be able to preserve their rights.

216. The representative of Tupaj Amaru said that Rev. 2 did not show any substantial improvement. In Article 1, "misappropriation" continued to be used, even though he had, on many occasions, during many meetings, mentioned that that notion and the use of that term had no legal basis. The fact that the Member States and the Facilitators saw where misappropriation existed in any instrument of WIPO was unacceptable. He also said that brackets remained around "peoples". After 18 years of work, he wondered how states could oppose any recognition of indigenous peoples, having signed UNDRIP. Furthermore, on the validity of the instrument as a binding legal instrument, the Vienna Convention on the Law of Treaties established in its Article 2 that a treaty was understood as an international agreement signed in writing between states and governed by international law. When the UN system was drawing up an international instrument, it had to be consistent with UN principles. It thanked the Chair for his Information Note, but contested the statement that a preamble was not legally binding text or a multilateral instrument and that it simply assisted in the interpretation of provisions, providing context for the instrument and the objectives for which it was drafted. He said that that position contravened all instruments. In treaties, the preamble was the soul that governed the whole text. No one could say that the preamble was without value.

217. The Delegation of the Islamic Republic of Iran expected that the Facilitators follow the same approach that they had taken in producing Rev. 1 and present more streamlined text and avoid duplication and redundancies. It recognized the difficulty in providing an inclusive document that reflected the position of all Member States. It could go along with Rev. 2, as submitted by the Facilitators. It was committed to continuing the fruitful discussion with regard to the two texts at IGC 38, where it would provide more detailed comments.

218. The Delegation of Brazil aligned itself with the statement by the Delegation of El Salvador, on behalf of GRULAC. Rev. 2 reflected the commitment and involvement of the Facilitators, and it was a comprehensive document that put together the different views of Member States. It was also, and inevitably so, an unwieldy document that reflected the slow progress the IGC had managed to make thus far. Nevertheless, it welcomed it in the spirit of compromise and in the hope that all viewed it not as a glimpse of the ends but as a tool to expedite further work.

219. The Delegation of the USA said the majority of the text-based suggestions it had made were captured in that document. However, there were a number of omissions. Earlier that

week it had suggested global edits. One was to bracket the term “article” or “articles” throughout the document and replace that with “section” or “sections”. Another was, where multiple alternatives existed within an article, to bracket each alternative, but there were still some places where that had been missed, e.g., in Article 9 of the TK text. It asked that any new language appear in brackets until it was agreed by the IGC. For example, “other beneficiaries” should be bracketed in the definition of TK. In Article 5 of the TK text, in Alt 3, after “encourage” it had suggested the addition of “as a best practice” and wished to see it reflected. In the TCEs text, it pointed out one omission in the definition of TCEs. Its intent and express request was to see that all of the eligibility criteria that formally resided in Article 3, Alt 2, paragraphs (a) through (e), be reflected in the definition of TCEs. It was glad to see paragraphs (a), (b), (c) and (e) in the revised definition, however it did not see paragraph (d) and asked that it be reflected in the definition. In the TCEs text preamble, there might have been a slight error when the preamble was unscrambled and put into two separate texts. There were a few places where the global change from TK to TCEs did not work and it created a few oddities. That could be corrected by returning to the original preamble, especially in new paragraphs 5, 7, 8 and 12, which were the old paragraphs 3, 4, 9 and 10, respectively.

220. The Delegation of Canada said that Rev. 2 would help to move the IGC’s discussions forward. Nonetheless, it had some general concerns. While it was useful to reduce the number of alternative wordings, to permit a simpler solution, the approach should not preclude in-depth discussion of the content. It was important to assure constructive dialogue on matters of substance to better understand and appreciate the implications of implementing the instrument’s provisions, including on the basis of national practices. Some provisions, for example, referred to such concepts as “moral rights”, “economic rights”, “secret”, and “sacred” in dealing with TK and TCEs. In its view, if the IGC wished to establish basic standards of protection in such areas, it needed to discuss the meaning of those terms, bearing in mind how perspectives might differ. It was by understanding the differences and similarities that members could reach agreement on such essential questions as the purpose, and the objectives, of protection. It was important to clarify the term “local community” so as to determine who the “beneficiaries” would be. It welcomed the work plans for IGC 38, 39 and 40. To better guide the collective understanding, it hoped the discussions would focus more on the meaning of particular concepts. In that regard, it reiterated its commitment to substantive dialogue, on the basis of Rev. 2, as the IGC moved ahead with that work.

221. The Delegation of Japan could accept Rev. 2 as a basis for further work. It wished to consider the text carefully and would make comments on the revised text at IGC 38. For the moment, it said that, based on its intervention in the informal held the day before, as regards Article 5 of the TCEs text, the new paragraph 5.4 had been inserted into Option 2 of Alt 3. That revision had been kindly made based on its proposal. Its intention, however, was to add the new paragraph into Alt 1 of Article 5 of the TK text. Moreover, in Article 5 of the TCEs text, there was a duplication of the same language in paragraphs 5.2 and 5.4. Therefore, it suggested deleting paragraph 5.4 from Option 2 of Alt 3 in Article 5 of the TCEs text, and to propose again adding the following paragraph into Alt 1 of Article 5 of the TK text. The text would read: “5.2 Protection under this instrument does not extend to traditional knowledge that is widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.”

222. The representative of IWA, speaking on behalf of the Indigenous Caucus, expressed her continuing concern about the use of the word “protected” before TK. The word was bracketed in some articles, but it was not bracketed, for instance, in Article 2. She was open to hearing states expressing what that concept might mean, whether there was a prejudgment that some TK was protected and some was not.

223. The Chair closed the discussion on Rev. 2 and closed the agenda item.

*Decisions on Agenda Item 5:*

224. *The Committee developed, on the basis of document WIPO/GRTKF/IC/37/4, a further text, “The Protection of Traditional Knowledge: Draft Articles Rev. 2”, and on the basis of document WIPO/GRTKF/IC/37/5, a further text, “The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2”. The Committee decided that these texts, as at the close of this agenda item on August 31, 2018, be transmitted to the Thirty-Eighth 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.*

225. *The Committee took note of and held discussions on documents WIPO/GRTKF/IC/37/6, WIPO/GRTKF/IC/37/7, WIPO/GRTKF/IC/37/8, WIPO/GRTKF/IC/37/9, WIPO/GRTKF/IC/37/10, WIPO/GRTKF/IC/37/11, WIPO/GRTKF/IC/37/12, WIPO/GRTKF/IC/37/13, WIPO/GRTKF/IC/37/14, WIPO/GRTKF/IC/37/15, WIPO/GRTKF/IC/37/16 and WIPO/GRTKF/IC/37/INF/7.*

**AGENDA ITEM 6: ESTABLISHMENT OF AN AD HOC EXPERT GROUP(S)**

226. The Chair recalled the mandate. The decision on that agenda item was to determine the duration of IGC 38: either five or six days. He said he had included a proposal in the methodology note that followed the same approach as the *Ad Hoc* Expert Group on GRs. He had invited the RCs to consult within their groups. Member States agreed with the proposal with only one change related to the composition of the *Ad Hoc* Expert Group: instead of four experts, each regional group would be represented by a maximum of five experts.

*Decisions on Agenda Item 6:*

227. *The mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC or Committee) for the*

*biennium 2018/2019 provides that the IGC “may establish ad hoc expert group(s) to address a specific legal, policy or technical issue”, and “the results of the work of such group(s) will be submitted to the IGC for consideration”. The mandate also notes that the “expert group(s) will have a balanced regional representation and use an efficient working methodology”, and “work during the weeks of the sessions of the IGC”.*

228. *With this background, the Committee agreed that an ad hoc expert group on traditional knowledge and traditional cultural expressions be organized as follows:*

*Mandate*

*The IGC plenary is the negotiating and decision-making body. The ad hoc expert group is to support and facilitate the negotiations of the IGC.*

*The ad hoc expert group will provide advice and analysis on legal, policy or technical issues. Member States, through the Regional Coordinators, will be invited to suggest the specific issues to be considered by the ad hoc expert group. The IGC Chair and Vice-Chairs will identify the list of specific issues from the suggestions made by Member States. The list should be balanced and as short and focused as possible. The draft list will be provided by the IGC Chair to the Regional Coordinators for comments and the experts in advance of the group’s meeting.*

*The ad hoc expert group will report to the IGC plenary at IGC 38 on the outcomes of its work.*

*The agenda for IGC 38 will make provision for such a report by the ad hoc expert group, which will be presented by the Chair or co-Chairs of the ad hoc expert group and will be included in the report of IGC 38.*

*Composition*

*Each Regional Group will be represented by a maximum of five experts. The European Union (EU) and the Like-Minded Countries will be invited to nominate two experts, without additional funding requirements. The Indigenous Caucus will be invited to nominate two indigenous experts to participate. The experts, who should preferably be subject-matter specialists, shall participate in their personal capacities.*

*The Regional Groups, the EU, the Like-Minded Countries, and Indigenous Caucus will be invited by the Secretariat to nominate their experts by a date to be advised, so that the necessary arrangements can be made.*

*The Secretariat is authorised to invite up to three experts from academia, civil society, industry or other constituencies to assist in the ad hoc expert group, such as by making presentations and answering technical questions. They will also participate in their personal capacities.*

*The Chair and Vice-chairs of the IGC will be invited to attend the ad hoc expert group meeting.*

Date and venue

*The ad hoc expert group on traditional knowledge and traditional cultural expressions will meet on Sunday, December 9, 2018, at WIPO Headquarters in Geneva, in Room NB 0.107, from 09h00 to 16h30.*

Funding

*According to the agreed funding formula for the IGC process, one participant each from 36 countries (seven countries from each region and China) will be funded for the 38<sup>th</sup> session of the IGC. Regional Coordinators will be invited, as usual, to provide the names of the countries to be funded. Funded countries will then be invited to nominate the funded participants to the IGC.*

*For those experts from each Regional Group attending the ad hoc expert group who are the funded participants to the IGC, one more daily subsistence allowance at the usual IGC rate will be provided by WIPO. WIPO will not cover the expenses of other experts or any other additional expenses.*

*This funding arrangement for the ad hoc expert group does not constitute a precedent for other WIPO meetings.*

*If the indigenous experts to participate in the ad hoc expert group are funded by the Voluntary Fund as decided by the Advisory Board or are the panellists for the Indigenous Panel at the 38<sup>th</sup> session of the IGC, WIPO will provide one daily subsistence allowance at the usual IGC rate. WIPO will not cover the expenses of other*



*indigenous experts or any other additional expenses.*

*Languages*

*The working languages of the ad hoc expert group will be English, French and Spanish.*

*Chair or co-Chairs of the ad hoc expert group*

*The Chair or co-Chairs will be identified by the Chair of the IGC from among the participating experts before the meeting of the ad hoc expert group so that they have adequate time to prepare.*

*Informality*

*The ad hoc expert group will not be webcasted, or reported on in the same manner as the IGC plenary.*

*All participants are requested to respect the informality of the ad hoc expert group, and not to communicate to the public, whether 'live' or at any future time, the content or nature of the discussions taking place in the ad hoc expert group, whether in general terms or by way of quoting specific experts. This includes restrictions on tweeting, blog posts, news stories and email list-serves.*

*Secretariat services*

*The WIPO Secretariat will facilitate the conduct of the meeting and provide secretariat services.*

**AGENDA ITEM 7: POSSIBLE RECOMMENDATIONS TO THE 2018 GENERAL ASSEMBLY**

229. The Chair opened the floor for statements.

230. The Delegation of Morocco, speaking on behalf of the African Group, recalled the mandate regarding the recommendations to the GA. Given the progress made at IGCs 35 and

36, the IGC had been called upon to devote sufficient time to the discussion of Agenda Item 7, which deserved particular attention. Recommendations should capitalize on what had been achieved and take into consideration the long discussions held within the IGC and the maturity of the texts. It counted on the Chair's leadership to find the appropriate way forward towards one or several recommendations that loyally reflected the progress made to date. It stood ready to contribute actively in that regard.

231. The Delegation of Indonesia, speaking on behalf of the LMCs, recalled the significant progress achieved, in particular on the GRs text at IGCs 35 and 36. It was optimistic to soon reach the finish line. The technical work on the GRs text was almost done, and the IGC needed to take the GRs text forward and show political commitment. It hoped that IGC 37 would be able to come up with recommendations to the 2018 GA, to guide the future work of the IGC based on the progress made under the mandate. It wished to have the reaffirmation that all IGC members were still respectful of the objective agreed to in the mandate for the biennium. The IGC should guide the 2018 GA for a work program that outlined key deliverables for future work, including the possibility of convening a diplomatic conference on the GRs text.

232. The Delegation of the Islamic Republic of Iran associated itself with the statement delivered by the Delegation of Indonesia on behalf of the LMCs. The 2017 GA had mandated the IGC to expedite its work with a focus on narrowing gaps with the objective of reaching agreement on a legal international instrument(s). Recalling the rationale behind the establishment of the IGC and its mandate, it expressed its commitment to fulfill it. Accordingly, after conclusion of the two sessions on GRs, it was essential that all Member States show flexibility and engage constructively in order to ensure that the objective of the establishment of the IGC be fulfilled without any undue delay. WIPO and all Member States had to respond to the expectation of a growing majority of Member States, while continuing the negotiations on TK and TCEs. Based on the deliberations at IGCs 35 and 36 and the progress made on the GRs text, the draft documents were now at an adequate level of maturity to be submitted to a diplomatic conference. If some Member States were in favor of continuing negotiations on working texts, the Delegation could be flexible, provided that those negotiations were not open-ended and would lead to a diplomatic conference. It would contribute constructively under that agenda item in order to make a concrete recommendation to the GA with regard to the GRs text.

233. The Delegation of India said the IGC had made considerable progress on the subject of GRs in the past two sessions until the dramatic turn of events on the last day of IGC 36. It recalled paragraph (e) of the IGC's mandate. As the subject of GRs would no longer be considered in the upcoming four sessions of the IGC, including IGC 37, it was imperative that the IGC make reasonable, value-adding and strong recommendations to the GA in 2018 on the subject of GRs. It looked forward to constructive discussions on Agenda Item 7.

234. The Delegation of the EU, speaking on behalf of the EU and its Member States, signaled that it had a somewhat different read of the mandate, which, in its understanding, did not foresee such recommendations as highlighted by other statements.

235. The representative of the Arts Law Center suggested recommending to the GA that it amend its rules so that indigenous peoples could get funding through the WIPO regular budget rather than only through the Voluntary Fund. She called for Member States' support.

236. The Chair said there was no Member State support for the proposal at that stage.

237. The Delegation of Indonesia asked the Chair for his guidance to come up with recommendations to the 2018 GA. It had been looking forward to having meaningful and

detailed discussions with regard to members' thoughts about Agenda Item 7, as per the agreed methodology.

238. The Delegation of Lithuania, speaking on behalf of the CEBS Group, welcomed the Chair's decision to open Agenda Item 7 and to allow ample time for informal consultations. It looked forward to receiving the Chair's well-balanced draft text of the recommendations for its consideration. The 2018 GA could only take stock of the progress made but not decide on matters outside the remit of the current mandate.

239. [Note from the Secretariat: The Chair had informal consultations with the RCs and the recommendations to the 2018 GA were agreed. The following session took place on August 31, 2018.]

240. The Chair said it was the first recommendations that the IGC had put forward to the GA in ten years, apart from the mandate. It was a significant event. The Chair closed the agenda item.

*Decision on Agenda Item 7:*

241. *The Committee agreed on the following recommendations to the 2018 General Assembly:*

*"The 2018 WIPO General Assembly is invited to **consider** the "Report of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)" (document WO/GA/50/8), and to **call upon** the IGC, based on progress made, to **expedite** its work in accordance with the mandate of the IGC for the biennium 2018/2019:*

*(a) **Noting** that at the conclusion of the 37th session all members of the IGC reaffirmed their commitment, based on the progress made, to expedite the Committee's work, with the objective of reaching an agreement on an international instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs); and to work in a constructive*

*and open way using sound working methods.*

*(b) **Acknowledging** the progress made at the 35th and 36th sessions on GRs, reflected in the report and draft report of the sessions respectively (WIPO/GRTKF/IC/35/10 and WIPO/GRTKF/IC/36/11 Prov.).*

*(c) **Noting** that GRs will next be considered at the “stocktaking” during the 40th session, where the Committee will consider next steps in relation to GRs, as well as TK and TCEs, including whether to recommend convening a diplomatic conference and/or continue negotiations.*

*(d) **Noting** progress made at the 37th session on TK and TCEs as reflected in the draft report of the session (WIPO/GRTKF/IC/37/17 Prov.).*

*(e) **Noting** that during the 38th, 39th and 40th sessions, the Committee will continue its work relating to TK and TCEs.*

*(f) **Recognizing** the importance of the participation of Indigenous peoples and local communities in the work of the IGC, **noting** that the WIPO Voluntary Fund is depleted, and **encouraging** Member States to consider contributing to the Fund and consider other alternative funding arrangements.”*

#### **AGENDA ITEM 8: CONTRIBUTION OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC) TO THE IMPLEMENTATION OF THE RESPECTIVE DEVELOPMENT AGENDA RECOMMENDATIONS**

242. The Chair said that further to the 2010 WIPO General Assembly decision to instruct the relevant WIPO bodies to include in their annual report to the Assemblies a description of their contribution to the implementation of the respective Development Agenda recommendations, he

invited delegations and observers to intervene on the contribution of the IGC to the implementation of the Development Agenda recommendations. The statements made on that item would be recorded in the usual report of the IGC and would also be transmitted to the WIPO General Assembly taking place in September 2018, in line with the decision taken by the 2010 WIPO General Assembly related to the Development Agenda Coordination Mechanism.

243. The Delegation of Morocco, speaking on behalf of the African Group, welcomed the efforts undertaken by WIPO to integrate the Development Agenda (DA) into its work. It recalled Recommendation 18 and other relevant recommendations which were Recommendations 15, 16, 17, 19 and 22. The achievements of the IGC on those three topics were a tangible contribution of the IGC to the implementation of the DA, with the adoption of an international legally binding treaty/treaties, which would strengthen transparency and effectiveness of the international IP system, protect the three subject matters, promote creation and guarantee the holders of TK and GRs the right to equitable benefit-sharing. The assistance provided by the WIPO Secretariat should meet the specific needs of the particular countries concerned in terms of development. The African Group was determined to achieve the objectives within the IGC and would continue to participate in its work constructively. It hoped that the remaining sessions would allow continuation of the implementation of Recommendation 18 as well as other relevant recommendations.

244. The Delegation of the Islamic Republic of Iran said that the importance of the DA recommendations could not be overemphasized. As one of the developing countries, it was in favor of streamlining Recommendation 18. One of the important WIPO committees was the IGC and one of the recommendations dedicated to the work of the IGC was to accelerate the negotiations on different subject matters. The work of the IGC was an important contribution to the actualization and implementation of the GA recommendations. It urged all Member States to reconsider their approach in order to implement one of the important recommendations. It highlighted the importance of technical assistance provided by the Traditional Knowledge Division to some Member States with regard to their national legislation and in conducting and organizing joint projects with relevant national organizations, which could also be considered as one of the elements of implementation of the dedicated recommendation.

245. The Delegation of Brazil stated that the outcome of the efforts of the IGC was key to a successful implementation of the DA as a whole. It recalled Recommendation 18 on the IGC and Recommendation 20 on the public domain. The participation of indigenous peoples in the IGC could be seen in light of Recommendation 21. By mainstreaming IP in those countries that had large traditional communities and indigenous groups and were rich in TK and TCEs, the IGC contributed in the most efficient way to the objectives of the DA. That went for all countries, regardless of their development levels. Countries like Australia, Canada, the USA and many others were richer countries that had a very wide treasury of TK, which should be preserved and protected as well.

246. The Delegation of Nigeria recalled DA Recommendations 18, 20 and 21. The IGC's tasks, with reference to GRs, TK and TCEs, were critical in addressing the global development deficit, and finding traction with the IP system. The development deficit globally affected mainly the world's most vulnerable groups, whose greatest asset to addressing that deficit was their TK and TCEs. The work of the IGC was very critical to WIPO's DA. The IGC's work created a link between industry, indigenous peoples and local communities (IPLCs) and development, and therefore, the idea of creating a dichotomy or a conflict of interest between industrialized and developing countries in the IGC's debates was not a sustainable conversation. In order to address global development deficits, industry and IPLCs all over the world had to come together, and the IGC provided that platform. In order to address global development deficits under the WIPO DA, understanding and collaboration across regional groups were very important. The work of the IGC, more than any other, contributed to bringing all the interests

together in addressing the global development deficit. Participation of IPLCs was critical. The Delegation linked the legitimacy of the IGC to the participation of IPLCs.

247. The Delegation of South Africa aligned itself with the statement made by the Delegation of Morocco, on behalf of the African Group. The adoption of the DA in 2007 had altered the mandate of WIPO to include the mainstreaming of the development dimension into its work. The IGC's work played an important part towards the achievement of that mandate and should, therefore, be taken seriously.

248. The Delegation of Indonesia recalled Recommendation 18 of the WIPO DA. It supported that the IGC would report the contribution to the implementation of that particular recommendation to the 2018 General Assembly, taking into account the factual situation throughout the mandate, whether the IGC had actually been implementing Recommendation 18.

*Decision on Agenda Item 8:*

*249. The Committee held a discussion on this item. The Committee decided that all statements made on this item would be recorded in the report of the Committee and that they would also be transmitted to the WIPO General Assembly taking place from September 24 to October 2, 2018, in line with the decision taken by the 2010 WIPO General Assembly related to the Development Agenda Coordination Mechanism.*

**AGENDA ITEM 9: ANY OTHER BUSINESS**

*Decision on Agenda Item 9:*

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

**AGENDA ITEM 10: CLOSING OF THE SESSION**

251. The Chair recalled that IGC 37 was the first of four sessions on TK and TCEs. The working documents had to be rationalized in order to get clarity. The IGC had to start to work through the different frameworks and approaches in the document. Members needed to look at balance, lift themselves up from the existent mechanisms, and listen to the views of the Indigenous Caucus and understand their perspective and their view of the world. He asked members that might have ideas on how to improve the process to forward them to him and the Vice-Chairs. He thanked his Vice-Chairs, with whom he worked as a team. He thanked the Facilitators for their tireless work and valuable contribution to the process. He said they worked very hard behind the scenes to find consensus among conflicting, sometimes unclear, positions. He thanked the Secretariat, which assisted in preparing the meetings and the documents, such as the Updated Draft Gap Analyses. The Traditional Knowledge Division did a significant amount of technical assistance work with Member States across the world. He thanked the RCs, particularly for trying to craft recommendations to the GA that met everyone's needs. The RCs were very important in keeping him informed of all issues. He really appreciated their efforts, realizing they had many other meetings to deal with. He indicated his strong support for

the Indigenous Caucus and the work they did. It was critical to listen to their voices. It was very pleasing to have a recommendation for the Indigenous Caucus in the report to the GA. Representatives of civil society were also key stakeholders in the discussions, as was industry. All three groups of stakeholders were very important to the work of the IGC, which had to balance all those interests. He thanked the Member States. It had been a very successful meeting, as the IGC had been able, for the first time in a long time, apart from agreement on the mandate, to put forward a recommendation to the GA. That was a very good outcome from the meeting. The IGC had a remit and indeed an obligation to make recommendations. If there was something that the GA needed to be told or where the IGC needed guidance, members, collectively, had a responsibility to make recommendations, and not just to forward the texts. He thanked the interpreters for their flexibility and hard work.

252. The representative of Maloca Internationale thanked all the delegations that had supported the recognition of IPLCs as beneficiaries of the negotiated texts. The rights of indigenous peoples could be respected only through FPIC, as a fundamental part of due diligence. The proposed use of databases to perform due diligence was technically impossible within the territories of many Member States and did not guarantee the FPIC of indigenous peoples. Information about the countries, the peoples and the means by which stakeholders had been consulted should be obtained by the appropriate offices in each country as part of the process for evaluating patent applications.

253. The representative of the Arts Law Center, speaking on behalf of the Indigenous Caucus, said that the Updated Draft Gap Analyses clearly showed that existing IP law was not sufficient to protect the GRs, TK and TCEs of indigenous peoples. Clearly, a new set of rules that took account of their collective, cultural rights was required. There were many examples of misappropriation and exploitation of TK and TCEs by non-indigenous users without permission or consent from indigenous peoples. For example in Australia, some 80 percent of indigenous style souvenirs sold were actually made by non-indigenous producers and the majority was imported from overseas. Such unauthorized uses violated their customary laws, diluted their cultures, and caused spiritual, moral, economic, as well as cultural harm. That was why the IGC needed to speed up the process to negotiate international instrument(s) to address those issues. Indigenous representatives at the IGC continued to be shocked by the detachment of the process from UNDRIP, in particular Article 31, which specifically dealt with indigenous peoples' IP rights. For centuries, so much had been taken from indigenous peoples - their lands, children, languages, and way of life. Their TK and TCEs were what made them unique to other cultures in the world, and they could not allow them to be taken away for the interests of innovations and businesses. She highlighted the narrowing scope of protection in relation to the tiered approach. That approach should only be considered with the FPIC of indigenous peoples. Any limitation on protection based on a temporal requirement was unacceptable. She invited the IGC to join other international fora that had seen the need to incorporate the rights-based approach. She urged Member States to look beyond the purely economic paradigm of IP and see the protections of GRs, TCEs and TK as the cultural, moral, and spiritual rights of indigenous peoples. Members were obliged to recognize and respect their right to self-determination. She saw databases, at the most, as complementary measures for TK and TCEs. There should be no databases designed, populated, maintained, or utilized without indigenous peoples' FPIC. Any information contained in databases was not evidence of their knowledge being in the public domain; it was evidence of their property rights. Their TK and TCEs were not in the public domain. There was no international definition of public domain. Customary laws were fundamental for indigenous peoples and had to be considered when drafting those instruments. She also implored Member States to consider pledging funds to the Voluntary Fund. The Fund was depleted and needed further funds for more indigenous representatives to attend the important IGC meetings. The best way for Member States to gain a better understanding of the complexities of the issues involved was to support the participation of indigenous representatives at the IGC meetings. She thanked the Delegations

of Brazil, South Africa and Nigeria for supporting their proposal to encourage Member States to consider an *ad hoc* contribution to the fund from the WIPO regular budget. She also thanked the delegations that had reached out to the Indigenous Caucus and made time to interact with them to better understand their perspective. She thanked the Chair and the Facilitators for all of their hard work. She implored Member States to talk with them to better understand those issues and how one could develop strong protection of TK and TCEs.

254. The Delegation of El Salvador, speaking on behalf of GRULAC, expressed its satisfaction for the work and achievements made at IGC 37. It thanked the Chair for his efforts and for his creative work, always looking for a way forward for all IGC participants. It thanked the two Vice-Chairs for their work and commitment in supporting members. It recognized the work of the Facilitators who had deployed great efforts and done so much work, despite the challenges of working on two documents simultaneously. It welcomed having a Facilitator from its region. It expressed its interest in the upcoming *Ad Hoc* Expert Group in December and would be eagerly awaiting the modalities as to how members could shed light to contribute to that exercise, which was important to move forward and make progress. It hoped to be able to see the participation of experts from its region. It thanked all experts and regional groups for their flexibility, which it hoped could be carried forward in upcoming sessions. It was important to maintain an open mind, because points of view differed. Although not all of its positions had been reflected precisely in the text, it could support the work done, in a spirit of compromise. The participation of indigenous peoples in the IGC process gave legitimacy to its work. Therefore, it assigned primordial importance to having contributions to the Voluntary Fund. It thanked the Secretariat for the preparation of the meetings, the conference services and the interpreters.

255. The Delegation of El Salvador, speaking in its national capacity, supported its statement, on behalf of GRULAC. It was delighted to have successfully concluded the session. The President of El Salvador had just launched a national policy of health for indigenous peoples, as a result of consensus and internal coordination with organizations overseeing the rights of indigenous peoples in the country. That policy had an intercultural health focus, which recognized the knowledge of indigenous peoples. During the launch, the President of El Salvador had expressed with that policy that the Government was bringing justice to one of the most excluded sectors of the country, guaranteeing indigenous peoples' right to health, respecting their knowledge and their traditions. The President had added that it was marking a historic step forward in the path to guaranteeing rights and advancing justice in favor of indigenous peoples in El Salvador. It provided the deserved recognition to the long struggle of indigenous peoples and recognized their dignity and identity. In 2014, the rights of indigenous peoples in El Salvador had been constitutionally recognized. That was one more step in materializing the conclusion. It hoped that sharing that piece of news could serve to motivate the IGC. It was one example of the positive results that could be achieved when there was true commitment and political will.

256. The Delegation of Lithuania, speaking on behalf of the CEBS Group, extended its thanks to the Chair, the Vice-Chairs, the Facilitators and the Secretariat for the hard work during the session and for their efforts in moving the discussions forward. It thanked the interpreters for their patience and professionalism as well as the Conference Services, which ensured excellent working conditions. It appreciated the strong engagement of all delegations, representatives of IPLCs as well as other stakeholders and their valuable contributions to the discussions. IGC 37 was a rich session on TK and TCEs. It looked forward to continuing the text-based discussions at IGC 38, preceded by the meeting of the *Ad Hoc* Expert Group. It was committed to the IGC process and would spare no effort in preparation for IGC 38.

257. The Delegation of Indonesia announced that on that day, in Jakarta, the Prime Minister of Australia and the President of Indonesia had witnessed a defining moment in the finalization



and signing of the Indonesia-Australia Comprehensive Economic Partnership. Speaking on behalf of the APG and the LMCs, it thanked the Chair for his guidance and for a successful conclusion of the session. It thanked the Vice-Chairs, the Facilitators, the Secretariat, the Conference Services and the interpreters. It thanked the RCs, Member States, the Indigenous Caucus and observers. IGC 37 showed that patience and inclusive and frank discussions based on flexibility and compromise could help achieve results. Members could understand each other's position better. It hoped that that spirit could be maintained in future IGC sessions, so as to narrow gaps not only in the text but, more importantly, in the conceptual divide and expectations.

258. The Delegation of Morocco, speaking on behalf of the African Group, expressed its thanks to the Chair for his professionalism and openness, which were very important conditions for the success of any meeting. It thanked the Vice-Chairs and the Secretariat for the preparations of the deliberations and for the management of the meeting. It thanked the Facilitators for all of the efforts they had deployed to provide a revised version of the texts. The treatment of the two issues during the meeting was not an easy task. There were divergences of opinions and of legal interpretations, which made the discussion difficult. The IGC had achieved good results. It was normal to have diversity in a multilateral system and yet moving forward on negotiations required to not cap one's position but to show flexibility. The IGC had to give enough importance to international relations. The text was the fruit of the efforts made to apply those legal considerations. It would always contribute in the most efficient possible way in moving forward. There were often a certain number of challenges and IGC 37 had been an opportunity to build confidence. On that basis, it would continue to build confidence. It thanked all the representatives, the RCs and the interpreters, who allowed members to communicate effectively during all sessions.

259. The Delegation of India extended its sincere appreciation to all participants under the Chair's leadership, well assisted by both Vice-Chairs. It was also thankful to all who were not there but had contributed to make the IGC successful. India was among one of the hundreds of countries affected by misappropriation and biopiracy. Accordingly, it supported an early finalization of the international legal instruments on GRs, TK and TCEs. The absence of such a legally binding instrument(s) allowed continued misappropriation and biopiracy, thereby resulting in an imbalance of the global IP system. One had to ensure appropriate moral and economic rights for freely available TK, which had immense commercial value and was vulnerable to misappropriation. The IGC needed to recognize the important role played by the national authorities as the trustees of TK in those scenarios where beneficiaries could not be identified and also where beneficiaries were identified. India had developed the TKDL, a pioneering initiative in providing defensive protection to India's TK, particularly traditional medicinal knowledge. It looked forward to constructive deliberations at IGC 38, which would lead to a mutually agreeable multilateral framework on GRs, TK and TCEs.

260. The Delegation of the EU, speaking on behalf of the EU and its Member States, expressed its sincere thanks to all who had worked restlessly to bring the IGC forward. It thanked the Chair and the Vice-Chairs for giving valuable advice, for guiding IGC members and allowing them never to lose focus, and for creating a constructive spirit in the IGC. It recognized that it was not easy to serve as a Chair. It thanked the interpreters for their hard work and the Secretariat for providing excellent documents and support. It thanked the Facilitators for their hard work and their dedication to producing tangible results. Although the IGC obviously had not been able to agree on each and every thing at that point in time, it noted with satisfaction that it had eventually come up with further documents that it could accept for further discussions. It sensed with appreciation an increase in mutual understanding. It assured that it would continue to work hard with the goal to reach results acceptable for all. It would do so not only in Geneva but also in Brussels, where it intended to further coordinate with the EU Member States and consider all proposals.

261. The Delegation of China thanked the Chair and the Vice-Chairs for their hard work. It fully understood that it was not easy for the Chair, even after presiding over the IGC for many years. It thanked the Facilitators for their work, especially given that they had worked until midnight. Their work should be respected by all. Under the Chair's leadership, the IGC had carried out full discussions on TK and TCEs, so that all members could agree on Rev. 2 as a basis for further discussions. Members had put forward recommendations to the plenary and those recommendations had created a very good political environment for bridging the gaps between members. The RCs had played very important roles. It was optimistic about the following three meetings, on the condition that members would show flexibility and make more compromises.

262. The Delegation of Switzerland, speaking on behalf of Group B, thanked the Chair, the Vice-Chairs, the Facilitators and the Secretariat for their hard work throughout the week. It thanked the interpreters and the Conference Services for their professionalism and availability. It thanked the RCs for their constructive cooperation during the week, which it very much appreciated. It thanked the IPLCs as well as other stakeholders for their active participation in the IGC's work during the week. It acknowledged the valuable and essential role of all stakeholders for the work of the IGC. It remained committed to continuing to contribute constructively towards achieving a mutually acceptable result in the IGC framework.

263. The Chair closed the session.

*Decision on Agenda Item 10:*

*264. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6, 7 and 8 on August 31, 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 November 5, 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**

**I. ÉTATS/STATES**

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

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Abdulkader BAWAZIR (Mr.), Advisor, Copyright Department, Ministry of Media, Jeddah

ARGENTINE/ARGENTINA

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