

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

**Twenty-Second Session  
Geneva, July 9 to 13, 2012**

DRAFT REPORT

*Document prepared by the Secretariat*

1. Convened by the Director General of WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “the IGC”) held its Twenty-Second session in Geneva from July 9 to 13, 2012.

2. The following States were represented: Albania, Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Bolivia (Plurinational State of), Brazil, Brunei Darussalam, Bulgaria, Burundi, Cambodia, Cameroon, Canada, Chile, China, Colombia, Congo, Costa Rica, Côte d’Ivoire, Cyprus, Czech Republic, Democratic People’s Republic of Korea, Denmark, Djibouti, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Guatemala, Guinea, Holy See, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kenya, Lebanon, Lithuania, Madagascar, Malaysia, Morocco, Mexico, Monaco, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saint Kitts and Nevis, Senegal, Serbia, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, United Republic of Tanzania, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Kingdom, United States of America, Uzbekistan, Venezuela (Bolivarian Republic of), Viet Nam, and Zimbabwe. The European Union (“the EU”) and its 27 Member States were also represented as a member of the Committee.

3. The following intergovernmental organizations (“IGOs”) took part as observers: African Regional Intellectual Property Organization (ARIPO), African Union, International Organization of *La Francophonie* (OIF), Organization of Eastern Caribbean States (OECS), United Nations Permanent Forum on Indigenous Issues (“Permanent Forum”), South Centre, United Nations Educational, Scientific and Cultural Organization (UNESCO).

4. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: *Adjmor*; American Intellectual Property Law Association (AIPLA); Arts Law Centre of Australia; Assembly of Armenians of Western Armenia (The); Association of *Kunas* United for Mother Earth (KUNA); Center for Peace Building and Poverty Reduction among Indigenous African Peoples (CEPPER); Civil Society Coalition (CSC); *Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos* (CAPAJ); Coordination of African Human Rights NGOs (CONGAF); Creators’ Rights Alliance (CRA); Ethnic Community Development Organization (ECDO); Foundation for Aboriginal and Islander Research Action (FAIRA); Foundation for Research and Support of Indigenous Peoples of Crimea (FRSIPC); Friends World Committee for Consultation; Genetic Resources, Traditional Knowledge and Folklore International (GRTKF International); Hawaii Institute for Human Rights (HIHR); Health and Environment Program; Ibero-Latin-American Federation of Performers (FILAIE); Indian Council of South America (CISA); Indian Movement “*Tupaj Amaru*” (Tupaj Amaru); Indigenous Peoples’ Center for Documentation, Research and Information (doCip); Indigenous Peoples’ Council on Biocolonialism (IPCB); Indigenous Peoples (Bethechilokono) of Saint Lucia Governing Council (BCG); International Association for the Protection of Intellectual Property (AIPPI); International Center for Trade and Sustainable Development (ICTSD); International Committee for the Indigenous of the Americas (INCOMINDIOS Switzerland) International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Trademark Association (INTA); International Video Federation (IVF); Knowledge Ecology International, Inc. (KEI); L’auravet’*an* Information and Education Network of Indigenous Peoples (LIENIP); Maasai Experience; Métis National Council; Russian Association of Indigenous Peoples of the North (RAIPON); Saami Council; Traditions for Tomorrow; *Tin-Hinane*; Tulalip Tribes of Washington Governmental Affairs Department.

5. The list of participants is annexed to this report as an Annex.

6. Document WIPO/GRTKF/IC/22/INF/2 provided an overview of the documents distributed for the Twenty-Second session.

7. The Secretariat noted the interventions made, and the proceedings of the session were communicated and recorded on webcast. This report summarizes the discussions and provides the essence of interventions, without reflecting all the observations made in detail or necessarily following the chronological order of interventions.

8. Mr. Wend Wendland of WIPO was Secretary to the Twenty-Second session of the Committee.

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

9. [Note from the Secretariat: The session did not commence on time to allow for informal consultations among the States on the draft agenda (document WIPO/GRTKF/IC/22/1 Prov. 3). The session was formally opened at 17h00 on July 9, 2012.]

10. The Director General, Mr. Francis Gurry, opened the session and recalled that this important session was the third session of the IGC in 2012 and the last session before the forthcoming WIPO General Assembly in October 2012. He paid tribute to the dedication and constructive engagement of all delegations in what had been a very intense work program for the IGC in 2012. He added that the holding of three meetings was unusual. Since the last session of the IGC, he recalled that the Beijing Diplomatic Conference on the Protection of Audiovisual Performances had taken place with a successful outcome. He highlighted the extremely constructive and positive atmosphere that had prevailed amongst all delegations in Beijing. He emphasized the importance of such a spirit in carrying through the work program of WIPO. He welcomed the participating indigenous and local community experts and those who would be members of the indigenous panel. He acknowledged the presence of two members of the UN Permanent Forum on Indigenous Issues, namely Ms. Valmaine Toki of New Zealand and Mr. Paul Kanyinke Sena of Kenya, as well as of the two other panelists, Mr. Robert Les Malezer of Australia and Mr. Mattias Ahren of Sweden. The Director General made a call to delegations for contributions to the WIPO Voluntary Fund, reminding that the Fund had only enough resources at that stage to cover one more IGC, namely, the proposed Twenty-Third session of the IGC. He thanked the Chair for the dedication and hard-work that he had been investing in the IGC process and the guidance he was providing.

11. The Chair, His Excellency Ambassador Wayne McCook of Jamaica, thanked the coordinators of the regional groups for their guidance in preparing and consulting on the work program and working methodology in view of the present session. He recalled that he had had three formal consultations with the regional coordinators in preparation for this session. He thanked the Vice Chairs, Ms. Alexandra Grazioli of Switzerland and Mr. Bebeb A. K. N. Djundjuran of Indonesia, for their support. He reminded the Committee that he had also met with the Indigenous Caucus and thanked indigenous representatives for their useful inputs and suggestions. He announced he would meet with the Chair of the Indigenous Caucus again in the margins of the present session. He advised that the Secretariat had provided a briefing for Member States on the IGC documents and logistical arrangements for the session on July 2, 2012 and that the Secretariat would offer a similar briefing for all observers on the first day of the present session. He informed the IGC that the present session would be accessible on live webcast on the WIPO website for openness and inclusiveness. He hoped to be able to lay out a proposed work program and working methodology for the present session when the plenary would resume its work later in the afternoon. He recalled that the present session constituted a negotiating session and that no opening statements were provided for in the agenda. He offered the possibility for regional groups or Member States wishing to make general opening statements to hand such statements to the Secretariat in order to have them reflected in the report as was the case in previous sessions. He recalled that the present

session was a five-day session as mandated by the WIPO General Assembly. He said that the Committee, as it went along, should reach an agreed decision on those agenda items which required a decision and that the decisions as already agreed would be circulated in writing for formal confirmation by the Committee on July 13, 2012. The report of the session would be prepared after the session and circulated to all delegations in all six languages for adoption at the Twenty-Third session of the Committee. He reminded the IGC that IGC documents were made available in all six languages of the United Nations.

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

12. The Chair introduced the draft agenda for the session as presented in document WIPO/GRTKF/IC/22/1 Prov. 3. He observed that consultations on agenda item 9 of this draft agenda had taken place at the level of regional coordinators. He informed that those consultations had concluded with several alternative language options for the agenda item concerned, but that none of these options had been agreed upon. He said that he would share those options with the Committee for the purpose of transparency, but not for its consideration, as no agreement had been reached on any of them. He shared the options as follows: option 1(a): "Views on further work of the Committee"; option 1(b): "Expression of views on future work of the Committee"; option 1(c): "Expression of views on further matters concerning the IGC"; option 2: "Exchange of views on further work of the Committee"; option 3: "Exchange of views on future work of the Committee"; option 3: "Exchange of views on further matters concerning the IGC"; option 4: "Future work of the Committee"; option 5: "Consideration of further work of the Committee"; option 6: "Consideration of further matters concerning the IGC"; option 7: "Future work". That said, he noted that much time had been already spent on this issue during the day. It was his intention, therefore, to move forward and submit the draft agenda as it stood for consideration and decision by the Committee. In doing so, he opened the floor for statements.

13. The Delegation of Egypt, speaking on behalf of the African Group and in its national capacity, believed that IGC 22 did not have the mandate from the WIPO General Assembly to discuss the IGC's future work as intended by agenda item 9 of the draft agenda. It said that the African Group could not adopt the draft agenda as it stood and requested the deletion of agenda item 9 from the draft agenda.

14. The Chair regretted that no compromise could be reached on the issue. He noted that there was a proposal from the Delegation of Egypt, speaking on behalf of the African Group, for the deletion of item 9 from the draft agenda. He invited the Legal Counsel of WIPO to the podium and asked him, in view of this proposal, to guide the Committee on the decision-making process.

15. The Legal Counsel said that it was his understanding that the Delegation of Egypt, speaking on behalf of the African Group had proposed that the draft agenda be adopted with the deletion of agenda item 9. He added that, should this proposal be seconded by another delegation, then the Committee could proceed to vote by a simple show of hands. He said that this was the proposal at this moment.

16. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that it felt puzzled, because it had not heard any delegation calling for a vote. It found that it was rather unusual to have the Legal Counsel referring to a vote. It added that, in case there would be a formal call to a vote that would be seconded, then the Delegation of the EU would request a brief suspension for consultations. But it emphasized that it had not heard any delegation calling for a vote at this stage.

17. The Chair stated that the Committee had to proceed to submit the draft agenda to a decision making procedure, given the time that had already been lost. He recalled that the

Committee had until now proceeded by consensus. However, he noted that a delegation had asked for the deletion of an item from the draft agenda and that there was no consensus regarding this deletion. He had asked, therefore, for an explanation from the Legal Counsel in order to move forward and not proceed erroneously.

18. The Delegation of South Africa reminded that the Delegation of Egypt had made its motion on behalf of the African Group and requested clarification from the Legal Counsel as to whether this motion still had to be seconded in that particular case.

19. The Legal Counsel said that, although the Delegation of Egypt had made the proposal on behalf of a group of Member States, such proposal was to be considered as a proposal made by one single delegation that would need, therefore, to be seconded by another delegation.

20. The Delegation of South Africa said that it seconded the proposal made by the Delegation of Egypt.

21. The Chair noted that the proposal made by the Delegation of Egypt had been seconded by the Delegation of South Africa.

22. The Delegation of the United States of America supported the request that had been made by Group B for a supplementary agenda item to be added to the draft agenda, namely item 9 in document WIPO/GRTKF/IC/22/1 Prov. 3, pursuant to Rule 5 of the WIPO General Rules of Procedure. It added that this request was made in order to facilitate the work of the Committee. It recalled that, as the mandate given by the General Assembly to the IGC contemplated, IGC 23 was mandated to take stock of further work required to finalize the text. It was disappointed that a full day had been spent on a rather inefficient discussion. It stated further that it opposed the removal of agenda Item 9 from the draft agenda in document WIPO/GRTKF/IC/22/1 Prov. 3. It observed, like the Delegation of the EU, that it had not heard a call for a vote.

23. The Delegation of Australia felt extremely disappointed and surprised that the Committee stood in this situation. It said that WIPO was a consensus-based organization and that the consideration of a vote was not, from its own perspective, a good the start for the present session. It recalled that the Committee had had many successful meetings and had made significant progress. It was of the view that the matter under discussion was not substantive and preferred to see it deferred and submitted to further consultations, referring to the options that had been discussed so far. It recalled that some general discussion on future work had already taken place at the IGC.

24. The Chair said that it would give the floor to the Delegation of Brazil and then suspend the session for fifteen minutes.

25. The Delegation of Brazil said it would prefer to make a statement after the break in order to be able to discuss the matter.

26. The Delegation of South Africa raised a point of order regarding the intended suspension of the session. It recalled that it had seconded the proposal made by the Delegation of Egypt and, therefore, did not see the need to suspend the session and discuss the matter further.

27. The Chair responded to the Delegation of South Africa that he was about to suspend the session in accordance with the Chair's prerogative. He then suspended the session for fifteen minutes.

28. The Chair reopened the session and explained further the suspension, saying that views were expressed by some delegations that a formal call for a vote would need to proceed before the Committee could proceed to any vote. It added that the Committee needed to ensure that it was keeping in line with the General Rules of Procedure. He therefore wished to give more

time to ensure that all the requisite elements for a vote were in place in accordance with the General Rules of Procedure. He then suspended the session for a short while.

29. The Chair reopened the session and said that the necessity, as indicated by him already, to establish certain parameters for a vote, including the standing of members, had delayed the preparation for this possibility. He informed that this preparatory analysis had just been completed. He added though, that in view of the time that was left for the Committee before 18h00, it would not be possible for the Committee to proceed with a vote at this time. It was, therefore, his intention to give the floor to the delegations which would wish to speak and then to suspend before the Committee reconvenes the next day, with the first item on the Agenda being the decision on the adoption of the Agenda, with a seconded proposal to delete one agenda item. He said that, for the time being, the matter had been considered from all angles, including by regional coordinators, and recalled that he was in the hands of the Committee.

30. The Delegation of Brazil, speaking on behalf of the Development Agenda Group ("DAG"), said it was deeply concerned with the situation the present discussions had led to. It had expected that flexibility would be exercised. Although the DAG had not been part of the consultations as such, it still felt confident that all Member States would find an agreeable solution regarding the draft agenda. The Delegation did not see the need for the introduction of agenda item 9. It recalled that the present mandate of the Committee for this session was to make improvement in the text and the Delegation feared that the inclusion of agenda item 9 would lead to endless discussions on this item. It added that this was exactly what had happened on that day.

31. The Chair suspended the session until the next day.

32. The Chair reopened the session at 11h00 on July 10, 2012. He informed the Committee that the regional coordinators had that morning requested the opportunity to consult further on the draft agenda and understood that they had reached consensus on a proposal which could receive favorable consideration by the Committee.

33. The Delegation of the United States of America, speaking on behalf of Group B, thanked the regional coordinators for their flexibility. It submitted and read out the proposal that they had prepared as an alternative language for agenda item 9, as followed: "Expression of Views on Future Matters concerning the IGC."

34. The Delegation of Egypt, speaking on behalf of the African Group, requested to make a formal statement before the adoption of the draft agenda by the Committee as revised.

35. The Chair agreed with the request made by the Delegation of Egypt.

36. The Delegation of Egypt, speaking on behalf of the African Group, expressed doubts as to the need to retain item 9 of the draft agenda, as the present session did not have the mandate from the General Assembly to discuss future work. It believed that this additional agenda item would divert attention from what the IGC mandate provided for, that was, negotiating work to be done on the draft articles regarding traditional cultural expressions ("TCEs"), especially four articles, namely, subject matter of protection, definition of beneficiaries, scope of protection and limitations and exceptions, as well as the submission to the General Assembly of the text of an international instrument which would ensure the effective protection of TCEs. It was up to the General Assembly to take stock, consider the text submitted and the progress made at the IGC, and consider the need for additional IGC meetings. It agreed though with the agenda item 9 as amended, on the understanding that the African Group would not be able to engage in a discussion on agenda item 9, whether informally or formally, and that it firmly believed that there should not be any outcome or decision on this agenda item and that this agenda item should only allow for a mere expression of views by those interested delegations who would like to share or express ideas on this matter.

37. The Chair submitted the draft agenda, revised as proposed by the Delegation of the United States of America, speaking on behalf of Group B, for adoption by the Committee. [Note from the Secretariat: the draft agenda, as revised, was adopted and immediately re-issued as document WIPO/GRTKF/IC/22/1 Prov. 4]. The Chair opened the floor for statements.

38. The Delegation of the Islamic Republic of Iran, speaking on behalf of the Asian Group, recalled that it was up to the upcoming General Assembly to take stock, consider the text and progress made, as well as decide on convening a Diplomatic Conference and on the need for an additional IGC meeting or meetings, in accordance with the IGC mandate. It said that the agenda item 9 as revised could be included, but without prejudice to the complete treatment of all draft articles on TCEs. It noted from an informal meeting between delegations that the inclusion of agenda item 9 as amended would only allow for an expressions of views. It invited the Chair of the IGC to hold open-ended informal consultations in advance of the General Assembly to facilitate the adoption by the General Assembly of a decision on the date of the Diplomatic Conference and on the number of additional IGC sessions that would be conducive to the advancement of the draft text or texts and the convening of the Diplomatic Conference.

39. The Delegation of Brazil, speaking on behalf of the Development Agenda Group, stated that it shared the concern expressed by the Delegation of Egypt on behalf of the African Group, but could agree with the insertion of agenda item 9 as amended. It felt that this agenda item was not reflected in the mandate for the present session and urged Member States to focus the discussion on the mandate as adopted by the General Assembly, namely to submit the draft texts of legal instruments to the General Assembly for its consideration. It reiterated that the General Assembly was the deciding body regarding future work.

40. The Delegation of the United States of America, speaking on behalf of Group B, stated that agenda item 9 would only be an opportunity for delegations to express views on future matters and that no outcome or decision, including on the holding of informal consultations after the present IGC session, should be expected from this agenda item.

41. The Delegations of Angola and Senegal expressed support for the statement made by the Delegation of Egypt on behalf of the African Group.

42. The Delegation of South Africa expressed support for the statement made by the Delegation of Egypt on behalf of the African Group and wished to record its reservations on the insertion of agenda item 9 as amended, as this item undermined the mandate that was given to the IGC by the General Assembly. It considered that the present session should be a fully thematic session in accordance with the mandate of the IGC.

43. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked delegations for their flexibility and expressed its readiness to engage in informal consultations regarding future work during the present session or after, in view of the upcoming General Assembly.

44. The Delegations of Zimbabwe and the United Republic of Tanzania expressed support for the statement made by the Delegation of Egypt on behalf of the African Group and wished to record their reservations on the insertion of agenda item 9 as amended.

45. The Delegation of Pakistan expressed support for the statements made by the Delegation of the Islamic Republic of Iran on behalf of the Asian Group and the Delegation of Brazil on behalf of the Development Agenda Group.

46. The Chair expressed his disappointment at the time that had been spent on this issue, reminding participants that it was up to the Committee and its Chair to make use of the time and resources in the most efficient way and with a clear purpose. He stressed that the IGC was a process that had a cost and that resources had to be used efficiently. The presence of the

Legal Counsel had been necessary to ensure that any determination made by the Committee would have been taken in line with the General Rules of Procedure.

*Decision on Agenda Item 2:*

47. *The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/22/1 Prov. 3 for adoption. The Committee amended item 9 on the agenda to read as follows: "Expression of Views on Future Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)". With this amendment, the agenda was adopted.*

### **AGENDA ITEM 3: ADOPTION OF THE REPORT OF THE TWENTIETH SESSION**

*Decision on Agenda Item 3:*

48. *The Chair submitted the revised draft report of the Twentieth Session of the Committee (WIPO/GRTKF/IC/20/10 Prov. 2) for adoption and it was adopted.*

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

*Decision on Agenda Item 4:*

49. *The Committee unanimously approved accreditation of all the organizations listed in the Annex to document WIPO/GRTKF/IC/22/2 as ad hoc observers, namely: Andean Cultural and Folklore Research Association (Asociación de Investigación Cultural y Folklórico Andino) (ASICFA); Asia Indigenous Peoples Pact (AIPP); Associazione Sant'Antuono & le Battuglie di Pastellessa; Department of Sociology, University of Essex (UK); Foundation for the Regional Development of Araucanía (Fundación de Desarrollo Regional de la Araucanía) (FUDEAR); International Association of IT Lawyers (IAITL); International Trade Center for Development (Centre du Commerce International pour le Développement) (CECIDE); National Center for Human Rights (Centre National des Droits Humains) (CNDH); National League of Indigenous Pygmy Associations of the*



*Congo (Ligue nationale des associations autochtones Pygmées du Congo) (LINAPYCO); Patrice BINGOTO Foundation (Fondation Patrice BINGOTO) (FPB); People's Action for Development (PAD); Rulu Arts Promoters (RAP); The Intellectual Property Institute Nigeria LTD/GTE (IPIN); World Mountain People Association (WMPA) (Association des Populations des Montagnes du Monde) (APMM).*

## **AGENDA ITEM 5: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES**

50. The Chair introduced documents WIPO/GRTKF/IC/22/3 and WIPO/GRTKF/IC/22/INF/5. He recalled the decision by the General Assembly to create a Voluntary Fund for Accredited Indigenous and Local Communities (“the Fund”) to support the participation of indigenous and local representatives of accredited NGOs and noted that the Fund had operated successfully and was widely regarded as transparent, independent, and efficient. The Chair advised again that the Fund would, however, run short of funds after IGC 23 and there would be no funds to cover any session after IGC 23, which would be a great shame and could have the effect of harming the credibility and quality of the process. He reminded the Committee that the Secretariat had initiated a fundraising drive. He advised that a “Case for Support” was attached to document WIPO/GRTKF/IC/22/3. As the Director General had also done at the opening of the session, the Chair urged Member States to make pledges to contribute to the Fund and requested them to seek authority to do so from capital, if needed.

51. In accordance with the decision of the IGC at its seventh session (WIPO/GRTKF/IC/7/15, paragraph 63), IGC 22 was preceded by a half-day panel of presentations, chaired by Ms. Trish Adjei, Arts Law Centre of Australia. The presentations were made according to the program (WIPO/GRTKF/IC/22/INF/6). The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat, which is contained below in the form received:

“The following panelists discussed the theme, “ Intellectual property, traditional cultural expressions and United Nations Declaration on the Rights of Indigenous peoples: Perspectives of Indigenous peoples”: Ms. Valmaine Toki, Vice chair of the United Nations Permanent Forum on Indigenous Issues and Lecturer, Faculty of Law, University of Auckland, New Zealand; Mr. Les Malezer, Co Chair, National Congress of Australia's First Peoples, Sydney, Australia; Dr. Mattias Ahren, Head of Saami Council Human Rights Unit and Lecturer, Faculty of Law, University of Tromso, Norway and Mr. Paul Kanyinke Sena, Member of the United Nations Permanent Forum on Indigenous Issues and East Africa Regional Representative, Indigenous Peoples of Africa Coordinating Committee (IPACC).

Ms. Toki spoke about the main issues, that is, the relevant articles under the Declaration on the Rights of Indigenous peoples, Recommendations from the 11th session of the United Nations Permanent Forum on Indigenous issues and the Recommendations on the draft Traditional Cultural Expressions draft text. Ms. Toki discussed the background and history of the Intergovernmental Committee's work up to the text based negotiations on Traditional Cultural Expressions (TCEs), Traditional Knowledge (TK) and Genetic Resources (GRs) and what the future holds for the IGC, whether a diplomatic conference is likely in the future. Ms. Toki spoke about the problems with the process at IGC, that being the ability of Indigenous people to participate meaningfully and the need to recognize the intrinsic rights that Indigenous peoples have to their cultural expressions and traditional knowledge. Ms. Toki stated that there were problems with the process and

substance of the work at the IGC. Ms. Toki discussed the recommendations that were handed down at the UN Permanent Forum on Indigenous (UNPFII) issues that addressed this issue of process, firstly being establishing a panel of Indigenous experts on International human rights law to provide input into the substantive consultation process to ensure alignment of the text with International human rights. Another recommendation that was given was to establish an Indigenous co chair of the IGC.

Ms. Toki then stated that the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP) was adopted by the United Nations General Assembly in September 2007. Ms. Toki discussed the relevant Articles from UNDRIP that have relevance to the work of the IGC, that being Article 31 which provides the right for Indigenous peoples to maintain, control, protect and develop their traditional cultural expressions, traditional knowledge and genetic resources. Ms. Toki went on to examine Article 18 which provides for participation in decision making by Indigenous peoples. Ms. Toki also discussed the mandated activities of the UNPFII such as providing expert advice, raising awareness as well as disseminating information on Indigenous issues. Ms. Toki then went on to discuss the most 9 important recommendations from the 13 recommendations from the UNPFII to the WIPO IGC. Some of these recommendations included consistency with the Indigenous human rights system, a technical review by Indigenous experts within the Indigenous human rights framework, Friends of the chair groups and an Indigenous co chair to the IGC Chairperson. Ms. Toki then addressed the draft Articles of the TCEs text frequently referring to the TCE example of the Maori Haka which embodies lyrics, emotions and actions. The main points from this discussion included that the beneficiaries should be Indigenous peoples as being consistent with the UNDRIP, inclusion of free prior and informed consent, a 50% Indigenous representative collective body if there will be such a body and an alternative dispute resolution facility with inclusion of Indigenous peoples. Ms. Toki concluded with highlighting the absence of division between TCEs, TK and GRs, the establishment of the Indigenous Co Chair of the IGC, and the establishment of an Indigenous expert panel on International human rights law.

Mr. Malezer focused on Article 31 of UNDRIP, the Indigenous peoples' perspective and looked at the TCE draft text using the relevant UN Human Rights instruments. Mr. Malezer looked at the issues of self determination, non discrimination, property rights, free prior informed consent, systems and institutions as well as State obligations in relation to the TCEs draft text. Mr. Malezer stated these draft Articles should recognize holders of TCEs instead of beneficiaries, being less dismissive of the need to remedy past misuse of TCEs. Mr. Malezer also highlighted that there needs to equal access for all holders of TCEs and that any national laws should comply with the UNDRIP, CERD and Universal Bill of Rights. Mr. Malezer also raised the point that many delegates have stated that international human rights standards have no meaning at WIPO however he stated that this process will fail if States do not recognise the rights of Indigenous peoples.

Mr. Ahren put the draft TCE articles under a microscope and highlighted the existing issues and suggested new text for namely Articles 2, 3, 4 and 5. Under Article 2, Mr. Ahren emphasised that the beneficiaries who should be included are Indigenous peoples and local communities as these groups are the central element in the definition of TCEs. These peoples are seen as developing, holding, using and maintaining the TCEs. Looking at Article 3, Mr. Ahren suggested that the current text is quite similar to Article 5 and looked to the Nagoya Protocol language in Article 7 and 4(2) and (3). Mr. Ahren pressed that there must be conformity between the TCEs and TK instruments so the right of consent should pertain to all forms of TCEs. Mr. Ahren suggested that Article 3 should include free, prior, informed consent, some form of benefit sharing to the beneficiaries and that derogatory and offensive use always be forbidden. Mr. Ahren then looked at Article 4 and management of rights. He stated that the main issue was the level of State

involvement to assist beneficiaries to realize their rights under this instrument. Mr. Ahren thought that this Article was complicated and long. He thought that the main point should be that the management of TCEs is by Indigenous peoples. In the final point, Mr. Ahren looked at Article 5, exceptions and limitations. He stated that this Article included the main points of the public domain, third party rights and preservation which overlaps with Article 3. He suggested that it be deleted and merge relevant elements into Article 3. He also stated that there needs to be tighter control on what museums and galleries can and cannot do with TCEs.

Mr. Sena discussed the African context, examining the draft TCE Articles in relation to UNDRIP. Mr. Sena looked at the relation to the traditional knowledge instrument and how TCEs fit within the broader context of TK. He also emphasised the need for individual and collective rights over TCEs. Looking at the draft Articles, Mr. Sena discussed the need for a prescriptive and rights based approach to the policy measures. Mr. Sena also thought that there should be careful attention paid to public displays of TCEs in libraries and archives, some sort of restriction on use and reference to customary law at the international level. Mr. Sena then went onto to discuss the need for transboundary protection in the African context and for appropriate alternative dispute resolution (ADR) mechanisms. In conclusion, Mr. Sena suggested the way forward would be to have an expert committee to safeguard TCEs and a compensatory fund for misappropriated TCEs.

There were three questions from the floor. The Delegation of New Zealand asked about the definition of Traditional cultural expressions from the Panel given that there are two approaches to the definition, the wide and narrow approach. The Delegation stated that if there was a list in the definition that there may be a risk of leaving something off the list. The Delegation also asked about the collective rights management issue and what beneficiaries can do and that should not be addressed by the instrument. Mr. Ahren stated that there was no need to list all the various TCEs and to leave the list broad. He also stated that there was no need to instruct beneficiaries on how to manage their own TCEs. Ms. Toki stated that she was open to both types of definitions but if there was to be lists that she appealed to the principle of *eiusdem generis* to include other items.

The Delegation of Australia asked what the panel about the public education and awareness that UNPFII was doing. The Delegation also asked about possible language on the definition of the beneficiaries under Article 2. Ms. Toki stated that UNPFII does have a role in helping States conduct their negotiations and working in countries in raising awareness. Mr. Ahren stated that the definition should include the beneficiaries as being Indigenous peoples and local communities. Mr. Ahren also suggested that the title of the Article should be called rights holders or holders. Mr. Ahren also stated that if a community or Indigenous peoples cannot be linked to a particular TCE, then he has no problem with the State stepping in as the rights holder.”

*Decision on Agenda Item 5:*

52. *The Committee took note of documents WIPO/GRTKF/IC/22/3, WIPO/GRTKF/IC/22/INF/5 and WIPO/GRTKF/IC/22/INF/7.*

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

54. *The Chair proposed, and the Committee elected the following eight members of the Advisory Board to serve in an individual capacity: Ms. Gulnara Abbasova, Consultant, Human Rights Unit, Foundation for Research and Support of Indigenous Peoples of Crimea, Simferopol, Ukraine; Mr. Ousmane AD Dala, Representative, ADJ MOR, Tombouctou, Mali; Mr. Nabiollah Azami Sardouei, Legal Expert, Legal International Affairs Department, Ministry of Foreign Affairs, Tehran, Islamic Republic of Iran; Mr. Georgi Damyanov, Director, Copyright and Related Rights Department, Ministry of Culture, Sofia, Bulgaria; Mr. Clinton Dengate, Executive Officer, International Intellectual Property Section, Department of Foreign Affairs and Trade, Canberra, Australia; Ms. Kathy Hodgson-Smith, Consultant, Métis National Council (MNC), Ottawa, Canada; Mr. Mandixole Matroos, First Secretary, Permanent Mission of the Republic of South Africa, Geneva; Mr. Justin Sobion, First Secretary, Permanent Mission of Trinidad and Tobago, Geneva. The Chair of the Committee nominated Ms. Alexandra Grazioli, Vice-Chair of the Committee, to serve as Chair of the Advisory Board.*

## **AGENDA ITEM 6: TRADITIONAL CULTURAL EXPRESSIONS**

55. The Chair advised that he had consulted with regional coordinators and with the Indigenous Caucus and that these consultations had been most helpful in defining a work program as well as a working methodology for this agenda item. He said that the Chair would be guided by the principles of transparency, fairness and equity, inclusiveness, efficiency, orderliness, focus and discipline. He proposed a working methodology which envisaged a twin approach, combining, in a complementary manner, the plenary in formal session and an expert group in informal session. He indicated that, following consultations, a facilitator would continue to assist the IGC in its work, namely Ms. Kim Connelly-Stone of New Zealand. He added that each element of the working procedure would have its own distinct complementary role and function and that the plenary would provide for the presentation of views, positions, drafting proposals and the taking of decisions. Regarding the plenary, the Chair stated that it would be led by himself with the assistance of the facilitator and that discussions in the plenary would be reported on as usual. He added that the Secretariat would be on hand to assist the facilitator in keeping note of the discussions. The plenary would twice review the text of the draft articles as presented in the Annex to document WIPO/GRTKF/IC/22/4 and be invited to make comments on the text. The text, as revised by the facilitator, would be noted and transmitted to the General Assembly at the closing of the present session. Regarding the expert group, the Chair explained that the expert group process was to facilitate, in a smaller informal setting, the

reaching of compromises and the reduction in the number of options in the text where that could be possible and appropriate. The Chair added that the expert group would be invited to proceed through live-drafting. The Chair explained that each regional group would be represented by a maximum of five experts in the expert group. He highlighted that a regional group could decide to nominate a lesser number of experts and that, in order to increase transparency, other Member States representatives would be permitted to sit in on and observe the meetings of the expert group on a first-come, first-served basis. The Chair said that these representatives would observe only and not have direct speaking rights but would be able to channel observations, if necessary, through the designated experts. Indigenous peoples would be invited to nominate an expert to participate in the expert group, in keeping with the rules of procedure applicable to observers in the plenary, and that a second indigenous expert would be invited to attend as an observer without speaking rights. He added that State and indigenous peoples' experts could be changed based on the draft article or issue being worked on. In the expert group, the experts could take the floor and make drafting proposals. The text would be up on the screen and drafting proposals would be entered on the screen. The editing and final text to be considered by the plenary for the second time would be done by the facilitator on the basis of these inputs. The plenary would go through the revised text to ensure that the determination of what would appear in the revised text was the reflection of what was expressed in plenary and in the expert group. He added that interpretation into English, French and Spanish would be available during the meetings of the expert group, and that the text to be worked on would be in English. The Chair stated that the facilitator would help and guide the discussions of the expert group, taking into account the issues identified in the Note provided by the former Chair, Ambassador Philip Richard Owade (document WIPO/GRTKF/IC/22/INF/4) which gave vital guidance in terms of the priorities to be considered. Regarding the sequencing of the IGC work, the Chair explained that an initial read-through and discussion of the draft articles, as presented in the annex to document WIPO/GRTKF/IC/22/4, would be undertaken in plenary before the expert group would meet. That would be followed by the expert group process and, then, by a second review by the plenary, which would be involved throughout this process. Regarding the first read-through of the draft articles, the Chair announced that the Articles in the first read-through would be discussed in the following order: 1, 2, 3, 5, 4, 6, 7, 8, 9, 10 and 11, followed by the Objectives and General Guiding Principles. In consultation with the IGC, flexibility would be exercised by the Chair to ensure that the four main articles, namely 1, 2, 3 and 5, were given due priority and attention in accordance with the IGC mandate. However, the discussion of the other articles would also be properly accommodated. After this first reading-through in plenary and the meetings of the expert group, the facilitator would then prepare and circulate a revised version of the draft articles (Rev. 1) which would take into account the work of the first plenary discussion and of the work of the expert group. The plenary would then reconvene in order to consider the text, provide comments thereon and note it for transmittal to the General Assembly, notwithstanding any last editorial revisions made by the facilitator.

56. The Chair then introduced the TCEs text, found in the annex to document WIPO/GRTKF/IC/22/4. He recalled that the text before the Committee was not new. A text of "Objectives and Principles" had first been drafted in 2004, and, between 2004 and 2010, it had been discussed and revised by successive IGC sessions and through three intersessional commenting processes. Significant changes were made to the text at the 1st Intersessional Working Group (IWG 1) that had met in July 2010 and that text had been further negotiated at IGC 17 in December 2010 and IGC 18 in May 2011. Certain key articles were then focused on at IGC 19 in July 2011 (articles 1, 2, 3 and 5) and these were, therefore, more advanced than the other articles. He added, though, that numerous complex issues remained unresolved. Key issues, as the mandate of the IGC identified, were the definition of the subject matter, beneficiaries, scope of protection and exceptions and limitations. He highlighted that much work was still needed, bearing in mind the IGC's mandate to submit to the WIPO General Assembly in October 2012 a text, for the General Assembly to take stock, consider progress and decide on convening a Diplomatic Conference. In terms of making progress on the text, the Chair hoped that, by the end of that session, the IGC would be able to transmit a next version of

the text to the General Assembly with fewer options and that was further consolidated. As at the previous session, the Chair welcomed the Note prepared by Ambassador Philip Richard Owade, which was very helpful. The Chair proposed to introduce each article with a reference to the main outstanding issues signaled by this Note, which was contained in document WIPO/GRTKF/IC/22/INF/4. Moreover, the Chair drew the Committee's attention to the contribution of the Like-Minded Countries (LMCs) reflected in document WIPO/GRTKF/IC/22/5 and the Glossary of Terms contained in document WIPO/GRTKF/IC/22/INF/8. The Chair opened the floor on Article 1. [Note from the Secretariat: in opening the floor on each article, the Chair briefly introduced the article and its key issues, drawing from the note in document WIPO/GRTKF/IC/22/INF/4].

57. The Delegation of the EU, on behalf of the EU and its Member States, supported Option 1. It emphasized that this option would allow Member States to have maximum flexibility in defining the scope of protection relevant to their specific circumstances.

58. The Delegation of Egypt preferred Option 2, since it contained greater detail and reflected correctly the subject matter of protection. It suggested making reference to UNESCO's achievements on the protection of intangible cultural heritage. It recalled that the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage set forth protection measures which were in line with Article 1.

59. The Delegation of Georgia supported Option 2 and indicated that the words "whether fixed or unfixed" should be deleted in paragraph 1(c) since they left uncertainty and were inconsistent with the essence of TCEs, as most TCEs were passed from generation to generation by oral means and were unfixed.

60. The Delegation of Argentina preferred Option 1 but stated that the best way of reflecting the categories would be to have a footnote and not include them within the article. It would not be a good idea to include the sentence on TK within the definition of paragraph 1 since these categories would be protected under two different instruments. Therefore, the Delegation proposed to keep at least the square brackets around the TK sentence. Regarding tangible and intangible forms, the Delegation stated that it should at least be adopted as a criterion that these forms, whether tangible or intangible, were capable of being reproduced.

61. The Delegation of Norway supported Option 1 which provided a great deal of flexibility in view of the wide diversity of TCEs. It also supported in Option 1, paragraph 2, the inclusion of letter (c) referring to TCEs being "distinctive of or the unique product of the cultural and social identity and cultural heritage of the beneficiaries", that being in line with its proposal as discussed in the TK text at the last session. The Delegation suggested also that a reference to the beneficiaries as set out in Article 2 be included for all of the criteria listed in paragraph 2.

62. The representative of Saami Council stated that he was flexible on Option 1 or 2 but highlighted the main element to be retained in both options: in Option 1, paragraph 2(d) "maintained, used or developed by the beneficiaries set out in Article 2" should remain, as just referred to by the Delegation of Norway; in Option 2, paragraph 2 should define TCEs as referring to a specific group, namely "indigenous peoples and/or local community". He added that those were the key elements that he needed to see retained in whatever option was chosen.

63. The Delegation of Colombia preferred Option 2 because it was much broader in its definition. Option 2 was not confined to artistic expressions, but also covered expressions in an intangible form. Moreover, Option 2 gave the autonomy to national legislation to qualify the terms under which protection was provided. It considered that Option 2 did not contain subjective nor restrictive criteria such as artistic expressions, creative intellectual activities and distinctive expressions.

64. The Delegation of Trinidad and Tobago supported Option 2 and highlighted that it was important to include examples and proposed an amendment to Option 2, paragraph 1(d) as follows: "Tangible and intangible expressions such as material expressions of art, handicrafts, works of mas, architecture and tangible spiritual forms and sacred places." In fact, the Delegation indicated that works of mas in itself did not consist of tangible custom only but also included an intangible manifestation which accompanied that custom.
65. The Delegation of Japan recognized that the subject matter of protection of TCEs was a fundamental issue. As for paragraph 1 of both Options 1 and 2, the Delegation noted that the scope of protection was still vague. The Delegation asked for clarification on how "traditional" would function as a criterion. It wondered whether the requirement to be "traditional" depended on duration, such as how many generations were needed to be considered as traditional. The Delegation of Japan added that "from generation to generation" in Option 1, paragraph 2, was not clear for the same reason. Generally speaking, it stated that it was not appropriate to establish any concrete measures concerning subject matter whose scope was vague. In addition, the Delegation of Japan believed that "shall" in Option 2, paragraph 2 should be replaced by "should", given the legal status of the forthcoming instrument.
66. The Delegation of the Plurinational State of Bolivia preferred Option 2, but suggested adding to each of the subparagraphs the following phrase: "and adaptations of the same" or "and adaptations thereof."
67. The Delegation of Brazil supported Option 2 and stated that the extensive exemplification of categories of TCEs that were eligible for protection was fundamental in order to assure clarity and legal certainty.
68. The Delegation of Australia noted that the substantive differences between the two options were relatively narrow and that, ideally, the expert group should be able to merge them. It said that eligible TCEs needed to be "distinctive" or "the unique product of the culture", as opposed to the vague notion of being "associated with", since this would better encapsulate the authentic and unique character of the TCEs worthy of protection. On whether examples needed to be included in the text, the Delegation said that its main concern was to ensure legal certainty. It noted that any category of TCEs which would not be listed could be interpreted as having being left out purposefully. It was, therefore, of the view that a higher level of abstract definition would better ensure legal certainty. Finally, the Delegation suggested amending "passed from generation to generation" in Option 1, paragraph 2(b) and Option 2, paragraph 1 into "passed from generation to generation and between generations". This was to address the situation where TCEs had not been directly transmitted from one generation to another, either because there had been a gap in the generational transmission for some reason or because the transfer was actually skipping a generation.
69. The Delegation of Oman preferred Option 2. It aligned itself with the proposal of the Delegation of Egypt relating to the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, as that would ensure consistency between relevant international instruments.
70. The Delegation of the Islamic Republic of Iran supported Option 2, but highlighted that the word "carpet" had been omitted from the list of examples in subparagraph 1(d), while it had been included in the previous text. The Delegation would like to see "handmade carpet" reinserted in the list in subparagraph 1(d).
71. The representative of Tupaj Amaru said that he had submitted to the Secretariat a complete drafting proposal in writing, with comments and amendments to each Article related to TCEs. Regarding Article 1, he suggested the following: "Article 1: Subject matters of protection. The present International instrument shall have the purpose of protecting the traditional cultural expressions and expressions of the folklore in all their tangible and intangible forms. This includes all forms of expressions and different places where they themselves

express appear and/or are evident in the cultural heritage. They are transmitted from generation to generation in time and space. The legal protection of TCEs from (against) any illicit use, as stipulated in the present article, shall be applied in particular to: (a) Phonetic or verbal expressions, such as stories, popular stories, epics, popular legends, poetry, riddles and other narratives; as well as the words, signs, oral expression, names and sacred symbols; (b) the musical or (aural) sound expressions, such as songs, the rhythms, and indigenous instrumental music; (c) the corporal expressions by actions, such as dances, scenic representations, the ritual ceremonies in sacred places, the traditional games, and other interpretations or executions, theatre and dramatic works based on popular traditions; (d) The tangible expressions, such as works of art, in particular drawings, designs, paintings, sculptures, pottery, terracotta, mosaics, woodwork and jewellery, architectural and funerary spiritual works. 2. Protection and safeguarding will be applied to all TCEs/EF which are the fruit of a collective and intellectual activity and constitute the living memory of indigenous peoples and local community and belong to this people or community as an intrinsic part of their cultural, social and historic identity or heritage.” He said that his proposal merged Options 1 and 2, with some specific improvements. He pointed out that this merged version as proposed would facilitate the discussions of the IGC and asked all Member States for their support.

72. The Chair, in order to facilitate the identification of the elements which would improve the text as it stood, asked the representative of Tupaj Amaru whether there were new specific elements in his suggestion and, if so, which they were. In such case, those new drafting elements would need the support of a Member State, if he wished that those new elements be introduced in the text by the facilitator.

73. The representative of Tupaj Amaru added that his proposal had drawn from the standard legal concepts and glossary that framed the UNESCO Conventions and the UN Declaration of Rights of Indigenous Peoples (“the UNDRIP”).

74. The Delegation of Cuba said that it would be interested to take into consideration the merging suggestions made by the representative of Tupaj Amaru and have them discussed by the Committee.

75. The Chair, replying to the Delegation of Cuba, indicated that Member States, when endorsing drafting suggestions made by observers as formal proposals, needed to state which specific language they were endorsing. The Chair took note though of the recommendation made by the representative that Option 1 and Option 2 be merged. He said also that the detailed written suggestion of the representative of Tupaj Amaru would be passed over to the facilitator for her consideration.

76. The Delegation of the United States of America expressed its strong support for Option 1, because it provided a simple and straightforward formulation and gave Member States enough flexibility in protecting or safeguarding TCEs. It noted the helpful comments made by the Delegation of Japan concerning the need to avoid language that would prejudice the ultimate nature of the instrument. Therefore, the Delegation preferred a “should/shall” formulation that provided the necessary flexibility, given the state of discussion on the nature of the instrument. The Delegation reiterated that it was looking for practical and workable solutions that would allow Member States the opportunity to provide appropriate protection for TCEs. With respect to the important issue of “tangible” versus “intangible” forms of eligible TCEs, it noted that it had been a topic of discussion within the IGC for a long time and that by envisaging the extension of IP protection to intangible property, the IGC had entered new and perhaps uncharted waters. It noted the closeness of that formulation to the 2003 UNESCO Convention for the Safeguarding of the Cultural Intangible Heritage and indicated that it was linked to the discussion on Article 10. It was of the view that WIPO had to undertake a serious and sustained discussion of the relationship of TCEs instrument to other international instruments. The Delegation highlighted that the field of TCEs, TK and GRs was a crowded area of international law and norms. With respect to the issue of fixation, it expressed a preference for the protection of



fixed forms of TCEs. It observed that many countries would seek to provide copyright or copyright-like protection for TCEs, and fixation had been a longstanding and important element of copyright protection. With respect to the issue of whether “knowledge” should be included or not in the definition, the Delegation preferred not reflecting this term in that particular article. With respect to the important issue of the linkage between subject matter and the associated community, the Delegation preferred the use of the word “unique”, as it considered the close association between the subject matter and the source of TCEs to be an important principle that would ultimately make any instrument workable.

77. The representative of GRTKF International supported Option 2 because it provided examples which Member States could add on to later. Concerning Option 2, subparagraph 1(c), the representative made the request that the text should use the term “sports and traditional games” instead of “traditional sports and games”, exactly as in the UNDRIP. Moreover, the representative supported the amendment proposed by the Delegation of Trinidad and Tobago for inclusion of works of mas as both tangible and intangible.

78. The Chair took note that the Delegation of Trinidad and Tobago supported the proposal made by the representative of GRTKF International.

79. The Delegation of Sri Lanka supported Option 2 in principle, but proposed the following amendments to the text in Option 2. Firstly, in subparagraph 1(a), he suppressed the words “phonetic and” before “verbal expressions” and added the terms “phonetics, ideas” before “stories”. Secondly, in subparagraph 1(b), he suppressed the words “musical or” before “sound expressions” and added the term “music” before “and instrumental music.” Thirdly, in subparagraph 1(c), he proposed the term “action expressions” instead of “expressions by action”. Fourthly, he proposed to replace all subparagraph 1(d) by “material expressions, such as art, handicrafts, works of mas, architecture and all kinds of tangible and intangible expressions, spiritual forms, and sacred places.” Finally, in Option 2, paragraph 2, he proposed to invert “national law” and “customary practices” to read as follows: “in accordance with the customary practices and national law.”

80. The Delegation of India, on Article 1, expressed its support for Option 2, the main reason being the comprehensive nature in which TCEs were treated. That option also reflected the ground reality of how communities understood, developed and maintained TCEs; it also took care of the fact that some TCEs, during their development and maintenance, moved from one community to another, while still being maintained and used by the communities. The Delegation reiterated that the word “knowledge” had to be part of the definition, because there were a number of categories of knowledge systems that overrode TCEs and TK. Until the IGC consolidated a clear definition of TK in the TK document, it was extremely difficult to make a decision on removing the word “knowledge.” The issue of “tangible and intangible” and the “combination thereof” was also a reflection of how TCEs were understood by the communities, and that last phrase was important. Paragraph 2 on the criteria for protection was important because it set the standard and really covered all forms of TCEs.

81. The Delegation of Saint Kitts and Nevis stated its support for Option 2 because of the clarification provided by the examples cited; it was particularly in support of the inclusion of “works of mas.”

82. The Delegation of the Russian Federation preferred Option 1 because it was more flexible.

83. The representative of FILAIE was in favor of Option 1 because the definition of TCEs was broader. Option 2 was very detailed and there was a risk that if something was not in the list, it would be excluded. In Option 1, it proposed adding, after “artistic”, “and literary.” He also proposed adding the word “original” so as to avoid giving protection to tangible or intangible TCEs which were copies of other expressions. The concept of originality reflected the very

concept of creation which the IGC was trying to protect. He did not agree with the reference to TK because there could be confusion. He believed, however, that the expression “passed from generation to generation” had a connection with the term of protection, and he wished to know when the protection started and when the protection was supposed to end.

84. The Chair took note of the proposal and asked if there was any Member State support for the addition of the words “and literary.”

85. The Delegation of Canada supported the proposal made by the representative of FILAIE to add “and literary.”

86. The Delegation of Thailand generally associated itself with the LMCs position submitted at IGC 19, which appeared in document WIPO/GRTKF/IC/22/5 and had been incorporated in the form of options in document WIPO/GRTKF/IC/22/4. Article 1 was very important as it concerned the subject matter of protection. The IGC needed to set the right tone for proper understanding as to what could be eligible for protection. The Delegation supported Option 2 in all three paragraphs which mostly reflected the LMCs’ position. That option, which had gone through many rounds of discussion at Asian Group and LMCs meetings, gave a very clear definition with some illustrative and non-exhaustive examples for clarity of understanding of the subject matter of protection. The Delegation was flexible on the amendment proposed by the Delegation of Trinidad and Tobago in Option 2. Option 1 was too limited and the restricted listings under its paragraphs 1 and 2 did not give adequate room for proper interpretation. It had concerns about the term “artistic” in paragraph 1 and about “creative intellectual activity” in subparagraph 2(a). Those terms could lead to misunderstandings about the nature of TCEs being generated and changed over time and not being only of artistic nature or a result of intellectual creativity. It called for clarification on those two issues.

87. The Delegation of Ecuador supported Option 2 because it appeared to better reflect the subject matter to be protected. It was important to explain everything very clearly and with great precision and detail, in order not to give rise to different interpretations by judges. Protection had to be provided for all the TCEs of all peoples of the world. It should be left up to domestic legislation and national authorities to determine the specific choice of terms to describe the subject matter. It was prepared to be flexible and accept the proposal made by the Delegation of Trinidad and Tobago and the delegations of other Caribbean countries about adding, after tangible: “and intangible” in subparagraph 1(d). It wished to have an explanation, in Option 1, subparagraph 2(a), of what was meant by “creative intellectual activity.”

88. The Chair opened the floor on Article 2.

89. The Delegation of the EU, speaking on behalf of the EU and its Member States, favored Option 1 and preferred a definition without a reference to “peoples” or “nations.” Those terms suggested that protection would be granted to a very broad group of beneficiaries, the scope of which was poorly defined. It believed the scope of protection had to be sufficiently clear.

90. The Delegation of Mexico was in favor of Option 1. It proposed adding, after “local communities”: “and other entities existing in the legislation of each State.”

91. The representative of the Saami Council favored Option 1. He pointed out that it was standard practice in the UN to refer to indigenous peoples in the plural and exhorted the IGC to follow that practice. Regarding Option 2, which referred among other things to “families” and “individuals,” he said he had not heard anyone disagreeing on the collective nature of TCEs, as defined in Article 1. Thus it would not be possible to have families and individuals as right holders. They could be owners of TCEs but they had to derive the right from the group to which they belonged. The group was the right holder.

92. The representative of the Métis National Council supported Option 1 for some of the reasons mentioned by the representative of the Saami Council. The idea that there be TCEs

shared among indigenous peoples was possible. She preferred the wording “Indigenous peoples.”

93. The Delegation of Australia considered the primary beneficiaries within Australia to be Australian indigenous communities. It recognized that Member States should be afforded the flexibility to include other traditional communities which were not indigenous, and there was sufficient flexibility in the text for that purpose. It also said that there were lessons to be drawn from the TK text around how some of those issues could be represented, in particular from the discussion on beneficiaries. There was introductory language which was agreed and fairly easily identifiable. It suggested that it was a useful model to follow, to start to identify the substantive policy issues for discussion rather than continuing down the line of a recitation of preferred options. It hoped that was something that could be achieved by the expert group.

94. The Chair invited delegations to note that there was a two-pronged approach in the working methodology for this session. The articulation in the expert group of rationales, perspectives, clarifications, and responses to questions would allow for deeper engagement on the elements of the various provisions. The expectation was that each critical point of view would be represented in the experts’ discussions. The IGC had to be mindful that on some issues, it could allow for further intensive give-and-take to take place at the expert level, and that the “high points” of national positions be the subject of presentations during the plenary session, recording that the IGC would, in addition to the expert process, come back to the plenary and see more clearly the evolution of the text as it developed.

95. The Delegation of Bangladesh preferred Option 2, because there were countries like its own where no particular groups had been identified as indigenous or local communities. Therefore, it wished to have “nations” or “any national identity determined by domestic law.” It referred to Article 2 of the LMCs text in document WIPO/GRTKF/IC/22/5 and wished to have that wording in the text.

96. The Delegation of Norway was in favor of Option 1 and wished to see the term “indigenous peoples” used. It supported the statement made by the representative of the Saami Council. Option 1 was the logical approach to defining the beneficiaries in an instrument that addressed TCEs that were distinctive of a group of people.

97. The Delegation of Senegal expressed its preference for Option 2. Subparagraphs (a) to (h) reflected the multiple cultural and social dimensions of its country.

98. The Delegation of Georgia considered that it was appropriate to consolidate Options 1 and 2 because in Georgia, like in many other countries, there were no indigenous people as such, and TCEs were the property of the citizens of Georgia, of the whole nation. However, it proposed excluding subparagraphs (c), (d), (g) and (e), as those concepts were encompassed in the term “local communities.” It proposed consolidating the options as follows:  
“1. Beneficiaries of protection for traditional cultural expressions are indigenous peoples, local communities and nations who develop, use, hold and maintain the cultural expressions.  
2. Where traditional cultural expressions are not specifically attributable to or confined to an indigenous or local community or it is not possible to identify the community that generated it, any national entity determined by domestic law.”

99. The representative of Tupaj Amaru proposed the following text: “For the purposes of the present instrument, it shall be understood by beneficiaries the collective entitlement of the creators, possessors, guardians, and holders of traditional cultural expressions or expressions of folklore, which are the indigenous peoples, local communities and their descendants: (a) who have been entrusted with the custody, care and the safeguarding, protection and preservation of the TCEs, in accordance with the laws and customary practices of indigenous peoples, according to current international norms on intellectual property; (b) and who, in the collective and traditional context, according to customary laws and traditional practices, maintain,

preserve, develop, use and control TCEs as authentic and genuine elements of their cultural and social identity and their cultural heritage.”

100. The Chair said that the proposal by the representative of Tupaj Amaru was contained in the reference to indigenous peoples and local communities which was already in the text. Substantively, therefore, there was nothing to be added. He asked the facilitator to take note of the explanatory references to custody, but noted that there was nothing new in the proposal by the representative of Tupaj Amaru.

101. The Delegation of Brazil supported Option 2. However, it sought clarification on the list of beneficiaries and wished to reduce it to subparagraphs (a) and (b). Regarding inclusion of other beneficiaries such as families and individuals, it favored the language of Article 2(2) of the LMCs text in document WIPO/GRTKF/IC/22/5 and wished to see that option reflected in the TCE draft text.

102. The Delegation of El Salvador supported Option 1, because the definitions remained open to include other groups which were not necessarily reflected in Option 2. At the same time, it considered essential to add the term “create” before “develop.”

103. The Delegation of Colombia concurred with the Delegation of Brazil. It supported the inclusion of “indigenous peoples” and “local communities.” It wished to maintain subparagraph (h) and to include Article 2.2 of the LMCs text in document WIPO/GRTKF/IC/22/5 regarding the fact that local communities would be defined in accordance with the classifications provided by the States in domestic law.

104. The Delegation of Japan believed that the definition of beneficiaries was insufficient if it did not describe any relationship between each TCE and its corresponding beneficiary. In addition, the scope of TCEs was not yet clear, which made it difficult to clear the scope of beneficiaries. The Delegation reiterated that the scope of TCEs had to be defined clearly.

105. The Delegation of Argentina considered that Option 1 was the one that best reflected the universe to be protected. It agreed with maintaining the reference to “indigenous peoples” but said that the meaning of “local communities” was unclear. It was not opposed to it, but it said that it required more reflection. In relation to Option 2, it considered that the community would act as a legal entity on behalf of all its members and it was therefore not appropriate to establish exclusive rights for individuals as referred to in subparagraph (g).

106. The Delegation of the Plurinational State of Bolivia supported Option 2. However, it had issues with the concepts of individuals and families, and preferred that those not be in the text, as they could receive protection under copyright. Those concepts contradicted the communal ownership of TCEs. It supported the contribution of the LMCs text in document WIPO/GRTKF/IC/22/5, which had to be looked at in more detail and could be picked up in the text.

107. The Delegation of Switzerland supported Option 1. It did not support the inclusion of “nations” and “individuals.” In its view, the two texts on TCEs and TK had to use parallel concepts and terminology. Thus the IGC had to look at the TK Article 2 on “beneficiaries”; the present text, in the Facilitators’ Option (Convergent Text), referred to “indigenous peoples and communities and local communities.”

108. The representative of FILAIE considered that instead of “beneficiaries,” the text should read “holders.” He made a distinction between beneficiaries and holders. A right holder was a person who, because of his creativity, held a right. A beneficiary could be someone else, for example, a visually impaired or disabled person: those people were being granted a benefit and not a right. That also needed to be reflected in Article 4 on the management of rights. In brief, he wished to change the title of Article 2 and the first word in Option 1 to “holders”. He also wished to refer to “original” TCEs.

109. The Chair noted that there was no Member State support for the proposal made by the representative of FILAIE to change “beneficiaries” to “holders” or for the insertion of the word “original.”

110. The representative of GRTKF International supported Option 2 and suggested that it read: “Beneficiaries of protection of traditional cultural expressions, as defined in Article 1, are the holders of traditional cultural expressions, which may include: (a) Indigenous Peoples [with capital I and capital P and s]; (b) local communities; and (c) individuals within the categories listed above.” He explained that TCEs included handicraft and works of mas. There could be individuals from a particular group performing those acts. If one excluded individuals from the specific groups, it meant that some of what had been discussed would fall flat.

111. The Chair noted that there was no Member State support for this proposal.

112. The Delegation of Thailand preferred Option 2 and noted that the option, though different from the LMCs text in document WIPO/GRTKF/IC/22/5, had indeed taken its essence while adding some potential beneficiaries. The list, however, included some terms which had received different interpretations in various countries and had led to many difficult debates at past IGC sessions. Therefore the terms in the list needed further clarification. In view thereof, the Delegation asked to go back to the LMCs text which provided a shorter and simpler definition of beneficiaries and left enough room for flexibility in domestic law.

113. The Delegation of the United States of America expressed its strong preference for Option 1. While that option was far from perfect, its precise formulation advanced the objectives most efficiently. The Delegation also expressed some thoughts with respect to particular formulations within Option 1. The phrase “indigenous peoples” was well established in international law, while the term “indigenous communities” less so. It further noted that the phrase “local communities” was quite vague and could be subject to further clarification. As a proud nation of immigrants, its country was fully aware of the migratory nature of TCEs: they began in one community or one traditional setting and then migrated or were practiced in other settings. It was still searching for a formulation that would capture that important concept. It took note of the use of the words “families” and “individuals” in Option 2 and was momentarily attracted to those concepts as a way of capturing the migratory nature of TCEs. Nonetheless it continued to search for a more precise way to capture that important notion. By contrast, it was not persuaded that the concept of “nations” was appropriate. Finally, it had listened carefully to the very brief and accelerated discussion of the important distinction of “holders” and “beneficiaries” and noted that it could be a significant change. It requested more time to reflect on its importance, certainly as not to prejudge the nature of any ultimate instrument.

114. The Delegation of Panama supported Option 1 and was in favor of the amendment submitted by the Delegation of Mexico.

115. The Delegation of Sri Lanka supported Option 2, with some amendments. It proposed that subparagraphs (a) and (b) be merged into “indigenous and local communities.” It proposed to delete “families” and that “nations” come as subparagraph (a). It proposed that (h) read “...any such entity determined by national law.” Lastly, small island states were covered under Option 2 and therefore, Option 3 was not necessary.

116. The Delegation of the Russian Federation considered that the issue of the beneficiaries was one of the most complexes. It preferred Option 1. As to Option 2, the reference to “families” and “individuals” as beneficiaries required further discussion, because individuals could already benefit from the existing IP regime. In further discussions on beneficiaries, the IGC could take into account the discussions on TK.

117. The Delegation of Oman proposed a new definition, drawing from Options 1 and 2: “beneficiaries of protection are the peoples and nations and any other entities so defined by national legislation.” It said that this formulation was a short and concise text.

118. The Delegation of India supported Option 2 because of the flexibilities available to member States in identifying the beneficiaries, given the diverse nature of TCEs and their use and maintenance by communities. It appreciated the importance of keeping “nations” for the reasons given by other delegations. It was also supportive of the suggestions made by some delegations, including the Delegations of Bangladesh, Brazil, and Thailand, to opt for the concise language of Article 2 of the LMCs text in document WIPO/GRTKF/IC/22/5.

119. The Chair opened the floor on Article 3.

120. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported the simplification and flexibility of Option 1. It argued that WIPO members needed maximum flexibility to determine the scope of protection relevant to their circumstances. Moreover, the instrument in general had to make recommendations but could not lay down legal obligations. Therefore, it wished to replace throughout the document the word “shall” with “should.”

121. The representative of the Métis National Council acknowledged the complex nature of determining the scope of protection. She encouraged Member States to begin with the principle of respect for the authority of indigenous peoples over their IP in TCEs and support for the cultural nature of that authority. As such, Alternative 3 was preferable because of its focus on rights. In Alternative 1, the qualification “where appropriate” suggested a limit over the authority of the holders or beneficiaries. She urged caution in that regard.

122. The representative of the Saami Council stated that Article 3 was a key article. He could not go with Option 1, which basically allowed States to regulate such an important matter. He added that Option 1 made the whole instrument essentially meaningless. He was not particularly supportive of Option 2 either. He believed the structure should be, first, a paragraph on the principle of free prior informed consent. Then one could have exceptions to that principle, for instance, when the TCEs were already widely publicly available. The third element could be benefit-sharing. The last element would be prevention of derogatory or offensive use. He reiterated that those four elements should structure the whole article, which was very difficult to understand as it read.

123. The Chair asked whether each of those concepts was already captured in the current text, but not in the order and form described.

124. The representative of the Saami Council responded that it was correct and that the article could be restructured and rewritten.

125. The Delegation of Canada, although it reserved the right to make further comments on the article, was of the view that Option 1 provided a better base, though it recognized it was incomplete. It looked forward to working with colleagues to add missing elements. That said, it suggested rephrasing Option 1 as follows, to avoid any ambiguity: “The economic and moral interest of the beneficiaries as they relate to their traditional cultural expressions...”.

126. The Delegation of Mexico proposed merging Options 1 and 2, with Alternative 3. [Note from the Secretariat: the following proposal regarding Article 3 was submitted by the Delegation of Mexico in written form and not delivered orally: “The economic and moral interests of the beneficiaries of traditional cultural expressions, as defined in Articles 1 and 2, should/shall be safeguarded according to national law, with steps being taken in particular to: (a) prevent the unauthorized disclosure, fixation or other exploitation of secret traditional cultural expressions; (b) acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible; (c) prevent use which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to

the beneficiary; (d) protect against any false or misleading uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and (e) ensure the beneficiaries have protection concerning the following in relation to their traditional cultural expressions: (i) fixation; (ii) reproduction; (iii) public performance; (iv) translation or adaptation; (v) making available or communicating to the public; (vi) distribution; (vii) any use for commercial purposes, other than their traditional use; and (viii) the acquisition or exercise of intellectual property rights.”]

127. The Delegation of Japan recognized that Option 1 was preferable, with brackets around “shall.” Option 2 was not acceptable for the following reasons: besides the difficulties of defining TCEs clearly, there had to be further consideration of whether exclusive rights and economic rights were granted to the beneficiaries. Furthermore, since granting rights to beneficiaries of TCEs which were already available without restriction in the public domain had negative effects on cultural development, it was not appropriate to take such a measure.

128. The Delegation of the Islamic Republic of Iran did not support Option 1, which did not have the minimum standard of protection. It supported Option 2. It believed that the article would be the heart of the future instrument and it had to ensure adequate and effective measures. It thus proposed the following to be added to Option 2: “Adequate and effective legal, administrative or policy measures shall be provided to safeguard the economic and moral interests of the beneficiaries, including but not limited to....” Regarding subparagraph (e), it supported Alternative 3.

129. The Delegation of Sri Lanka supported Option 2, replacing the word “should” with “shall.”

130. The Delegation of Thailand supported Option 2, and as to subparagraph (e), Alternative 3. It noted that Option 2 was closer to the text proposed by the LMCs in document WIPO/GRTKF/IC/22/5 though minor changes had been introduced.

131. The representative of Tupaj Amaru considered that Article 3 was very important for the survival of indigenous peoples and their TCEs. He proposed the following text: “1. For the purposes of the present instruments, protection of the rights of the owners of holders, hereinafter referred to as beneficiaries, and in accordance with Article 2, shall apply to the following illicit acts and practices of appropriation, as stipulated in this article: (a) Reproduction, publication, adaptation, interpretation or execution in the public, communication to the public, distribution, renting, making available at the public domain, including fixed (static) photography of TCEs without the free prior and informed consent of the owners; (b) Any use of TCEs or adaptation of such TCEs for commercial purposes running counter to the collective interests of the indigenous peoples or local communities which are the legitimate owners of that cultural heritage; (c) Any deformation, modification, falsification or mutilation of TCEs or acts of bad faith, (with intention of damaging, offending or causing damage and prejudice) intending to damage, offend, or prejudice the reputation and the identity and cultural integrity of indigenous peoples or local communities, whatever region they may inhabit; (d) Any acquisition by a fraudulent means or violent actions or usurpation of the intellectual property rights over TCEs shall not be tolerated (and will attract civil and criminal sanctions); (e) Any indication or false or improper or misleading use of TCEs for the trade in goods and services without the free prior and informed consent of the holders shall be subject to both civil and criminal sanctions (punishments). 2. Persons responsible for the distortion, mutilation; any indication or false, confused or deceitful assertion with intention or premeditation of using the TCE as a reference to the commerce of goods and services, without free prior and informed consent of the owners will be judged and attract legal sanctions or punishments.”

132. The Chair asked the representative of Tupaj Amaru to state the specific additions to the current text of Article 3.

133. The representative of Tupaj Amaru responded that the Chair was suggesting that he did a different exercise. He explained that he had taken all the texts, all the proposals, and the sentences and had merged them into one precise text.

134. The Chair recalled the intervention made by the representative of the Saami Council, who had made specific recommendations in terms of the textual approach. The Chair asked again the representative of Tupaj Amaru to indicate the specific items that he wished to add, so that those could be treated on the basis of the General Rules of Procedure. He recommended that the representative follow that practice for the upcoming articles.

135. The representative of Tupaj Amaru wished to state on record that his freedom of expression was being hindered, as the Chair did not want to take note of the proposals of the indigenous peoples and imposed separate rules.

136. The Chair stated that the comments of the representative of Tupaj Amaru were noted.

137. The Delegation of Norway supported the wording and policy choice along the lines of Option 2 and supported a rights-based approach in the article. Under subparagraph (e), it supported Alternative 3, but wished to delete the word “inalienable,” because the reference to the right being “exclusive” was more than sufficient. It also supported a possible restructuring of the article along the lines expressed by the representative of the Saami Council.

138. The Delegation of Argentina continued to consider what would be the best option for that article; however, it had a number of comments on Option 2. On subparagraph 1(a), “secret TCEs” was a term not yet defined and it had doubts about that term. In respect of subparagraph (e), it preferred to work on the basis of Alternative 1.

139. The Delegation of Georgia supported merging the first and second options because the main aim of the articles was to establish a common way of treatment of TCEs on an international level. Option 1 was inappropriate because it was too general and would cause difficulties in practice. In Option 1, it recommended replacing the words “economic and moral” with “moral and economic,” because for the beneficiaries, the moral rights were more important than the economic ones. It also wished to add to Option 2 the term “modification” in subparagraph (c). It wished to add a new paragraph (f) “prevent the acquisition or exercise of intellectual property rights in traditional cultural expressions” to be added from Alternative 3. It preferred Alternative 1 under subparagraph (e) and proposed rephrasing it as “enable beneficiaries to authorize the commercial exploitation of traditional cultural expressions by others, namely to authorize or prohibit the following acts: fixation, reproduction, translation or adaptation making available or communicating to the public and distribution.”

140. The Delegation of the Plurinational State of Bolivia supported Option 2 and Alternative 3. In the heading of Option 2, it wished to delete “should be provided” and to add “Member States shall provide” at the beginning of the sentence.

141. The Delegation of Brazil supported Option 2 and Alternative 3. It said that Option 2 and Alternative 3 were the most adequate to provide a clear and defined scope of protection to ensure legal certainty and to ensure that the instrument met the needs of indigenous peoples and local communities. To make sure all TCEs were equally protected, it proposed removing mention of “secret TCEs”; according to Alternative 3, all beneficiaries would have exclusive rights and therefore the differentiation of secret TCEs was not needed.

142. The Delegation of the United States of America expressed its strong support for Option 1. It was a succinct and flexible formulation that permitted Member States to safeguard as appropriate the economic and moral interests in that important subject matter. It also noted with approval the “should/shall” formulation, which did not prejudice the outcome of the deliberations.



143. The representative of CISA said that the document was far removed from the UNDRIP. He agreed with the proposal made by the representative of the Saami Council.

144. The Delegation of the Russian Federation preferred Option 1 which left flexibility under national law, with the understanding that under Option 2, subparagraphs (a), (b), (c) and (d) would be used to protect the interests of the beneficiaries under Option 1. It pointed out that in the Russian text, Option 2, subparagraph (a) had to be corrected: "traditional knowledge" had to be replaced with "traditional cultural expressions."

145. The representative of the Arts Law Centre of Australia supported the statements made by the representatives of the Saami Council and the Métis National Council. Option 1 was unfavorable for indigenous peoples. It could not be left to the State to determine the scope of protection. She supported a restructure of Option 2 to provide free, prior and informed consent, equitable remuneration and adequate protection against offensive, false and misleading uses.

146. The representative of FAIRA supported Option 2 with Alternative 3, with the insertion at the beginning of the sentence of "require equitable remuneration." In other words, Alternative 3 had to include the concepts of equitable remuneration and mutual benefit sharing.

147. The Chair noted that there was no Member State support for the proposal made by the representative of FAIRA.

148. The Delegation of Ecuador considered that Option 2 best reflected and guaranteed the fact that the TCEs were duly protected. In other words, it best reflected the scope of protection. It agreed to give it greater emphasis, a more effective nature. It agreed with the proposal to include "shall provide legal measures." On subparagraph (e), it endorsed Alternative 3 because it was more inclusive, with the understanding that when referring to inalienable rights, the reference was to individual rights.

149. The Delegation of India supported Option 2 and Alternative 3, noting that Option 2 and Alternative 3 were closer to the LMCs text in document WIPO/GRTKF/IC/22/5. It stated that the IGC was negotiating an international document which created minimal obligation to Member States. In that context it was important to recognize minimum rights for the beneficiaries. For the same reason it could not support Option 1.

150. The Chair opened the floor on Article 5.

151. The representative of the Saami Council stated that Article 5 was very closely related to Article 3, so much so that it was partly reproducing language from Article 3 and partly contradicting it. He suggested that the article be simply deleted, as it was very confusing. Both Articles 5 and 3 seemed to establish the relationship between the instrument as well as the public domain and third-party rights. It would be better to have one single article to address that very important issue. He said that Article 5 as drafted was currently confusing and to some extent contradictory. He suggested that elements from Article 5 that still needed to be explicitly addressed and that were not covered by Article 3 be added as a new paragraph; for example, paragraph 1 and subparagraph 4(a) could be added to Article 3. He understood the need for such a provision but it needed to be more nuanced. The language on third-party rights such as copyright and trademark had to be dealt with in Article 3, as well as those provisions touching on the public domain. He added that a merging approach would make a shorter and clearer instrument.

152. The representative of Tupaj Amaru proposed new text for Article 5 as follows: "The State Parties with the arrangement of its national legislations and in conformity of the instruments of the intellectual property shall establish limitations and exceptions to authorize the use of protected traditional cultural expressions. The authorization or authorizations of which may be inconsistent or contrary to the collective use within a traditional context and shall obtain the free prior and informed consent of the owners or holders of traditional cultural expressions or

expressions of folklore. By their intrinsic nature secret, sacred and spiritual knowledge with not be subject to any exceptions and limitations.”

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

154. The Delegation of India stated that it needed to wait and see how Article 3 would mature. It preferred Option 1, and, in paragraph 3, Alternative 1. Its real concern was in Option 2, subparagraphs 4(a) and (b), which were attempts to completely undermine the rights granted in Article 3. Those subparagraphs had to be deleted or better language had to be used.

155. The Delegation of Japan stated that since both Options 1 and 2 had a common part, both options could be unified. It preferred Option 2. As to paragraphs 1 and 2 of both options, one had to avoid restricting the exploitation of TCEs by the beneficiaries themselves. Therefore, it shared the intention of those paragraphs. As to paragraph 3 of both options, it agreed on the idea that States could provide exceptions and limitations in their law. As to paragraph 4 of Option 2, the Delegation shared the objective to provide exceptions for the reproduction by archives. It also supported subparagraph (b). As to paragraph 5 of Option 2, it also shared the idea of a provision on exceptions of copyright on private reproduction. However, it thought that “shall” had to be replaced by “should.” Further, since the definition and the scope of “secret” TCEs were not clear at that stage, it was not appropriate to exempt them from the application of the provision on exceptions and limitations. Therefore, the beginning of the sentence until “against disclosure” had to be bracketed.

156. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported Option 2 with some amendments. In subparagraph 4(a), it wished to replace “presentation” by “education.” In subparagraph 4(b), after the words “inspired by” it wished to add the terms “or borrowed from.” In paragraph 5, it wished to bracket the text from “except for the protection” until “against disclosure.”

157. The representative of FAIRA suggested that in both options, in paragraph 4, the words “only with the free, prior and informed consent of the beneficiaries” be inserted after the words “should be permitted.”

158. The Chair asked if there was a Member State that supported the insertion of the language proposed by the representative of FAIRA.

159. The Delegation of Australia supported the proposal made by the representative of FAIRA for consideration by the IGC, noting the significance of the work of archives and libraries and museums in dealing with the TCEs and heritage generally.

160. The Delegation of Brazil supported Option 1, Alternative 2. It said it would be satisfied with an exceptions and limitations clause that included two aspects: (a) exceptions to guarantee the transmission and exchange of TCEs among communities and (b) a general three-step test. In order to have a three-step test similar to the one existing in copyright, it wished to have the third criterion included in Alternative 2: “in special cases.”

161. The Delegation of Thailand supported Option 1, as well as Alternative 2 under paragraph 3. It wished to remove the brackets in paragraph 1 of Option 1, as consistency with national law was important. It was flexible regarding the proposal made by the Delegation of Brazil, as well as by the representative of the Saami Council, to merge this article with Article 3 without changing the wording. However, it would need to look at the language again to make a final decision.

162. The Delegation of Argentina supported Option 2 and, regarding paragraph 3, Alternative 2.

163. The representative of the Health and Environment Program supported Option 1. With respect to paragraph 3 of Option 1, Alternative 1, she wished to add in letter (c): “by exercising good faith”. Regarding Option 2, she considered it was broader and not easy to adapt to the African context.

164. The Chair noted that there was no Member State support for the proposal made by the representative of the Health and Environment Program.

165. The Delegation of Norway supported a rights-based approach and considered it therefore essential to secure appropriate limitations. That could be done in a relatively simple manner along the lines of the wording in Option 2, paragraph 3, Alternative 2. It had suggested in the context of the discussions on the TK text that some of the elements that were included in the article on exceptions and limitations could appropriately be moved to the article on scope. The issues of third-party rights, creation of independent works, and not restricting further use within the traditional context, for instance, could be addressed in Article 3.

166. The Delegation of the Islamic Republic of Iran supported Option 1. It wished to remove the brackets in paragraph 1. It supported paragraphs 2 and 4. In paragraph 3, it supported Alternative 2.

167. The Delegation of Sri Lanka supported Option 2. It did not consider that Alternatives 1 and 2 were necessary at that juncture. It supported the proposal of the Delegation of the EU, on behalf of the UE and its Member States, to replace “presentation” by “education” in paragraph 4 (a) of Option 2. It wished to see paragraph 4 (b) of Option 2 deleted.

168. The Delegation of the United States of America supported Option 2, as well as Alternative 2 under paragraph 3. Consistent with the fundamental principle of free speech, it attached particular importance to Alternative 2. Regarding paragraph 4 (a), it called out for special attention to the important role of cultural institutions in promoting free speech. With respect to paragraph 4 (b), it called to attention the important role of the creation of new works, as serving the fundamental values of freedom of speech. It noted that such a provision was entirely consistent with well-established principles of copyright law, under which a great hoard of ideas and cultural resources might move into protectable expressions, thereby sustaining and enriching the global cultural environment.

169. The representative of the Arts Law Centre of Australia supported the intervention made by the representative of the Saami Council, regarding restructuring Articles 3 and 5 with exceptions included in the new Article 3. She considered important to restrict the language of the exception for archives, libraries, museums or cultural institutions. It was not acceptable to have an exception for derivative works, as proposed in Option 2 paragraph 4 (b), as that exception might lead to further misuse by third parties.

170. The Delegation of Senegal favored Option 1 without the square brackets. It welcomed the expression “within and among communities”. It was important to mention the relationship that existed among the communities in the very specific field of TCEs. Communities developed rules amongst themselves, which were pre-established and very long-standing, and that enabled the harmonization of energies and the maintenance amongst communities of a very fertile nucleus. Regarding Alternative 1 (a) of Option 1, it had a problem with the reference to beneficiaries, since it was not clear whether reference was made to the beneficiaries of exceptions and limitations or to the beneficiaries as described in Article 2. There seemed to be duplication among Alternatives 1 and 2. Both alternatives could be merged.

171. The Delegation of Switzerland supported Option 2, and Alternative 2 under paragraph 3. It also supported the additions proposed by the Delegation of the EU, on behalf of the EU and its Member States. Like the Delegation of Japan, it noted that considerable parts of the two

Options were identical. It said that this could be taken into account by the facilitator when reviewing the text.

172. The Delegation of Azerbaijan expressed a preference for Option 1, Alternative 1.

173. The Chair opened the floor on Article 4.

174. The Delegation of Thailand supported paragraphs 1 and 2, which reflected the proposal of the LMCs in document WIPO/GRTKF/IC/22/5. It considered that paragraph 3 was a rather unnecessary burden to both WIPO and the competent authority, and wished to have it deleted. It also questioned whether the word "collective" was needed in the title and relevant parts of the article.

175. The Delegation of the EU, speaking on behalf of the EU and its Member States, having previously supported Option 1 in Article 3, and in coherence with that preference, wished to have some new language introduced in the title of the Article 4. It wished to replace "Collective management of rights" by "Administration of interests".

176. The Delegation of Australia suggested to rename the article "Administration of rights" to be consistent with the TK text. In its view, the key policy issues coming from the article were that the administration of those rights was at the behest of indigenous communities and that should be a principle emerging through the text. Any competent authority that was envisaged by the article should not be mandated by the instrument but rather be flexible to allow States to determine the type of authority and the governmental level of the authority that should be created.

177. The Delegation of Japan suggested replacing, in paragraph 3, the word "shall" with "should".

178. The Delegation of India supported paragraph 1 as it was, with minor variations on the brackets it included. It also wished to add a clause in paragraph 1: "(e) If determined by national/domestic law, the authority may, with the consultation and approval of the beneficiary where possible, administer the rights of a traditional cultural expression that fulfills the criteria under Article 1, and is not specifically attributable to or confined to a community." It supported paragraphs 2 and 4. It recommended to delete paragraph 3.

179. The representative of Tupaj Amaru considered that the proposal made by the Delegation of the EU, on behalf of the UE and its Member States, was not acceptable. Indigenous peoples believed collective rights were the issue under discussion and not economic, strategic or financial interest. In its view, collective rights of indigenous peoples could be exercised or applied, but not administered. It added that administering rights was impossible legally speaking. [Note from the Secretariat: the following proposal regarding Article 4 was submitted by the representative of Tupaj Amaru in writing form and not delivered orally: "The Contracting Parties of the present instrument shall establish, in consultation with the owners or holders of traditional cultural expressions and with its free prior and informed consent, a competent authority or national or regional authorities with the following attributes: (a) To adopt measures to guarantee the safe-conduct of the traditional cultural expressions or expressions of folklore; (b) To spread information and to encourage practices, studies and investigation for the conservation of the traditional cultural expressions or expressions of folklore, as requested by the holders; (c) To offer advice to the holders in the exercise of its rights to be authorized based on free prior and informed consent and assistance in the resolution of the controversies between beneficiaries and users; (d) to maintain the public information or of the threats against the traditional cultural expressions; (e) to supervise if the user has obtained the free prior and informed consent of the holders of the above mentioned cultural expressions; (f) To verify and to control the just and equitable sharing of the benefits derived from the use of the above mentioned traditional cultural expressions. The composition of the competent authority or

national or regional authorities composed with the consent, and the participation of indigenous peoples shall be communicated to the World Organization of the Intellectual property (WIPO).”]

180. The Delegation of Argentina supported the proposal made by the Delegation of Australia to rename the article “Administration of rights”. It did not see the need for paragraph 3, unless WIPO was given some authority to check the information it received.

181. The Delegation of Guatemala agreed in principle with paragraph 1, but requested that its wording be improved, because it was rather confusing. It considered that paragraph 2 was fairly appropriate. Paragraph 3 could be deleted, since it was unnecessary. It agreed with paragraph 4.

182. The Delegation of the Islamic Republic of Iran preferred to delete “collective” in the title, so it could be read “Management of rights” or “Administration of rights”. In paragraph 1, it wished to delete “collective” in line 1 and “their traditional decision-making and government process” in line 4. In paragraph 1 (a), it wished to insert “national law” in line 2 and to delete the third line. It preferred to merge letters (b) and (d). It wished to delete paragraphs 3 and 4.

183. The representative of FAIRA supported the inclusion of all the references to free prior informed consent and the acknowledgment of the rights. He also supported the intervention of the Delegation of Australia.

184. The Delegation of Brazil wished to join the proposal of the Delegations of Thailand and India that opted for the deletion of paragraph 3.

185. The Delegation of Sri Lanka supported the proposal of the Delegation of Australia to change the title to “Administration of rights”. That wording should also be used in paragraph 1. It wished to delete the expression “international law” in the fifth line of paragraph 1, or, if needed, its replacement by “national law”. It supported the statement of the Delegation of Thailand. It wished to delete paragraphs 3 and 4.

186. The Delegation of Georgia proposed to delete paragraphs 2 and 3.

187. The Delegation of Norway supported what was said by the Delegation of Australia, since it believed that the issue of administration of rights was in the hands of the beneficiaries. The article could be made much simpler. It also supported changing the title as suggested by the Delegation of Australia.

188. The Delegation of the Russian Federation considered that the word “Collective” should be removed from the title, and that a wording similar to the one used for TK could be used. It did not object against the setting up of national bodies mandated to administrate the rights. Paragraph 3 could be reworded and just say that WIPO would inform others of the setting up of such bodies. Regarding the functions of those administrative bodies, more clarification and further discussion were needed.

189. The Delegation of the United States of America noted that there was a sharp contrast between the proposal to modify the title made by the Delegation of Australia, which included the word “rights”, and the proposal made by the Delegation of the EU, on behalf of the EU and its Member States, which used the word “interests”. Since there appeared to be a significant divergence between those two concepts and, so as not to prejudge the outcome of the instrument, it would suggest that the phrase “rights/interests” be used, at least in the interim, in order to have flexibility and not prejudge the outcome. Like other Delegations, it found that Article 4 was quite complex and looked forward to significantly simplifying it. The Delegation was a proponent of the collective management of rights that had served rights-holders very well in the copyright’s sphere. Nonetheless, it recognized that collective management could be quite diverse around the world. It said that for instance, the United States of America did not have a national competent authority in the area of collective management of rights; rather, it had

private nonprofit organizations that administered those rights. For that reason, it looked forward to simplification and clarification of that provision.

190. The Delegation of Mexico agreed, in general, with the content of the article. [Note from the Secretariat: the following proposal regarding Article 4 was submitted by the Delegation of Mexico in writing form and not delivered orally: “The collective management of the rights provided for in Article 3 belongs to the beneficiaries as defined in Article 2. The beneficiaries may authorize the competent authority, acting at the request and on behalf of the beneficiaries, in accordance with the national law and their traditional decision-making and government process. When an authorization is to be granted by a competent authority, a competent authority may [...]” Regarding subparagraph (a) in paragraph 1, the Delegation proposed to include “to a beneficiary by the designated competent authority” after “grant licenses.” Regarding subparagraph (b) in paragraph 1, the Delegation proposed to add “designated” before “competent”. It also suggested adding at the end of paragraph 4 the following: “The management authority will abide by the relevant national law.”]

191. The representative of GRTKF International stressed that there was a difference between rights and interests. He referred to Articles 18 and 19 of the UNDRIP and pointed out that those articles had to take precedence over what was being discussed, since the majority of States had adopted the Declaration.

192. The representative of the Saami Council supported the comments made by the Delegations of Australia and Norway that the focus should be on the rights of the beneficiaries. It also considered that the article was overly long and complicated and offered a shorter, condensed version, which would replace the entire article: “If necessary, and upon request by beneficiaries as identified by Article 2, the State within which such beneficiaries reside can assist in managing the beneficiaries’ rights under this instrument, for the direct benefit of the beneficiaries.” He pointed out that one element was missing in the article. The article referred to assistance, which was fair because some beneficiaries needed to have assistance in managing vis-à-vis multinationals, but that should be an interim measure, while the long-term measure should be capacity-building. Capacity-building was needed to put those beneficiaries in the position to actually manage their rights and interests themselves within time. That element should be added somehow.

193. The Chair noted that the Delegations of Norway and Australia supported the reformulation proposed by the representative of the Saami Council.

194. The Delegation of the EU, speaking on behalf of the EU and its Member States, wished to propose a short text to replace the entire article. The Chair requested the Delegation to pass the text for the consideration of the facilitator.

195. The Delegation of Thailand supported the title proposed by the Delegation of Australia, since it was the title originally proposed in the LMCs text as presented in document WIPO/GRTKF/IC/22/5.

196. The Chair opened the floor on Article 6.

197. The Delegation of Namibia supported Option 1 with reservations on the paragraph dealing with secret TCEs. Paragraph 3 should be separated from the article, as proposed by the LMCs in document WIPO/GRTKF/IC/22/5.

198. The Delegation of Thailand supported paragraphs 1 and 2 of Option 1, and noted that they met the needs of the LMCs. It was not convinced that there was a need for a paragraph 3 under Option 1, as it believed that secret TCEs were already protected under Option 2 of Article 1.

199. The Delegation of Azerbaijan preferred Option 1, since it set out more clearly what was required for the term of protection.

200. The Delegation of Australia did not have a firm view as to the preference for Options 1 or 2. It had two drafting suggestions for Option 1. First, it agreed with the Delegation of Thailand that paragraph 3 was unnecessary. Second, it suggested changing paragraph 2, so that the protection lasted for the period expressed in paragraph 1, which indicated that the rights should endure for as long as the TCEs continue to meet the criteria for protection under Article 1.

201. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported Option 2.

202. The Delegation of the Islamic Republic of Iran supported Option 1, paragraphs 1 and 2. It considered that paragraph 3 was redundant and already covered by the first two paragraphs, and could be deleted. In fact, no distinction should be made on secret or non secret TCEs regarding the term of protection.

203. The Delegation of Japan suggested replacing the word "shall" with "should" in paragraphs 2 and 3 of Option 1.

204. The Delegation of Norway believed that it would be sufficient to keep paragraph 1 of Option 1.

205. The Delegation of Trinidad and Tobago preferred Option 1 with a reservation on paragraph 3. It believed that Option 1 was more broad-ranging and broad-based in terms of protection. The language used in Option 2 was a bit cumbersome and not clear.

206. The Delegation of the United States of America believed that it was still premature to talk about the term of protection until the precise legal and/or other mechanisms to safeguard those important materials were determined. At that time it would be in a position to determine appropriate limits based on the particular legal and/or other mechanisms selected.

207. The Delegation of Sri Lanka supported Option 1. It agreed with the proposal of the Delegation of Japan. Paragraph 3 of Option 1 should be deleted.

208. The Delegation of Brazil supported paragraphs 1 and 2 of Option 1, in accordance with what was stressed respectively by the Delegations of Thailand and the Islamic Republic of Iran. It was not comfortable with the language that differentiated secret TCEs.

209. The Delegation of Georgia supported Option 1. In paragraph 2 of Option 1, it proposed to replace "community, indigenous peoples and communities or region" by "beneficiaries". It also proposed the deletion of paragraph 3.

210. The representative of Tupaj Amaru, regarding the statement of the Delegation of the United States of America, pointed out that the Committee was drawing up an international instrument which was consistent, precise and binding. It stressed that indigenous peoples considered that TCEs would endure in time and space while they lived or survived. [Note from the Secretariat: the following proposal regarding Article 6 was submitted by the representative of Tupaj Amaru in written form and not delivered orally: "The duration of the protection granted by the present instrument to the TCEs/EoF will continue in perpetuity, to the life of indigenous peoples or traditional communities, stipulated in the article 1: (a) The protection of the traditional cultural expressions or expressions of folklore will be for the duration period of the lifetime of its holders or holders and , while the above mentioned cultural heritage has not put itself at the disposal of the public domain; (b) the protection granted to the ECT or cultural expressions that binds the secret, spiritual and sacred values will last while it keeps on personifying the life, the history, the living memory and the cultural heritage of indigenous peoples who have been transmitted from generation to generation; (c) the protection granted to

the ECT or expressions of the folklore from any distortion, mutilation or another infraction perpetrated with the intention of injuring or of destroying whole or partially the memory, the history and the image of the peoples and indigenous communities in the place in which they live, will last indefinitely.”]

211. The Chair opened the floor on Article 7.

212. The Delegation of Japan suggested replacing the word "shall" with "should."

213. The Delegation of Thailand supported the text as it was. It noted that the text reflected the position of the LMCs in document WIPO/GRTKF/IC/22/5.

214. The Delegation of Trinidad and Tobago accepted the text as it was without any change.

215. The Delegation of Azerbaijan supported the article but had a few comments to make about the wording. It wished to delete the beginning of the article: "As a general principle". It wished to replace "shall not be subject" with "is not subjected".

216. The Chair opened the floor on Article 8.

217. The Delegation of Canada did not wish to prejudge the nature of the future instrument. With a view to further streamline and simplify the text, it suggested that the word "rights" in the title be put in square brackets, for reasons previously mentioned under other articles. It supported paragraph 1 of Option 1, with an amendment: "Member States should/shall undertake to adopt, as appropriate and in accordance with their national legislation, measures to ensure the application of this instrument." It wished to support paragraph 4 of Option 2, with an amendment, namely replacing "contracting parties should" with "Member States should cooperate/", and the rest would stay the same.

218. The representative of Métis National Council supported the articulation of a positive duty on the enforcement of obligations under the instrument. Option 1 mandated contracting parties to take measures against infringements; however, it limited the infringements to those which were willful or negligent. She requested the removal of "willful or negligent" in Option 1, paragraph 2. She considered important to note that an indigenous people might be a contracting party. As such, given the general status of indigenous peoples as generally impoverished or lacking in capacity to address courts, she suggested that there should be an inclusion of an alternative dispute resolution option, as set out in the proposed Article 8bis. She also submitted that the authority which granted access under the instrument should also be the authority which carried the positive duty to enforce obligations. That brought Article 4 to bear in the discussion. Article 5, Option 1, paragraph 4 provided for a challenge against limitations and exceptions.

219. The Chair noted that there was no Member State support for the proposal of the representative of Métis National Council to remove "willful or negligent".

220. The Delegation of Japan suggested replacing the words "Contracting parties" and "party" in both Options with "Member States" and "Member State". It also suggested bracketing the phrase "undertake to", in paragraph 1 of Option 1.

221. The Delegation of the Plurinational State of Bolivia supported Option 2 and also the proposed Article 8bis.

222. The Delegation of the United States of America approached any article that dealt with sanctions, remedies and exercise of rights or interests with a great deal of caution, given the many vague terms and ill-defined boundaries of the subject matter at hand. That being said, it supported Option 1 as amended by the Delegation of Canada with respect to Option 1,



paragraph 1. It further noted that it was studying Option 2, paragraph 4 to see if it might advance the interests being discussed.

223. The representative of Tupaj Amaru considered that “sanctions” was not an appropriate word. It could be interpreted differently in English. He wished to replace “sanctions” with “punishment”. [Note from the Secretariat: the following proposal regarding Article 8 was submitted by the representative of Tupaj Amaru in written form and not delivered orally: “The Contracting parties promise to adopt, with arrangement of its respective juridical procedures and in conformity with the international instruments, the mechanisms adopted to ensure the application of the present instruments. (a) In the cases in which the unlawful conversion of the traditional cultural expressions or expressions of folklore would contain the danger of its extinction, the Contracting parties, according to the arrangement in article 3, shall commit themselves to establish mechanisms appropriate for the resolution of controversies, administrative recourses before the courts and punishment in the penal and civil ambience; (b) in conformity and as established in article 4, a competent Organ will be established, in free prior and informed consent of the indigenous peoples to give advice and assistance to the beneficiaries mentioned in article 2, in order to guarantee the observance of its rights and the application of procedures and punishment that are stipulated in the present article; (c) the Contracting parties shall compromise to provide cooperation and assistance with the purpose of facilitating the application of the mechanisms and appropriate measurements of observance in the national territory and in the frontier areas with the neighboring countries contemplated in the present article. New article 8bis : restitution and reparation. The indigenous peoples shall have the right to a just indemnification, compensation, restitution and reparation of its cultural and intellectual heritage, the mortal remains of its ancestors (taken from them) deprived without their free prior and informed consent and, in violations of their customary laws and traditional practices. Indigenous peoples reserve the right to a just compensation for the material and moral damages and injuries caused by national and international piracy.”

224. The Chair noted that there was no Member State support for the proposal of the representative of Tupaj Amaru for the substitution of the word “sanctions”.

225. The Delegation of Thailand supported Option 2, paragraphs 1, 2 and 3. It noted that paragraph 4 was taken from the originally proposed Article 12 in the LMCs text in document WIPO/GRTKF/IC/22/5. It wondered whether it truly belonged there. It preferred to see it as a separate article, but it was flexible on that. It supported in principle Article 8bis, though the wording was different from the one it had proposed and seemed too strong.

226. The Delegation of the Russian Federation supported Option 1. It did not object to Article 8bis.

227. The Delegation of Sri Lanka supported Option 2, with amendments. In the second line of paragraph 1 of Option 2, it proposed to replace “should” with “shall”. In paragraph 2 of Option 2, it suggested to replace “[I]f a designated competent authority is appointed” with “[A] competent authority appointed under Article 4”. In paragraph 3, the term “legislation” should be replaced by “the national law”. It did not think that paragraph 4 should be there, however, it preferred to stay neutral.

228. The Delegation of the Islamic Republic of Iran supported Option 2, paragraph 1. The brackets in paragraph 2 should be deleted. It did not consider that a dispute settlement mechanism was appropriate. It could not accept changing “contracting parties” to “Member States” in the text.

229. The representative of FAIRA highlighted that the proposed Article 8bis was included in order to assist indigenous peoples to have protection in an internationally recognized context.

230. The Delegation of Mexico considered that there were valuable elements in both options. It would submit in writing a proposed wording which summarized both options. [Note from the Secretariat: the following proposal regarding Article 8 was submitted by the Delegation of Mexico in written form and not delivered orally: "1. Contracting Parties undertake to adopt, as appropriate and in accordance with their legal systems, the measures [necessary] to ensure the application of this instrument. 2. Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions. 3. Contracting parties will take measures against the willful or negligent infringement of the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent to further infringements. 4. The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed. 5. If a [designated competent authority] is appointed under Article 4, it may additionally be tasked with advising and assisting the beneficiaries referred to in Article 2 with regard to the enforcement of rights and with instituting remedies provided under this article when appropriate and requested by the beneficiaries. 6. Where traditional cultural expressions are shared by different countries or by indigenous peoples and communities in several jurisdictions, contracting parties should provide cooperation and assistance to facilitate the implementation of enforcement measures provided under this instrument." In its writing submission, the Delegation of Mexico added that the provisions under this Article should be aligned with those under the relevant article in the TK text, and reciprocally.]

231. The Delegation of Argentina preferred Option 1. It might be interesting to include paragraph 4 of Option 2 in the text of Option 1.

232. The Delegation of Brazil supported Option 2. Since enforcement of TCEs at customs would be extremely costly and virtually impossible, it suggested the deletion of the expression "border-measures" in paragraph 1 of Option 2. It was not comfortable with Article 8bis and proposed its deletion; it also asked for clarifications on the nature of such dispute resolution mechanism.

233. The Chair opened the floor on Article 9.

234. The Delegation of the EU, speaking on behalf of the EU and its Member States, pointed out that Articles 9, 10 and 11 were closely related to the nature of the instrument, and stressed that they were more related to a binding instrument. Therefore, it stated that it was a bit premature to discuss their content.

235. The Delegation of Australia suggested replacing, in paragraph 1, the phrase "at the moment of the provisions coming into force" with "at the moment of the provisions coming into effect", being the latter the accepted non-legally binding language. That change would also need to be made in paragraph 2 of Option 2. In paragraph 2 of Option 2, the idea that the bringing into conformity with the provisions be subject to respect for rights previously acquired by third parties was of significance, since its country had a constitutional limitation on acquisition of property. Paragraph 3 of Option 2 could be deleted. If it was retained, the expression "the rights to" should be inserted, so that the last lines would read: "the communities shall have the right to recover the rights to such traditional cultural expressions". At the moment it was unclear whether in fact the paragraph referred to rights in TCEs or to the TCEs themselves, and that required clarification.

236. The Delegation of the United States of America agreed with the statement made by the Delegation of the EU on behalf of the EU and its Member States. It might be premature to discuss transitional measures in as much as the precise legal nature of any instrument had yet to be determined. It did not wish to prejudge the outcome of deliberations. That said, any protection accorded to the rights or interests had to be prospective. With respect to Option 1,

consistent with other interventions, it wished to replace the word “rights” with “rights/interests”, until the precise nature of the obligations, if any, was determined.

237. The Delegation of Japan supported in principle the statement made respectively by the Delegations of the EU and the United States of America. It suggested replacing the words “coming into force”, in paragraph 1 and in paragraph 2 of Option 2, with “commencing.” It proposed replacing the word “enter into force” in paragraph 2 of Option 2 with “commence.” It also suggested replacing the word “shall”, in paragraph 3 of Option 2, with “should.”

238. The representative of the Saami Council also considered that it was premature to discuss the article at that time but for different reasons. The article was closely related to how the instrument related to third-party rights, and it was difficult to discuss that before there was agreement on Articles 3 and 5. It would be more fruitful to return to that article once those articles had been agreed on.

239. The Delegation of Thailand considered that Article 9 was necessary. It supported paragraph 1 followed by paragraphs 2 and 3 of Option 2. Regarding the concern of the Delegation of Australia, it indicated that it had also been discussed at length at the LMCs meeting, and most participants had expressed strong support for those paragraphs.

240. The Delegation of Sri Lanka supported paragraph 1 and Option 2. It noted that paragraph 2 of Option 2, in the last line, referred to “rights previously acquired by third parties qualified by paragraph 3”. Instead of “paragraph 3, it should read “Article 3”.

241. The Delegation of the Islamic Republic of Iran supported Option 2 without any of the changes that had been proposed by some Member States.

242. The Delegation of Argentina wished to continue working on paragraph 1 followed by Option 1.

243. The Chair opened the floor on Article 10.

244. The Delegation of Canada recognized that it might be a little premature to discuss Article 10. However, that should not prevent the IGC from looking at the text, if only to ensure that all the relevant issues with respect to the future instrument, regardless of its final nature, were collectively discussed. The issue of the relationship with other international instruments was of particular importance to the Delegation. It proposed new wording: “1. The provisions of this instrument shall not affect the rights and obligations of any State deriving from any existing international agreement. 2. Nothing in this instrument shall prevent the States from developing and implementing other relevant international agreements provided that they are supportive of and do not run counter to the objective of this instrument.” It explained that the new paragraph 2 was not intended to create a hierarchy between the instrument and other international instruments.

245. The Delegation of Australia noted that the intent of the provision was that the outcome of the Committee’s work would not replace but be complementary to existing IP laws. Paragraph 2 of Option 1 was a policy issue directed at another question, it would be better placed in Article 6. If that change was made, the two options would probably be fairly easily reconcilable and could be merged.

246. The Delegation of the United States of America stressed that one could not act in a vacuum. It recalled that WIPO had a long history in setting international norms in areas that were pertinent to the protection of the important interests that the IGC sought to protect, not the least of which were copyright and trademark. Therefore, the relationship of any instrument to existing IP instruments was of fundamental importance. At this juncture, it preferred Option 2 as a clean statement of the relationship of any future instrument in this area to past IP instruments. It noted that the developing mosaic of existing international IP instruments had not only taken

note of expressions of folklore but had provided binding international norms. Those norms had been first incorporated into an international IP instrument in the WPPT. It noted that most recently, under the new Beijing Treaty on Audiovisual Performances, there was now an international norm with respect to the protection of expressions of folklore in performances.

247. The Delegation of Thailand supported Option 1 but felt that paragraph 2 of Option 1 was redundant and unnecessary. It also disagreed with the wording in brackets in paragraph 1 of Option 1, which was very similar to the text proposed by the LMCs in document WIPO/GRTKF/IC/22/5, being the latter cleaner and better written. It wished to return to the text proposed by the LMCs.

248. The Delegation of the Plurinational State of Bolivia supported Option 1. It wished to add in paragraph 2 of Option 1, after “tangible and intangible”: “material and immaterial.”

249. The Chair noted that the terms “material and immaterial” in English had an interpretation that might not be applicable in the present case.

250. The Delegation of India supported paragraph 1 of Option 1. It suggested adding in paragraph 1 of Option 1: “In case of conflict of any provisions of this Treaty with that of any provisions of any other international instruments on intellectual property rights, the provisions of this Treaty shall prevail.”

251. The Delegation of Brazil supported Option 1 and also supported the proposal of the Delegation of Thailand to delete paragraph 2 and to substitute paragraph 1 with the LMC's wording in document WIPO/GRTKF/IC/22/5.

252. The Delegation of Mexico favored Option 2.

253. The Delegation of Switzerland pointed out that clarifying the relationship of the international legal instrument being discussed with other international instruments was crucial. It said that the proposal of the Delegation of Canada sounded interesting. It would be interested in studying that proposal in greater detail.

254. The Delegation of the Islamic Republic of Iran could not support Option 2. At the end of paragraph 2 of Option 1, it wished to replace “indigenous peoples” with “beneficiaries”.

255. The representative of FAIRA suggested adding at the end of paragraph 1 in Option 1, after the words “the diversity of cultural expressions”: “as determined by mutual agreement with the beneficiaries.”

256. The Chair noted that there was no Member State support for the proposal of the representative of FAIRA.

257. The Chair opened the floor on Article 11.

258. The Delegation of Australia suggested that Article 11 be amended. Instead of envisaging that eligible foreign beneficiaries would enjoy the same rights and benefits as enjoyed by other beneficiaries, the standard should be no less favorable treatment. It noted that this approach would be a more practicable arrangement. It observed that this amendment would focus on the effect of the treatment rather than whether the words and statute were exactly the same from jurisdiction to jurisdiction. It wondered whether it was correct to apply the concept of national treatment or whether another mechanism like reciprocity could be considered. That could be explored further in the expert group.

259. The Delegation of Namibia supported the current drafting of the article up to the end of the first sentence. It noted that the second sentence put more emphasis on the foreign beneficiaries rather than the national and defeated the title of the article. It proposed the

deletion of the second sentence except otherwise explained. It supported the LMCs' proposal as presented in document WIPO/GRTKF/IC/22/5.

260. The Delegation of the Islamic Republic of Iran preferred to use "contracting party" instead of "prescribed country." It wished to receive clarification about what would be the scope of "prescribed country." It wished to add in line 4, after "eligible foreign beneficiaries": "of contracting parties", so it would read "foreign beneficiaries of contracting parties."

261. The Delegation of the United States of America indicated that it was studying the whole concept of a national treatment provision in an instrument of that nature. For example, there were no points of attachment to which the national treatment principle would correlate. It wondered ultimately whether the words "nationals" and "residents" were the appropriate points of attachment. It noted as well that the IGC had not reached agreement on the fundamental question of rights versus interests.

262. The Delegation of Thailand, speaking on behalf of the LMCs, could not support certain wording, particularly the expression "eligible foreign beneficiaries." The LMCs requested returning to the text originally proposed in document WIPO/GRTKF/IC/22/5, which was shorter and cleaner

263. The Chair opened the floor on Objectives and Principles.

264. The Delegation of Sweden recognized stressed that the Objectives and Principles did not represent all current normative alternatives, as expressed in the articles. Against this backdrop, it suggested that all current Objectives and Principles be bracketed and replaced by the following statement under the heading "Introductory observations": "TCEs should be safeguarded in a balanced and reasonable manner, taking into account the need to secure rights already acquired by third parties, as well as legal certainty and a rich and accessible public domain." It said that the content of the statement as proposed was in line with the Recommendations 16 and 20 of the WIPO Development Agenda.

265. The Chair closed the first read-through of the Draft Articles as contained in the Annex of document WIPO/GRTKF/IC/22/4. [Note from the Secretariat: the following discussion took place in the plenary after the expert group had completed its work].

266. Upon invitation by the Chair, the facilitator, Ms. Kim Connolly-Stone of New Zealand, presented to the IGC a revised version of the Draft Articles (Rev. 1) dated July 12, 2012 and titled "The Protection of Traditional Cultural Expressions: Draft Articles as revised by the Facilitator." She explained that this revised version was based on the comments and proposals previously made in the plenary and further amended as result of deliberations by the expert group on Article 1, 2 and 5.

267. The Chair opened the floor for comments on the revised facilitator's text (Rev. 1). He said that there would be no live drafting at this stage in plenary. The Chair explained that specific text which had been proposed in plenary, but that had been mistakenly left out by the facilitator would be introduced by the facilitator in the version of the text that would be transmitted to the General Assembly, underlined or bracketed as appropriate. The Chair recalled that general comments on the draft would be recorded in the session's report. He proposed that the IGC take note of the text by the facilitator as further revised, and transmit the facilitator's text to the Assemblies of Member States of WIPO at the end of the present IGC session. He stated that this text would not be agreed upon or adopted as such by the IGC. The Chair opened the floor for comments on Article 1.

268. [Note from the Secretariat: several delegations thanked the Chair and the facilitator for this revised version.]

269. The Delegation of India welcomed the facilitator's decision to follow the approach of the TK Draft Articles, since it believed that the outstanding policy issues in both documents were similar and needed to be discussed together in order to reach an agreement. That would also enable the IGC to find a consensual solution regarding the subject matter of protection in both drafts. The Delegation was of the view that both drafts raised the same outstanding issues. Regarding the definition of TCEs, it proposed to remove "artistic." It supported Alternative 2, since the embodiment approach mentioned in Alternative 1 was restrictive and affected the dynamic and evolving nature of TCEs. Regarding the criteria for eligibility, it noted the substantial change which had been introduced by the facilitator in WIPO/GRTKF/IC/22/4. It welcomed the change, since it was in line with the TK text. It reiterated though, that the criteria should not be cumulative. It reiterated its concerns regarding the use of "the result of the creative intellectual activity" and suggested removing it. It proposed to put the word "held" between brackets in Article 1.2(c).

270. The Chair encouraged, as he would do several times, consultations among States and observers on pending issues in order to enhance convergence of the text and reduce options in the text.

271. The representative of FILAIE was concerned that the word "artistic" was bracketed and believed that it should be included. He suggested including "literary" as well, as supported by the Delegation of Canada earlier, since the inclusion of this word would cover dramatic productions.

272. The Chair noted that, if the inclusion of "literary" was an omission, it would be included in the revised Draft Articles.

273. The Delegation of South Africa, speaking on behalf of the African Group, supported the removal of "artistic", which excluded the other forms of expressions. It observed that the removal of the brackets around "or a combination thereof" created a third option. It expressed support for Option 3 and Alternative 1, which read "in which traditional cultural and knowledge are embodied". It felt that Alternative 2 was too broad. In this regard, it reminded that in Africa, much TK was unrecorded and undocumented. It said that the burden of obligations would weight on local communities according to Alternative 2. In Alternative 1, the obligation would lay on the applicant. Because TK and TCEs were linked, it supported the removal of the brackets around "and knowledge." It expressed support as well for the deletion of Article 1.1(e) and suggested moving it to Article 3. It said that indigenous and local communities should either authorize or prohibit the adaptation of TCEs in any event. The Delegation did not support the inclusion of "the result of the creative intellectual activity." Regarding Article 1.2(c), it supported the removal of the brackets around "held". It explained that in Africa much TK which was held was no longer maintained, used or developed.

274. The representative of Métis National Council emphasized the holistic and intergenerational nature of indigenous knowledge and culture. Although she recognized that it was difficult to capture those important elements in a text, she urged that the text take this character into account. She supported the removal of the brackets around "and knowledge". She also supported the removal of the brackets in Article 1.1(e).

275. The Delegation of the United States of America said it was agnostic with respect to the particular choice of the word "artistic." It noted the importance of finding some limiting factor with respect to the broad encompassing notion of TCEs. It felt that the limiting factor was found principally in Article 1.2(a), referring to the phrase "the result of creative intellectual activity." It suggested using the word "creative" instead of "artistic." With respect to the choice of the word "embodied" and with due respect to the Delegation of India, it did not see the principle of embodiment as an unduly limiting factor, as it noted that TCEs must be tangible or intangible, or both, in a combination thereof. It said that trying to protect purely mental or cerebral subject matter would hardly be workable in any international instrument. With respect to the words "and

knowledge”, the Delegation requested the continued bracketing of that term until the relationship of the TK and TCEs texts was clarified. With respect to the word “adaptations”, the word bore directly on the copyright concept of derivatives and was best handled in other articles, particularly Articles 3 and 5. The Delegation highlighted the importance of Article 1.2(a) which limited the broad scope of the protected subject matter.

276. The Delegation of the EU, speaking on behalf of the EU and its Member States, wished to retain the word “artistic” and maintain the brackets around “and knowledge.” It suggested maintaining the brackets around “which pass from generation to generation and between generations” and the brackets around the examples which were listed in Article 1.1. It noted that the word “adaptations” was also used in Article 3. It suggested maintaining the brackets around Article 1.1(e) for the time being.

277. The Delegation of Australia stated that the phrase “from generation to generation and between generations” was essential to the definition of TCEs. It was a central concept that needed to be retained. It strongly supported the removal of the brackets around that phrase and wondered what the policy rationale for bracketing that phrase was.

278. The Delegation of Ethiopia requested the removal of the word “artistic” as it excluded other forms of TCEs. It supported Alternative 1 with the removal of the brackets around the word “and knowledge.” It requested to remove the brackets around “generation to generation” because it would make the negotiations on TCEs meaningless and would contradict with its position regarding the definition of the subject matter in the TK text. It suggested removing the brackets in Articles 1.1(a), 1.1(b), 1.1(c) and 1.1(d), since it thought it useful to have an illustrative definition in view of its implementation. It suggested removing Article 1.1(e) because it felt illogical to include “adaptations.” It further subscribed to the deletion of Article 1.2(a) as the phrase was applicable to other IP rights and did not bear any relation with TCEs. It wished to keep the word “held” in the definition.

279. The Delegation of Cameroon supported the statement made by the Delegation of South Africa, on behalf of the African Group, and the comments made by the Delegation of Ethiopia.

280. The Delegation of Barbados supported the removal of the brackets around “held”.

281. The representative of CAPAJ stressed that it would be unacceptable for indigenous peoples to put “from generation to generation” between brackets. He reiterated that TCEs were passed down from one generation to another as by their own nature.

282. The Chair recommended the representative of CAPAJ together with other indigenous representatives to consult informally with other delegations regarding the intergenerational character of the protected subject matter.

283. The Delegation of Indonesia, speaking on behalf of the LMCs, was pleased that the contribution of the LMCs in document WIPO/GRTKF/IC/22/5 was reflected in many articles in the document and hoped that it would help to move the negotiations forward. Speaking in its national capacity, the Delegation believed that TCEs were much broader than artistic expressions. It supported the deletion of “artistic.” It preferred Alternative 1 and supported the removal of the brackets around “and knowledge.” It supported the removal of the brackets around the examples in Articles 1.1(a), 1.1(b), 1.1(c) and 1.1(d). Considering that TCEs were not necessarily intellectual activity, it supported the deletion of Article 1.2(a). Regarding Article 1.2(b), it supported the removal of the brackets around “associated with.”

284. The representative of the Arts Law Centre of Australia supported the removal of “artistic” as there were important aspects of TCEs which were not necessarily artistic, such as ceremonies and rituals. She supported the statements made by the Delegation of Australia and

the representative of CAPAJ on the removal of brackets around “passed from generation to generation and between generations”, as that was an integral and vital part of TCEs.

285. The representative of Tupaj Amaru suggested replacing the word “artistic” with “creative” as used in the TK text. He supported the removal of the brackets around “which pass from generation to generation and between generations” and all the brackets in Articles 1.1(a), 1.1(b), 1.1(c) and 1.1(d). Regarding Article 1.3, he proposed to add “international instruments” after “regional law.”

286. The Delegation of Trinidad and Tobago supported the removal of the word “artistic” which was subjective and excluded other forms of expressions. It supported the removal of the brackets around “from generation to generation and between generations” which was an important ingredient of the definition of TCEs. The use of the term “between generations” took into consideration TCEs which had skipped generations. It wished to remove all the brackets in Articles 1.1(a), 1.1(b), 1.1(c) and 1.1(d), supporting in this regard the statement made by the Delegation of Ethiopia.

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

288. The Delegation of Barbados supported the inclusion of language that national law could determine the beneficiaries of TCEs which met the criteria for protection in Article 1. Should this option be adopted, then the Delegation would see no need any more to continue supporting “nations” as one of the beneficiaries. Regarding the use of the words “hold, maintain, use or develop” in Article 2, it believed that there would be no need to repeat those words with the appropriate amendment of Article 1.

289. The representative of FILAIE did not agree with the title of Article 2, namely “beneficiaries of protection.” He believed that the title should be “holders” or “rights holders” as the rights were referred to in Articles 3 and 4. He stated that indigenous peoples should be the rights holders, but as a specific category that was different from the eventual beneficiaries.

290. The Delegation of Australia stated that Article 2 was the result of a very fruitful deliberation in the expert group for all concerned beneficiaries. It said that it was clear that the beneficiaries in Australia should be indigenous peoples. However, it recognized that there needed to be flexibility for other Member States to be able to deal through national law with the beneficiaries of protection. It believed that the current text provided that flexibility and was a particular useful articulation of a flexible approach. The Delegation supported the removal of the brackets around “peoples”, “local communities” and “or as determined by national law or by treaty.” The requirement that beneficiaries held, maintained, used or developed TCEs was a key component of the active life of TCEs. Thus, it equally supported the removal of the brackets around “who hold, maintain, use or develop.”

291. The representative of the Health and Environment Program proposed to add “rights holders” after “beneficiaries of protection” to avoid any conflict. She believed that those were two different entities and rights holders should be represented as well. She supported the statement made by the Delegation of Australia on the removal of the brackets around “peoples” and “local communities.”

292. The Delegation of Colombia expressed its concern about bracketing “peoples” and “local communities”, noting that those concepts were not new in international laws, such as the CBD, the ILO 169 Convention and the UN Declaration on the Rights of Indigenous Peoples. It proposed therefore to remove those brackets.

293. The Delegation of the Plurinational State of Bolivia believed that there had been great progress on Article 2. It echoed the concerns expressed by the Delegation of Colombia regarding the brackets around the word “peoples”. It recalled that it had taken the international community twenty years to negotiate the UNDRIP. The Delegation noted that the UNDRIP was



adopted by the majority of the Member States in the IGC, including the EU, but that brackets around the word “peoples” were requested by a Member State of the EU. The Delegation noted that the word “by treaty” was included. It did not understand why that word had been introduced and requested its removal from the text.

294. Regarding the use of the words “or by treaty”, the Chair recalled that, based on the statements made by some delegations, the definition of beneficiaries was subject to treaties in their countries. He wondered whether the inclusion of “treaty” would do harm to the capacities of national law. In seeking to find compromise language, the text broadened the definition to allow for various jurisdictions to be able to accommodate whatever was agreed within their structures as comfortably as possible. He gave an example of the Maroon community in Jamaica. Certain privileges which the Maroon community maintained were subject to a treaty not with its national authority but with the previous colonial power. The Chair encouraged further consultation on the issue. He clarified that he, as the Chair, was not speaking as a *demandeur* for one view or the other, but had merely provided some thoughts for further consultation to help resolve the issue in due course.

295. The Delegation of South Africa, speaking on behalf of the African Group, supported the removal of brackets around “peoples”, “local communities” and “or as determined by national law or by treaty.” Given that there was a reference to Article 1, it supported the deletion of “who hold, maintain, use or develop.” The Delegation suggested including a glossary of terms in which a definition of “local communities” could be included, noting that this could avoid confusion.

296. The Delegation of Ethiopia supported the removal of the brackets around “peoples”, “local communities” and “or as determined by national law or by treaty.” However, it felt that “treaty” caused confusion because treaty would become part of national law when it had been signed or ratified by a country. It supported the removal of “who hold, maintain, use or develop” because it thought it as redundant with Article 1.

297. The Delegation of India supported the removal of the brackets around “peoples”, “local communities” and “or as determined by national law or by treaty.” It believed that the phrase “or as determined by national law or by treaty” gave sufficient freedom to national law. It supported the removal of “who hold, maintain, use or develop” because this would be retained better in Article 1.

298. The Delegation of Guatemala shared the concerns of the Delegations of Colombia and the Plurinational State of Bolivia regarding the terms “peoples” and “local communities. It reminded that Guatemala was a multilingual and multi-cultural country, where there were four groups of peoples. It requested the removal of the brackets around “peoples” and “local communities.” It also requested to remove the brackets around “who hold, maintain, use or develop.”

299. The representative of CAPAJ expressed his gratitude to the delegations who had expressed their support for the removal of the brackets around “peoples.” He stated that indigenous peoples were subject to international public law and had enriched the world with their cultural heritage. He said that this was why the category of indigenous peoples had been recognized in some international instruments, such as the ILO 169 Convention.

300. The representative of GRTKF International supported the statement made by some delegations regarding the removal of the brackets around “peoples”, “local communities” and “or as determined by national law or by treaty.” He proposed to put a full stop there. Regarding “treaty”, he gave the example of Dominica, recalling that there had been a treaty signed between the United Kingdom and the indigenous peoples in Dominica over land rights. He supported therefore the inclusion of the words “or by treaty” in the text.

301. The Delegation of Indonesia acknowledged the flexibility demonstrated by many delegations in the expert group in order to reach the revised formulation of Article 2. It proposed to remove the brackets around “peoples”, “local communities” and “or as determined by national law or by treaty.”

302. The Delegation of Switzerland expressed support for the term “indigenous peoples and local communities” as being the holders and beneficiaries of the instrument on TCEs. It was pleased to see some kind of emerging consensus on that particular topic. It said that this would also be consistent with the universal support that was granted to the UNDRIP. The Delegation also recognized the need for flexibility at the national level. In some jurisdictions beneficiaries might not be “local communities” but “traditional communities”, “ethnic minorities”, “cultural communities”, etc. However, it believed that the phrase “or as determined by national law” would be too vague as this phrase would include the possibility that even a ministry or agency of the State or a museum could fall under that category. Such institutions of course should assist indigenous peoples and local communities in defending their rights but they should certainly not be the beneficiaries. It thought that if the definition of beneficiaries would be extended beyond “indigenous peoples and local communities”, some qualification was needed regarding what national law may determine in this regard. For example, in the TK instrument, there was a formulation saying “similar categories as defined by national law”. For the same reasons, it suggested retaining the words “who hold, maintain, use or develop” in Article 2 and removing the brackets.

303. The Delegation of Congo supported the statement made by the Delegation of South Africa on behalf of the African Group. It believed that holders and beneficiaries should be distinguished. Holders were those who held the rights but there were also other beneficiaries. For the holders to take better advantage of TCEs, they had to allow others to exploit those TCEs commercially and to give them royalties. It wished that beneficiaries could also encompass nations and individuals.

304. The Delegation of the United States of America believed that Article 2 was an important article not just because it reflected the aspirations and expectations of the indigenous peoples and communities whose interests were the subject of that article, but also because of the important legal interrelationships of that article to other articles, especially Articles 1, 3 and 5. Therefore, the search for legal certainty was upon the IGC. If the IGC failed to achieve that, it could cast a long shadow on any instrument that would be the outcome of the IGC work. The Delegation noted that progress had been made regarding Article 2, but expressed concerns on key terms that remained elusive. It had a high degree of comfort with the phrase “indigenous peoples.” It noted though that the phrase “local communities” remained vague and should be the subject of further clarification. It took note of the final so-called “catch-all phrase”. It expressed a continuing concern regarding the need for finding legal certainty. The Delegation stated that it needed to consult with its treaty experts and its experts on governmental tribal relationships with respect to the specific domestic implications of that important article.

305. The Delegation of Norway supported the removal of the brackets around “peoples” and “local communities.” Regarding the phrase “or as determined by national law or by treaty”, it shared the concerns expressed by the Delegation of Switzerland and preferred to keep that phrase in brackets. It believed that the new text weakened the important link between the defined beneficiaries and the specific TCEs which were related to those beneficiaries. It proposed to add “of traditional cultural expression as determined in Article 1” after “Beneficiaries of protection” and to delete “as defined in/determined by Article 1.”

306. The Delegation of Brazil welcomed the new language for Article 2. It believed that that language had achieved to aggregate two main concerns: first, to recognize indigenous peoples and local communities as the primary beneficiaries of the forthcoming instrument, and second, to allow for adequate flexibilities required by some Member States to indicate other beneficiaries nationally. In order to ensure the needs of the primary beneficiaries of the instrument, the

Delegation supported the removal of the brackets around “peoples” and “local communities.” It had some concerns on the use of the word “treaty” and would like to have further clarifications on the interpretation of the term.

307. The Delegation of the EU, speaking on behalf of the EU and its Member States, would like to retain the brackets around the word “peoples”, but it could accept to remove the brackets around “local communities.” It would like to maintain the brackets around “or as determined by national law or by treaty.” It stressed a strong preference for retaining the words “who hold.”

308. The Delegation of France responded to the statement previously made by the Delegation of the Plurinational State of Bolivia. It supported the deletion of the word “peoples” recalling previous interventions made at preceding sessions of the IGC in this regard. It said that Article 1 of the Constitution of France adopted in 1958 provided that “France shall be an indivisible, secular, democratic and social Republic” and that the inclusion of “peoples” in Article 1 would assign privileges to only part of the French people. The Delegation supported the use of “indigenous and local communities” as proposed by the LMCs in document WIPO/GRTKF/IC/22/5. It noted that this phrasing was used in almost all international conventions.

309. The Chair invited the Delegation of France to consult with its authorities and the other Member States on the matter. He acknowledged that the French Constitution would not recognize “peoples” within France. He wondered, though, whether that would require the Delegation of France to deny the capacity of any other Member State to recognize “peoples” in the framework of an international instrument.

310. The representative of Tupaj Amaru was extremely disappointed with the new text of Article 2 with “peoples” and “local communities” between brackets. He stated that the article had a crucial flaw which was the phrase “or as determined by national law or by treaty.” He said that many indigenous peoples in Latin America did not conclude treaties and were not subject to treaties. The phrase would exclude a large amount of indigenous peoples from the right to be holders of TCEs. He regretted that the Delegation of the EU, speaking on behalf of the EU and its Member States, and the Delegation of France insisted upon putting “peoples” in brackets. He urged the IGC to include “peoples”, noting that the word was used in the closing Declaration of the 2009 Durban Review Conference against Racism and in the CBD.

311. The representative of Métis National Council supported the statements made by the Delegations of Australia, the Plurinational State of Bolivia, South Africa, on behalf of the African Group, and others on the removal of the brackets around the word “peoples”. She expressed support for the retention of the word “or” between those optional categories.

312. The Delegation of Ecuador welcomed the fact that the two previous options in the draft text were reconciled in this revised version. It believed that the revised text was a very cautionary and prudent solution. It said that beneficiaries included indigenous peoples and local communities, and the possibility was given for other beneficiaries to be determined by national law. It supported the comments made by the Delegations of Colombia, the Plurinational State of Bolivia and Brazil in the regard.

313. The Delegation of the Islamic Republic of Iran believed that there was no need to include “or by treaty” in Article 2 and suggested deleting it. It stated that relying on national law to determine beneficiaries of protection was a good way forward. It added that national law could determine different categories of beneficiaries according to the needs and the legal requirements of each country.

314. The Delegation of El Salvador believed that it was important to remove the brackets around “peoples” and “local communities.” For future discussion on the term “local communities”, it suggested that the IGC should bear in mind the influence of migrations.

315. The representative of the Assembly of Armenians of Western Armenia preferred the use of the term “indigenous peoples” rather than “local communities.” He said that indigenous peoples were linked to their environment and that the phrasing of Article 2 should reflect that.

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

317. The Delegation of the EU, speaking on behalf of the EU and its Member States, expressed its preference for Option 1 which allowed greater flexibility. It preferred to use the word “should” in Option 1 and throughout the text, given that it favored a non-binding instrument. It strongly supported keeping the word “safeguarded” as currently in Option 1.

318. The Delegation of the United States of America believed that Option 1 was a succinct and flexible formula. It had the great virtue of providing an umbrella for divergent national and regional approaches to protecting the subject matter. It emphasized that this option was a workable solution. Like other delegations, it had a strong preference for a non-binding instrument and for the word “should” rather than “shall.” It supported keeping the word “safeguarded”, since that word allowed Member States more flexibility.

319. The Delegation of Brazil stated that the group of experts had not been able to achieve substantial progress on Article 3 because there was a lack of convergence amongst Member States on the objectives of the instrument. It was concerned that some delegations were reluctant to agree with a comprehensive and effective set of measures to prevent misappropriation of TCEs and recognize the rights of the beneficiaries. It favored Option 2. Regarding the brackets around the term “secret” in Option 2, it suggested keeping the brackets. Its main concern was to avoid differentiating secret TCEs in order to ensure that all TCEs were equally and effectively protected. It would like to seek further clarification on that point.

320. The Delegation of India supported Option 2 with the removal of Alternative 1. In Option 2, it supported “shall” rather than “should.” It was not supportive of the use of the word “safeguard” since it believed that a minimum but clearly articulated and binding set of protection measures should be created. It would like to remove the brackets around “secret” in subparagraph (a) and to remove the word “inalienable.

321. The Delegation of Indonesia believed that Article 3 was very important. It preferred Option 2 and Alternative 2. It did not support the use of the word “safeguard” because it said that the IGC was discussing the protection of TCEs.

322. The Delegation of Nigeria aligned itself with the statements made by the Delegations of South Africa, on behalf of the African Group, and Ethiopia on Articles 1 and 2. It said that Option 2 in Article 3 reflected the expectations of its country in preventing infringements of IP rights.

323. The Delegation of South Africa, speaking on behalf of the African Group, noted that Article 3 merely looked at protection measures. It noted that there was a conspicuous omission on the use of the word “appropriation” in the article as currently drafted. It did not support Option 1, nor the use of the word “safeguard”, given that safeguard was a more restrictive objective than what protection encompassed. It supported Option 2 with the insertion of brackets around “should.” It reiterated that effective legal, administrative or policy measures were obligations rather than recommendations and that the instrument was meant to be adopted by a diplomatic conference. It supported the removal of the brackets around “secret.” It expressed support for Alternative 2.

324. The Delegation of Ethiopia supported Option 2. It suggested being consistent with the TK text that included minimum obligations. In Option 2, it wished to see the word “should” bracketed and the brackets around the word “secret” removed. It supported Alternative 2. It did not accept the word “safeguard”.

325. The Delegation of Colombia believed that Article 3 was of great importance in protecting the TCEs of the indigenous groups and other ethnic groups in its country. It added that the rights of indigenous peoples should be protected in an effective and practical manner and that Article 3 was therefore fundamental. It said that Option 1 was not appropriate and did not generate a suitable protection of TCEs. Regarding Option 2, it preferred Alternative 2. It requested to delete Alternative 1.

326. The Delegation of the Plurinational State of Bolivia supported Option 2 and Alternative 2. It shared the concerns of other delegations regarding the safeguarding approach proposed by some other delegations as a substitute to protection.

327. [Note from the Secretariat: The Vice-Chair, Ms. Alexandra Grazioli, was chairing the session at this point].

328. The Delegation of El Salvador supported Option 2. It believed that the term “safeguard” was weak and inadequate and that a stronger word should be used. It preferred Alternative 1 because it was more appropriate and it offered some margin of maneuvering at the national level.

329. The representative of the Métis National Council supported the statement made by the Delegation of South Africa, on behalf of the African Group. She supported Option 2 and Alternative 2. She said that the core of the scope of protection was to enforce respect for the property interests that were collectively held by indigenous peoples over their TCEs and the right to consent to their use. She believed that the instrument should be legally binding and she supported the inclusion of the word “shall.”

330. The Delegation of the Russian Federation supported Option 1, which allowed Member States to define the scope of protection under national legislation. It supported that option as being the most flexible one.

331. The Delegation of Norway supported Option 2. It preferred to retain the text “safeguard the economic and moral interest of the beneficiaries, including but not limited to.” It wished to retain the brackets around “inalienable” in Alternative 2. It noted that the term “beneficiaries” included “local communities” which was broad.

332. The representative of Tupaj Amaru noted that Option 2 and Alternative 2 were closer to his proposal. He proposed to replace the word “prevent” with “prohibit.” He proposed to include a new subparagraph “any indication or false or improper or misleading use of TCEs for the trade in goods and services without the prior informed consent of the holders shall be subject to both civil and criminal sanctions.”

333. The Delegation of Sri Lanka supported Option 2. It preferred to use the word “shall.” It requested the text “safeguard the economic and moral interest of the beneficiaries, including but not limited to” to be deleted. It supported the removal of the brackets around “secret.” It expressed support for Alternative 2.

334. The Delegation of the Islamic Republic of Iran believed that providing effective legal measures of protection pertain to the heart of the upcoming instrument on TCEs. It said that it was for this reason that it supported Option 2, which provided means to prevent misappropriation and misuse of TCEs.

335. The Vice-Chair opened the floor for comments on Article 4.

336. The Delegation of Barbados supported Alternative 1 which was all encompassing in providing that the competent authority may be regional, national or local. Such broad language would allow small island developing states with vulnerable economies like the CARICOM states to pool their limited resources, if they so desired, and have a regional competent authority. The

Delegation wished therefore to delete Alternative 2 as it didn't sufficiently take into account the realities existing in certain small island developing states.

337. The Delegation of Australia supported Option 2.

338. The Delegation of the United States of America wished to share some preliminary thoughts on Article 4. Option 1 did not align with United States law, as US. law did not have national, local or regional authorities. Instead, collective management organizations were usually organized on a private non-profit basis. The Delegation noted that if the Committee were to proceed with this, this would need to be reflected somewhere. The Delegation believed that Option 1 was a useful distillation of the previous related provisions. Nonetheless, it believed that it remained overly prescriptive, in particular with respect to the list of functions enumerated. The Delegation approved the retention of paragraph 2 within Option 1. Transparency and accountability of collective management of rights was always an important if not paramount consideration. This would have special relevance to ensure that benefits flew efficiently with low administrative costs to the affected communities. With respect to Option 2, the Delegation noted that although it had the advantage of being brief, it failed to elaborate with greater specificity the operation of this mechanism and could be the subject of further development.

339. The Delegation of Norway supported Option 2 as it believed that the administration of the rights and principles should be in the hands of the beneficiaries. It however wished to develop that option a little further.

340. The Delegation of El Salvador supported Option 2, in line with its national legislation.

341. The Delegation of the EU, speaking on behalf of the EU and its Member States, noted that its previous comment to replace the word "rights" by the word "interests" in the title of Article 4 was not reflected in the Rev. 1 text. This comment was, however, reflected in the previous text prepared by the facilitator. As this matter had not been discussed in the expert group, the Delegation requested a clarification regarding this difference between the two texts. Concerning Option 2, the Delegation understood that the short text which was now presented under that option captured the essence of the policy objective of the proposal which had been made by the Delegation and handed over to the facilitator and the Secretariat. That proposal read: "[T]he beneficiaries as defined in Article 2 should have the possibility of designating a competent body to safeguard their interests as defined in Article 3." The Delegation needed more time to study the short option now proposed under Option 2 and study the effect of this proposed language, which was drafted differently from its proposal. Finally, as a general comment, it noted that this was the first time the facilitator had worked on this article. It needed, therefore, more time to review the text and reserved its right to come back later with further comments at a future session.

342. The Delegation of South Africa, speaking on behalf of the African Group, noted that this was the first time that the Committee was engaging with a totally new draft for Article 4. It wished to engage with the facilitator in getting her understanding on the underpinning of Options 1 and 2. These options had been substantially revised in comparison with the previous document and it reserved its right to make more substantial comments later. The Delegation had a preference for the LMCs' text in document WIPO/GRTKF/IC/22/5. It also wished to see the number of options reduced to one.

343. The Delegation of India noted that there were a lot of changes in Article 4 in comparison with the LMCs' text in document WIPO/GRTKF/IC/22/5. It expressed its preference for Option 1 but reserved the right to come back and give its definite position. In Option 1, it wished to retain letter (g) and remove the square brackets. This aspect was important because of its linkage with Article 2. It wished to bracket the new proposal suggested by the Delegation of the EU because it was new and it wanted to study it. It noted with some concerns that the word

“safeguard” was being used in the proposal made by the Delegation of the EU. It also wished to bracket the word “interests” in the proposal of the Delegation of the EU. The Delegation of India was not in favor of Option 2. That option needed further elaboration in terms of framing the administration of rights.

344. The representative of GRTKF International supported Option 2. The way it was written would leave room for interpretation and also for the full and effective participation of the beneficiaries in the determination and implementation of the objectives of the competent authority. By so doing, it would allow for more transparency on the part of the beneficiaries and those whom they may appoint to manage their rights.

345. The Delegation of Colombia indicated that it would need more time to consider this new proposal more deeply. However, it wished to include a first sentence in the article, which had been eliminated in document WIPO/GRTKF/IC/22/4. The sentence read “the management of the rights provided for in Article 3 belongs to the beneficiaries as defined in Article 2”. It regretted that the sentence had been removed because the rest of the article flowed from that sentence.

346. The representative of Tupaj Amaru pointed out that the facilitator had made the text a great deal more complex. He noted that it included five alternatives and said that this brought much confusion. He indicated that the notion of administration of rights or interests, as the Delegation of the EU had proposed, had no source in jurisprudence, or in any treaty or international instrument. He believed that states could not propose any notion which had no legal or fundamental basis. On the other hand, the text he proposed was based on instruments, such as the various UNESCO Conventions, the UNDRIP and the CBD. He explained that his proposal aims at the exercise of collective rights instead of administration of rights. He said that he maintained his proposal and would resubmit it later on.

347. The Delegation of Sri Lanka expressed its satisfaction with the title “administration of rights” for Article 4. It reserved its right to speak on that article at a later stage.

348. The representative of the Health and Environment Program supported the statement of the Delegation of South Africa on behalf of the African Group. She said that this article indicated what rights could be claimed. She added that this was a key issue. She noted though, that it was not clear who was the beneficiary of these rights. She requested therefore that these questions be reviewed also outside the Committee with other participants. The representative supported Option 1 because it was broader and offered more alternatives than Option 2 which was in her view a very ambiguous option. She wished to remove the brackets in paragraph (d). Regarding Option 2, she said that there was no sufficient certainty as to the rights involved and as to who could claim one particular right or another.

349. The representative of CEPPEP wished to make some preliminary observations concerning Article 4. Firstly, this article was a very strategic article because it had to do with the implementation of the entire body of law that would protect TCEs. Secondly, he observed that it was not possible to administer a right without the participation of the rights holders, such as indigenous people and communities. Thirdly, the use of the term “national law” was nebulous. It was preferable that a new law be enacted under domestic law, rather than referring to or using an existing national law. In most countries, nothing had been done yet in terms of domestication or in terms of enactment of a law within the states. In that context, he urged Member States to look at Option 1, Alternative 1. It had always been accepted that the power, the competence and the authority of indigenous communities and peoples came from the cultural integrity given to them by international protocols on human rights law and on different regimes and protocols. It was important to recognize this traditional component of competency as an authority in this legislation. He noted that Option 1 did not reflect that. The decision making and governance processes of the beneficiaries were a good recognition and input. In relation to Alternative 5, which referred to “international law”, he suggested that the alternative

should be specific on what international law it was referring to. He said that Option 1 was nebulous and brought a lot of confusion. He supported Option 2 for this reason.

350. The representative of the Métis National Council supported the essential aspect of this article, that is, that it is based on the consent of the beneficiaries. She looked forward to further discussion in plenary given the significant revision of the text and the key role of the beneficiaries in terms of the implementation of the article. She added that references to traditional governance and decision-making processes, customary protocols, understandings, laws and practices were also most relevant.

351. [Note from the Secretariat: The Chair was chairing the session again at this point]. The Chair opened the floor on Article 5.

352. The Delegation of El Salvador wished to remove the brackets from paragraph 1. In paragraph 3, it preferred Alternative 2, and in paragraph 4, it believed that it was important to stress that the instrument should facilitate the use of TCEs in archives and libraries, museums and other cultural institutions for purposes of preservation and research.

353. The representative of Tupaj Amaru wished to maintain his proposal regarding exceptions and limitations. He reiterated that cultural expressions and traditional knowledge, sacred knowledge, spiritual expressions and secret expressions, by their intrinsic nature, could not be subject to exceptions and limitations as far as their protection was concerned.

354. The Delegation of South Africa, on behalf of the African Group, wished to reiterate its position that Article 5 had no clear policy intent and noted that the degree of protection depended on both Articles 3 and 5. That said, the Delegation supported paragraphs 1, 2 and 3 with the bracketing of “should” in all of these paragraphs. In paragraph 3, it supported Alternative 2. In paragraph 4, it supported the removal of the brackets from the words “only with the free prior informed consent of the beneficiaries.” The Delegation welcomed the inclusion of “education” in paragraph 4(a) and supported the deletion of paragraph 5. It noted that its support for the deletion of paragraph 5 was consistent with its earlier argument that these were obligations imported from other instruments.

355. The Delegation of Ethiopia supported the statement made by the Delegation of South Africa on behalf of the African Group. In addition to that statement, it wished to bracket paragraph 4(b).

356. The Delegation of India wished to take more time to look at Article 5. As a preliminary statement, and as the article stood, it supported paragraphs 1, 2, and 3, Alternative 1. The Delegation had difficulties with Alternative 2 because it was trying to bring in principles from a different instrument. On paragraph 4, it wished to bracket sub-paragraph (b) because of the vagueness of the words “inspired by or borrowed from.” In all paragraphs, it preferred the use of the word “shall” rather than “should.” Finally, it wished to bracket paragraph 5 because it also tried to link this instrument with instruments that had no connections with it.

357. The Delegation of the Plurinational State of Bolivia supported paragraphs 1, 2, and 3 and Alternative 2. It reiterated the importance of the concept of prior informed consent for indigenous peoples. It wished to bracket paragraph 5, which was not needed because the forthcoming instrument should be a stand-alone instrument.

358. The Delegation of Brazil thanked the facilitator for the inclusion of the third step on the former two step test in Alternative 2. It believed that this set of criteria would provide for an adequate flexibility for exceptions and limitations without endangering the rights and interests of the beneficiaries. Additionally it wished to keep brackets around paragraphs 4(b) and 5.

359. The Delegation of the EU, speaking on behalf of the EU and its Member States, asked for clarification regarding the term “beneficiaries” in paragraph 1 as it was related to the expression



“within and among communities”. Further, it wished to see the words “member states” replaced by “members” throughout the text in order to include the EU and not only states. In paragraph 3, Alternative 1, sub-paragraph (c), the Delegation of the EU sought clarification of the unusual use of the term “fair practice.” In paragraph 4, it wished to maintain the brackets around the phrase “only with a free prior informed consent of the beneficiaries” in the chapeau. In sub-paragraph (b), it wished to delete the brackets and keep the text of this sub-paragraph. Finally, in paragraph 5, the Delegation noted that there was no mention of design law and asked for clarification as to why design law was omitted from that paragraph.

360. The Delegation of the United States of America reiterated its view that Article 5 was of great importance because of its fundamental policies favoring freedom of speech and freedom of expression. With that background in mind, it noted with approval that paragraphs 4 and 5 had been retained. The Delegation regarded those paragraphs as a minimum operational reflection of those fundamental policies. It pointed out that additional exceptions and limitations might be required as the discussion would unfold. With respect to the bracketed language in the chapeau of paragraph 4, “only with the free prior and informed consent of the beneficiaries”, the Delegation noted the considerable tension with its no prior restraint doctrine in the United States constitutional law. Its future interventions would be guided by full consideration of not only the letter of that law but also the spirit of its no prior restraint doctrine.

361. The Chair invited the Delegation of the United States of America to consult with other delegations on the matter.

362. The Delegation of Norway believed that paragraph 1 and the elements addressed in paragraph 1 could be better addressed in the article on the scope of protection. It reserved its position on paragraph 2 at this stage. On paragraph 3, it supported Alternative 2 but reserved its position on the inclusion of a new letter (a) and wished to bracket it. On paragraph 4, the Delegation supported sub-paragraph (a) but wished to retain brackets around “only with the free prior and informed consent of the beneficiaries” in the chapeau. On sub-paragraph 4(b) it believed that the principle expressed there could be better addressed in Article 3 on scope. The Delegation reserved its position on paragraph 5.

363. The representative of the Métis National Council, as a preliminary consideration regarding Article 5, supported the inclusion of the requirement of free and prior informed consent. She noted the link to the alternative dispute resolution process provided for in Article 8, paragraph 3.

364. The representative of CEPPEP noted that in paragraph 3 Alternative 1 was the best approach as it met the interests of the indigenous peoples. In Alternative 1(a), the words “acknowledge the beneficiaries, where possible” should be replaced by “acknowledge the beneficiaries at all times.” In Alternative 1(c) the words “is compatible with fair practice” should be replaced by the words “is compatible with fair practices and international human rights, protocols and law.” In paragraph 4, he wished to remove the brackets around the expression “only with the free prior and informed consent of the beneficiaries.” He also wished to remove the brackets in sub-paragraph 4(b).

365. The representative of the Health and Environment Program supported the statement made by the Delegation of South Africa, on behalf of the African Group regarding Article 5. She supported paragraphs 1, 2, 3 (Alternative 2) and 4(a) and proposed the use of the word “shall” instead of “should” throughout the text. In paragraph 4, she wished to remove the brackets around the words “only with the free prior and informed consent of the beneficiaries.”

366. The representative of the Arts Law Centre of Australia supported the removal of brackets around the words “only with the free prior and informed consent of the beneficiaries” in the chapeau of paragraph 4. It was important that indigenous peoples had control over their TCEs that were preserved and used in archives, libraries and museums. She also supported the deletion of paragraph 4(b), as this is was contrary to the interests and rights of indigenous

peoples and would lead to further misappropriation of TCEs. Finally, she also supported the statements made by the Delegations of the Plurinational State of Bolivia and South Africa on behalf of the African Group, in relation to the removal of paragraph 5.

367. The Delegation of Indonesia supported paragraphs 1, 2 and 3, Alternative 2. It also supported the removal of brackets around the words “only with the free prior and informed consent of the beneficiaries” in paragraph 4. Finally, it supported the removal of paragraph 5.

368. The Delegation of Nepal supported paragraphs 1, 2 and 3, Alternative 2, as well as the deletion of paragraph 5. It also preferred the use of the word “shall” instead of “should.”

369. The Delegation of the Islamic Republic of Iran, speaking on behalf of the Asian Group, expressed its appreciation for the hard work of the facilitator in coming up with a new text that was easier to understand. It said that the facilitator had made an excellent effort in accommodating different views. It requested that whenever there was a reference to “member states”, the term “contracting parties” also be inserted in order to preserve flexibility on the final outcome. It noted that the facilitator had wisely utilized the neutral formulation of “countries” instead of “member states” or “contracting parties”, which it could accept.

370. The Chair opened the floor on Article 6.

371. The Delegation of El Salvador expressed its gratitude for the pairing down and succinctness that had been done in the text. It believed that the Committee should continue working to ensure that protection measures included in these articles were provided for an unlimited duration.

372. The Delegation of Australia wished to reserve its position between Options 1 and 2. It suggested however that in paragraph 2 of Option 1 the words “should or shall last indefinitely” be bracketed as it did not think that moral rights should last indefinitely. Rather, it believed that they should be subject to the same restriction as in paragraph 1, which was that protection should endure for as long as the TCEs continue to meet the criteria for protection under Article 1.

373. The representative of the Métis National Council did not support any limitation in the term of protection.

374. The Delegation of Ethiopia supported Option 1.

375. The Delegation of the EU, speaking on behalf of the EU and its Member States supported Option 2.

376. The Delegation of South Africa, speaking on behalf of the African Group, supported Option 1 with a few adjustments. The Delegation wished to bracket paragraph 1. Regarding paragraph 2, it wished to use the words “indigenous peoples or local communities” instead of “indigenous peoples and communities.”

377. The Delegation of Sri Lanka supported Option 1.

378. The Delegation of India supported Option 1.

379. The Delegation of the United States of America reiterated its preliminary view that the discussion of the term of protection was premature since the scope of protection had not been determined. That said on a preliminary basis, it signaled support for Option 2 as under the U.S. Constitution the protection of copyrighted subject matter was, as a constitutional matter, limited in time.

380. The representative of FAIRA supported the statements made by the Delegations of Sri Lanka, South Africa on behalf of the African Group and Australia.
381. The Delegation of Brazil supported Option 1.
382. The Delegation of the Republic of Korea referred to the statement of the Delegation of the Islamic Republic of Iran, on behalf of the Asian Group and wished to make a reservation to the use of the term “contracting parties” as it needed to consult on this subject.
383. The Chair suggested that wherever the terms “contracting parties” and “member states” were put together, they would be bracketed.
384. The Delegation of Guatemala supported Option 1.
385. The representative of Tupaj Amaru supported Option 2. He observed that protection of TCEs should have a specified duration for the rights holders, but that protection of cultural heritage itself should not. Protection given to TCEs should continue to nurture the history of indigenous peoples and should reflect the fact that their heritage was transmitted from generation to generation.
386. The Delegation of Norway supported Option 1. Within that option it believed that paragraph 1 was sufficient.
387. The representative of the Health and Environment Program supported Option 1 because it believed that Option 2 was not efficient enough in relation to the exercise of these rights.
388. The Delegation of Panama supported Option 1.
389. The Delegation of Georgia supported Option 1. In paragraph 2 it wished to replace the words “indigenous peoples and communities or region” by “beneficiaries.”
390. The Chair opened the floor on Article 7.
391. The Delegation of the EU, speaking on behalf of the EU and its Member States, preferred that the determination of formalities, if any, be left to national law. The Delegation wished to remove the brackets around the phrase “as a general principle” and also proposed an alternative text which read: “National law will determine if TCEs are subject to formalities.”
392. The Delegation of El Salvador proposed that there should be no requirement for a register to obtain the benefit of protection.
393. The Delegation of India wished to remove or delete the words “as a general principle” to make the text consistent with the TK text.
394. The Delegation of South Africa, speaking on behalf of the African Group, wished to delete “as a general principle” and to square bracket the new text proposed by the Delegation of the EU made on behalf of the EU and its Member States.
395. The Delegation of the Russian Federation supported the proposal of the Delegation of the EU made on behalf of the EU and its Member States.
396. The Delegation of Indonesia wished to delete the words “as a general principle.”
397. The Delegation of Nepal wished to delete the words “as a general principle.”
398. The representative of the Health and Environment Program wished to delete the words “as a general principle” and the word “should.”

399. The Chair opened the floor on Article 8.

400. The representative of the Métis National Council stressed the importance of considering an alternative dispute resolution mechanism in Article 8.

401. The Delegation of Canada supported Option 1 of paragraph 1 but wished to bracket the words “including legal policy or administrative measures”, “willful or negligent”, “economic and/or moral” and “sufficient to constitute a deterrent.” It also supported paragraph 2.

402. The Delegation of El Salvador supported Option 1 as well as paragraph 2.

403. The Delegation of South Africa, speaking on behalf of the African Group, supported Option 2 with the inclusion of more clarity on the envisaged measures in paragraph 1. It wished to bracket the word “safeguarding” in paragraph 2.

404. The Delegation of India supported Option 2. It also wished to bracket the word “safeguarding” in paragraph 2. The Delegation believed that paragraph 3 should be deleted, but that in any case, the words “shall/should” should be replaced by “may.” Finally it wished to add the words “and most suitable and convenient to the beneficiaries” at the end of paragraph 3.

405. The Delegation of Brazil supported Option 2. In that option, it suggested that the expression “border measures” should be deleted since monitoring TCEs would be extremely costly and impracticable for authorities. The Delegation was not comfortable with paragraph 3 on alternative dispute resolution and asked for clarifications on the nature of such mechanism.

406. The Delegation of Ethiopia supported Option 2 and pointed that all brackets should be removed in that option.

407. The representative of the Assembly of Armenians of Western Armenia believed that the second option was the better one. He added that, in his view, acts which he referred to as cultural genocide should be subject to criminal sanctions under human rights and national legislation. The representative also supported paragraph 3.

408. The Delegation of the EU, speaking on behalf of the EU and its Member States, noted in relation to the title of Article 8 that its comment to introduce the word “interests” instead of “rights” was not reflected in this version of the text. The Delegation supported Option 1 of paragraph 1 with a few amendments. It wished to reintroduce the word “necessary” between brackets after “appropriate” so that the text would read “appropriate necessary measures.” At the end of that paragraph, it wished to put a full stop after “beneficiaries” and bracket the words “sufficient to constitute a deterrent.” It supported the retention of paragraph 3 but wished to slightly amend it. The words “each party shall/should be entitled to” should be deleted and replaced by “the parties can” and towards the end of the sentence “international and/or” should be deleted, so that the sentence would read: “where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, the parties can refer the issue to an independent alternative dispute resolution mechanism recognized by national law.”

409. The Delegation of the Russian Federation supported Option 1 of paragraph 1, and paragraphs 2 and 3.

410. The Delegation of Australia supported Option 1 of paragraph 1 but wished to bracket “sufficient to constitute a deterrent”. It also supported the removal of the brackets around paragraph 3.

411. The Delegation of the United States of America noted that this was a premature discussion because the nature of this instrument was not determined as suggested by the bracketed word “rights” in the title. Nonetheless as a preliminary exercise within this framework

it was studying closely Option 1 as a possible preferred option and noted with respect to Option 2 that that option caused considerable difficulties for this Delegation and was probably a non-starter because of the inclusion of criminal penalties. The Delegation would continue to study this option and come back with further thoughts on all options.

412. The Delegation of Indonesia supported Option 2. It also wished to see the word “safeguarding” bracketed in paragraph 2. With respect to paragraph 3, it wished to add the words “which is most convenient to the beneficiaries of the TCEs” after the words “dispute resolution mechanism.”

413. The representative of Tupaj Amaru supported Option 2 but wished to replace the word “sanctions” by “punishment”, because in legal cases of expropriation of TCEs, and referring to what was set forth in Article 3, the contracting parties should establish a mechanism or mechanisms which were appropriate for settling disputes and administrative remedies before the courts, as well as provide for civil and criminal punishments.

414. The Chair opened the floor on Article 9.

415. The Delegation of El Salvador emphasized the importance that these provisions fulfill the criteria set out in Article 1 and be valid at the moment of entry into effect of the instrument.

416. The Delegation of the EU, speaking on behalf of the EU and its Member States wished to remove the brackets around the word “effect.” It supported Option 1 of paragraph 2.

417. The Delegation of Canada did not want to prejudge the final outcome of these negotiations. For the time being, it supported paragraph 1. It wished to keep the brackets around “effect.” The Delegation supported Option 1 of paragraph 2.

418. The Delegation of South Africa, speaking on behalf of the African Group supported Option 2 with some changes. In the chapeau, it wished to use the words “into force” instead of “effect” in consistency with the LMCs’ text in document WIPO/GRTKF/IC/22/5. Further, paragraph 3 should be consistent with Article 1.

419. The representative of the Health and Environment Program supported Option 2 and wished to replace the word “should” by “shall.”

420. The Delegation of India wished to retain the language of the LMCs text in document WIPO/GRTKF/IC/22/5 for paragraph 1 and paragraph 2, Option 2, and replace the word “effect” by the words “into force.”

421. The Delegation of Australia supported the removal of the brackets around the word “effect” in paragraph 1 and also paragraph 2 of Option 2. It wished to bracket paragraph 3 and sought clarification about how that paragraph would operate in practice.

422. The Delegation of the United States of America considered that the discussion of this article was premature given the fact that the nature of the instrument was not clear yet. It noted that oddly enough this article discussed transitional measures when the more fundamental concept of application in time so common to WIPO treaties had not been discussed. The Delegation thought that when protection should be prospective and the discussion should include a strong retroactivity clause. Would the Committee get passed the discussion on Article 2, it then could give thought to transitional provisions with respect to continuing acts from the previous period into the period in which the treaty applied. With respect to that, Option 1 seemed to be the beginning point of a discussion.

423. The Chair opened the floor on Article 10.

424. The Delegation of Canada stressed that this was a very important article and reminded that it had provided alternative wording in plenary. It indicated that it would do so again in order to put it on record.

425. The Delegation of the EU, speaking on behalf of the EU and its Member States, found that the wildcard option weakened the language that was contained in Option 2. It wished to take some time to think further about this proposal. It also recalled its own proposal under this article which read “provisions under national law in accordance with this instrument should leave intact and should in no way affect the protection provided for in international legal instruments on intellectual property rights.”

426. The Delegation of India had concerns about this article. It was of the view that the text needed to be reconsidered along with the input and textual changes given in the plenary.

427. The representative of the Health and Environment Program wished to move or revise the words “dealing with intellectual property and with cultural heritage.”

428. The Delegation of El Salvador noted that this article had been introduced recently and it needed more time to assimilate and reserved the right to comment on it later on.

429. The Delegation of the United States of America stated that this article was extremely important to its country and raised complex issues. In imagining concentric circles of treaties, it said that at the core circle were intellectual property treaties, the Berne Convention, the WCT, the WPPT and the most recent Beijing Treaty on Audiovisual Performances. With respect to those core treaties, it would be looking for a strong non-derogation clause that would ensure that those treaties were left intact. It also requested a clause that dealt with interpretation and that would be consistent with those treaties. At the next concentric circle were the cultural heritage treaties, the relationship to those needed to be addressed also. At the further concentric circle, were human rights instruments like the UNDRIP. The relationship to that instrument would need to be addressed as well. The Delegation looked forward to further discussion as each of those circles would require consideration of its own.

430. The Delegation of South Africa, speaking on behalf of the African Group, noted that the article had been radically changed. It reserved its position for later. For the time being, it expressed its preference for the LMC’s draft article as contained in document WIPO/GRTKF/IC/22/5.

431. The Delegation of Indonesia would need more time to reflect on this formulation. However it also had a strong preference for the LMC’s text as contained in document WIPO/GRTKF/IC/22/5.

432. The Chair opened the floor on Article 11.

433. The representative of Tupaj Amaru did not support the article as drafted as it suggested that beneficiaries were equals to indigenous peoples, recalling that indigenous peoples were the owners of the TCEs. He was of the view that this article should be consistent with Article 2 and apply to indigenous peoples and local communities as beneficiaries and holders of their own cultural expressions.

434. The Delegation of the EU, speaking on behalf of the EU and its Member States, considered that it was premature to discuss this article and the principle of national treatment because it did not want to prejudice the nature of this instrument at this stage.

435. The Delegation of India stressed that this article was very important and wished to retain it. It wished, however, to look at the nature of the obligations that would come out of the instrument and return to this article at a later stage.

436. The Delegation of the Islamic Republic of Iran recalled that it had previously indicated in the plenary that it did not know the exact meaning of “prescribed country” or the scope of this concept. It had requested that these concepts be replaced by “contracting parties” and that the words “contracting parties” also be inserted after “eligible foreign beneficiaries” so as to read “eligible foreign beneficiaries of contracting parties.” He noted that its proposal had not been taken into account.

437. The Delegation of South Africa, speaking on behalf of the African Group, noted that since the IGC was moving towards a diplomatic conference, national treatment was an extremely important article for Africa. Hence it supported the article and also the intervention made by the Delegation of the Islamic Republic of Iran.

438. The Chair opened the floor on Article 12.

439. The Delegation of the EU, speaking on behalf of the EU and its Member States, expressed its gratitude to the facilitator for a much improved text under Article 12. It supported that article but wished to amend the language further for streamlining purposes. It proposed to delete the words “in instances” at the beginning of the draft article, and also to delete the words “instances of” further in the sentence.

440. The representative of GRTKF International supported the removal of the word “instances.” He explained that he supported Article 12 because of the reality of the situation in the Caribbean where the territories were only separated by water. He pointed out that the reality of parallelism between Africa and the Caribbean would need to be considered under that particular article.

441. The Delegation of South Africa, speaking on behalf of the African Group, supported, in principle, the inclusion of this article. However, it reserved its right to come back on the intent of the article.

442. The Delegation of Indonesia saw the importance of this article and wished to have more time to reflect and also consider the last LMC text that gave more elements on trans-boundary cooperation. It reserved its right to come back to this article at a later stage.

443. The Delegation of India supported this new article. It noted that there was a similar article in the TK text. It wished to reserve its right to come back to this article at a later stage with the right language in order to capture essential elements for cooperation in case of trans-boundary movement of TCEs.

444. The representative of the Assembly of Armenians of Western Armenia stressed the extreme importance of this article as many indigenous peoples lived across borders. He noted that there was a relative consensus on the article. He would come back with more concrete formulations at an appropriate time.

445. The Chair opened the floor for general comments on the Objectives and Principles.

446. The Delegation of the EU, speaking on behalf of the EU and its Member States noted that the latest discussion that took place in the Committee on objectives and principles dated back to IWG 1 which was a long time ago. It added that this part needed to be updated to reflect the progress that had been made in the meanwhile on the text and also to more adequately reflect the different policy options still contained in the text. The Delegation proposed to come back to the discussion on objectives and principles at length at a later stage and to give them more priority in discussions in a future session. It said that it would reflect on ways to improve the text.

447. The representative of CEPPEP wished to comment on paragraphs 5. He proposed to add the words “and resources” at the end of the statement so it would read “authority over their own traditional cultural expressions and resources.” In addition, under general guiding principles, he

wished to add an item (j) that would read “the requirement of free prior and informed consent of the title holders or traditional representatives of Indigenous Peoples and other cultural communities.”

448. The Chair noted the comments by the representative of CEPPER and recommended that he share his proposal with other observers and Member States for consideration when the Committee would return to a substantive and drafting discussion at a future time.

449. The representative of the Health and Environment Program considered that the objectives included in this text were self-explanatory. She added that a mere declaration would not serve the purpose of protecting TCEs effectively, since a declaration was not considered as law and would be open to conflicting interpretations.

450. The Delegation of South Africa, speaking on behalf of the African Group, would submit its comments on the objectives and principles later but stressed that there needed to be consistency in referring to indigenous and local communities.

451. [Note from the Secretariat: the Chair read out a proposed decision under this agenda item 6 for consideration by the plenary.]

452. The Delegation of the United States of America expressed concerns over the last sentence of the draft decision on agenda item 6. It observed that the sentence indicated that the text, in its present form, would be transmitted to the WIPO General Assembly. The Delegation nevertheless observed that there had been substantial expressions of divergent views with respect to the articles that had not been discussed in plenary and that none of these comments had been carried forward, nor had the text been bracketed to reflect the same. It suggested, for the record, that the comments on various articles that were not discussed, particularly those articles that were contested, be made available for future consideration as part of the text and welcomed the insertion of some form of textual reference within the document which would capture the diverse views on specific articles. It, however, remained indifferent to the particular mechanism which would be utilized to achieve this objective.

453. The Delegation of Canada expressed its support for the concerns raised by the Delegation of the United States of America, with specific reference, on its own part, to Article 10. It explained that it had similarly made a formal proposal at the beginning of the week in plenary which had not been reflected in the text.

454. The Chair indicated that the text would reflect the bracketing of the items within it. He also noted that the language from the TK text, which reflected that the current text was a work in progress, had been agreed to be used as part of an introduction to the Draft Articles on TCEs as transmitted to the General Assembly. This, he pointed out, showed that there were still elements within the text yet to be considered. He requested the facilitator to identify, and insert brackets in areas of the text where, based on the discussions, Member States had expressed an intention to bracket the text. He reiterated that the expert group process had been a servant of the plenary and requested that omissions be drawn to the attention of the facilitator for reinsertion. He also asked the facilitator to revisit her notes, and indicate where a signal for bracketing would have been given by Member States but was not reflected in the text.

455. The facilitator, Ms. Kim Connolly-Stone, responding to the intervention of the Chair, identified Articles 4, 8, 9, 10, 11 and 12 as being subject of reservations by delegations that wished to consider certain aspects further and would therefore be bracketed. In a few cases, she said, there were expressed requests to reinsert text, and in other cases, implied requests to bracket portions of the text.

456. The Chair said that the facilitator would bracket the relevant portions of the text as a means of conveying the lack of convergence or ongoing significant deliberation on these items.



457. The Delegation of the Islamic Republic of Iran sought clarification on whether its earlier intervention was reflected in the text.

458. The Chair clarified that the concerns of delegations would be addressed by the facilitator in the finalization of the text before its transmittal to the General Assembly.

*Decision on Agenda Item 6:*

459. *The Committee discussed the working and information documents prepared for this session under this agenda item, in particular documents WIPO/GRTKF/IC/22/4, WIPO/GRTKF/IC/22/5, WIPO/GRTKF/IC/22/INF/4 and WIPO/GRTKF/IC/22/INF/8. The Committee developed, on the basis of these documents and comments made in plenary, the text “The Protection of Traditional Cultural Expressions: Draft Articles” in accordance with the General Assembly mandate contained in document WO/GA/40/7. The Committee decided that this text, as at the close of the session on July 13, 2012, be transmitted to the WIPO General Assembly for consideration by the General Assembly in accordance with the Committee’s mandate contained in document WO/GA/40/7.*

## **AGENDA ITEM 7: PARTICIPATION OF OBSERVERS**

460. [Note from the Secretariat: The Vice-Chair, Mr. Bebeb A.K.N. Djundjuran of Indonesia, chaired the session dealing with agenda item 7]. The Vice-Chair introduced agenda item 7 and said that the IGC had paid attention for a long time to the role and status of observers, especially indigenous peoples and local communities. He recalled that at IGC 20 a study on this matter had been examined (document WIPO/GRTKF/IC/20/7), as required by the IGC’s mandate, and that several decisions had been taken by the IGC in this regard. Those decisions included that the Committee noted that that it was always within the discretion of the Committee’s Chair, with the Committee’s approval and in accordance with the Committee’s Rules of Procedure, to invite representatives of observers to join any “Friends of the Chair” groups that may be established and/or to co-chair working and drafting groups. The Vice-Chair recalled as well that the Committee had also supported the organization of an indigenous expert workshop preceding one of the upcoming IGC sessions. He echoed the fact that the Committee had strongly encouraged Member States to organize consultations with indigenous peoples. The Committee had agreed with several other initiatives to enhance information exchange and awareness-raising on indigenous peoples’ issues. As a result of this, for example, a special briefing session for observers was now held at IGC sessions and a new streamlined written guide for observers had been published by WIPO. A document (WIPO/GRTKF/IC/22/INF/9) on resources available on the WIPO website was also now routinely made available. He also noted that the Committee had welcomed cooperation of the WIPO Secretariat with the UN Permanent Forum on Indigenous Issues (“Permanent Forum”). Regarding the present session, the Vice-Chair introduced information document WIPO/GRTKF/IC/22/INF/10, which had been requested by the previous session of the IGC. He suggested opening the floor for any general comments on the implications of the six suggestions as described in the document. He would

also see if any Member States might wish to take up one or more of those suggestions as a formal proposal to be discussed by the IGC and, perhaps, try to reach a decision thereon by consensus. He would then open the floor for any new suggestion or proposals regarding the participation of observers. He requested, though, that suggestions previously discussed and not endorsed by the IGC at past sessions not be raised again.

461. The Delegation of the United States of America, speaking on behalf of Group B, requested that further clarity be provided on the objective of the discussion that the Vice-Chair wished to launch under agenda item 7. The Delegation reminded that information document WIPO/GRTKF/IC/22/INF/10 invited the IGC to take note of its contents and not to take any decision in this regard.

462. The Vice-Chair stated that his suggestion was to have a discussion on the information document before the IGC would take note of it. Any decisions would need, first, that a particular suggestion be taken up and endorsed as a formal proposal by a Member State, and, then, that the discussion taking place within the IGC on supporting or not the endorsed suggestion lead to a consensus decision. The Vice-Chair asked the plenary if there was at least one Member States which wished to discuss the document.

463. The Delegation of Sri Lanka stated that it wished that the document be discussed.

464. The Vice-Chair opened the floor on suggestion 1 in WIPO/GRTKF/IC/22/INF/10.

465. The representative of FAIRA noted that it seemed that this suggestion would only have minor budgetary implications. He added that this suggestion would not impact on the intergovernmental character of the IGC as a forum for Member States while it would give due consideration for indigenous peoples within the IGC process. He urged the IGC to consider supporting this suggestion.

466. The representative of the IPCB, speaking on behalf of the Indigenous Caucus, drew the Committee's attention to the Permanent Forum's recommendations resulting from the Comprehensive Dialogue with WIPO that had taken place at its eleventh session (see the report of the eleventh session of the Permanent Forum in the ECOSOC Official Record 2012, Supplement No. 23, E/2012/43-E/C.19/2012/13). She stated that the Indigenous Caucus was united in its endorsement of those recommendations and requested the IGC to endorse them and act upon these recommendations in a timely manner. She further called upon the IGC to make the following decisions: first, that the IGC adopt modalities to ensure the full, equal and direct participation of indigenous peoples in all IGC processes; second, that the IGC create a new category for participation for indigenous peoples, which would include the right to submit proposals, amendments, and motions and right to vote; third, that the IGC ensure equal representation of indigenous peoples representatives and delegates from Member States on the WIPO Voluntary Fund Advisory Board; fourth, that the IGC ensure that an indigenous representative serve as co-chair of the IGC and co-facilitator of any IGC working and drafting groups.

467. The representative of GRTKF International supported the statement made by the representative of IPCB on behalf of the Indigenous Caucus. He also stood in support of the first suggestion made by the Indigenous Caucus as listed in the information document WIPO/GRTKF/IC/22/INF/10.

468. The representative of Tupaj Amaru reminded that the General Assembly had requested the Committee to review its rules and practices in order to revise the participation of observers. He recalled in this regard that indigenous representatives requested from the Committee the recognition of their ability to participate in the negotiations as well as for their proposals and contributions to be directly considered as proposals by Member States without their prior endorsement. He recalled that indigenous peoples were holders and guardians of the TCEs.

He wished to put on record that his organization had participated in the negotiations of the UNDRIP. He recalled that many proposals and amendments had been submitted by indigenous peoples in this context and said that no member state was ever asked for authorization in this regard. He said that it was unfair by Member States to try to ignore the contributions of indigenous peoples who duly formulated their proposals at the IGC plenary. He said that this rule prevented indigenous peoples from letting their voices be heard on matters of their interest. He noted that delegations such as the Delegations of Cuba and Sri Lanka had supported his suggestions. But he otherwise criticized Member States for adopting what he called “airs of superiority” with respect to indigenous peoples. He observed that the IGC was focusing on measures that would draw profit from TK, TCEs and GR and facilitate the accumulation of riches in few hands. The denial of due status for representatives of indigenous peoples could be considered as discriminatory. He said that this double standard could only undermine the credibility of the Committee.

469. The representative of the Health and Environment Program objected that consensus had not been reached within the Indigenous Caucus contrary to what the representative of IPCB had said. She said that the Indigenous Caucus purported to speak on behalf of many sub-Saharan African representatives who represented African local communities, but without their consent. She did not support the first suggestion made by the Indigenous Caucus as it would marginalize those representatives. She advocated the work of her organization that represented African local communities and had been deprived of their riches. She said that they wanted to speak on their own behalf. She observed that the Delegation of Mexico had objected in writing to many of the suggestions made by the Indigenous Caucus. She said that those suggestions were dreams as they were not concrete. She urged the IGC to address concrete issues that would matter to the peoples she represented.

470. The representative of the Métis National Council said that everybody would agree that indigenous peoples had inherent rights which were at issue in the IGC negotiations and that the forthcoming instrument or instruments would impact upon those inherent rights. She stated, therefore, that the IGC should open its doors to a fuller and more meaningful participation of indigenous peoples. This request was not new and that indigenous peoples had the right and the obligation to represent their peoples, their nations, governments or organizations. She observed, though, that in the IGC deliberations, representatives of indigenous peoples were limited to their involvement as if they were members of a civil society. She considered that those representatives were not simply regular citizens, but that they brought into the processes legitimate expectations and conceptions from peoples regarding the negotiating text that needed to be taken on board. To offer them the actual possibility to negotiate would bring this negotiation to a higher level of credibility. He also recalled that legal certainty was something that the indigenous peoples also wished to obtain. She supported the statement made by the representative of IPCB and urged the IGC to endorse the recommendations of the Permanent Forum as adopted at its eleventh session.

471. The representative of the Tulalip Tribes acknowledged the progress made in drafting the text regarding TCEs and what he described as the good parts thereof. He added, however, that there were other elements in the draft text that undermined the good parts. He supported the statement made by the representative of the Métis National Council regarding the inherent rights of the indigenous peoples and recalled the chapeau from the UNDRIP, which reads “recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territory and resources.” He said that inherent rights were rights that could not be delegated and that pre-existed the IGC process. The IP rights system was used to working on the basis of delegated rights. This was the reason why, in the IGC, indigenous peoples needed very straightforward mechanisms that would enable them to ensure that their inherent rights were respected. He recognized that the forthcoming instrument or instruments would be much broader than just indigenous rights and would cover folklore or TCEs that were not held by

indigenous peoples. But he highlighted the fact that when it came to indigenous peoples' issues, it was very important to include indigenous peoples in the negotiating process. In other forums, like the CBD, a distinction had been made between indigenous peoples' representatives and other representatives of the civil society or local communities, and that co-chair arrangements had been adopted in this regard. He urged the IGC to discuss and support the suggestion made by the Indigenous Caucus.

472. The Delegation of Australia thanked the representative of FAIRA, who had made this suggestion on behalf of the Indigenous Caucus at IGC 21. The Australian government was still considering this suggestion. It had two questions in this regard. The first concerned the two potential ways, as elaborated by the Secretariat, of implementing it, namely to formally recognize indigenous representatives as delegates and give them the same rights as Member States delegates, or alternatively, to create a special category for indigenous representatives. It noted that this might be more of a procedural distinction than a practical one. It would be interested to know whether the Indigenous Caucus had any preference for one or two of those categorizations. The Delegation further wondered whether, if the preference of the Indigenous Caucus was for the second option, there were other elements of that special status which had not been articulated in the information document issued by the Secretariat.

473. The representative of IPCB, replying to the Delegation of Australia on behalf of the Indigenous Caucus, thanked the Delegation for its engagement in the discussion and said that the suggestion by the Indigenous Caucus primarily included elements of the second option, namely that of a special category, which would include the right to submit text proposals, to propose amendments, to formulate motions, and also to vote in the IGC processes. She added that it was important to be clear that indigenous peoples were not states.

474. The representative of the Health and Environment Program wished to see a clear and distinctive reference to the rights of African indigenous peoples and local communities in the statement made by the Indigenous Caucus.

475. The representative of CAPAJ reminded that the Indigenous Caucus was composed of indigenous organizations representatives accredited under the current rules of procedure of the IG. He recalled that the Indigenous Caucus had made considerable efforts to come to a consensus. The suggestion under discussion aimed at the possibility of creating, in order to bring about better and greater participation by indigenous peoples, a category distinct from NGOs, namely a category for nations or peoples. The new category was based on the fact that indigenous organizations had close links and contacts with their peoples and nations. He referred to various social organizations which were linked to indigenous peoples across the border between Peru and Bolivia. He said that their clear social role should be recognized in the international public law context. He added that the recognition of a special category of indigenous representatives, as suggested in the second option, would contribute substantively to the development of international law and international human rights law. Indigenous peoples were not asking to be identified as Member States, but to have the possibility to come to and participate in the IGC sessions, as well as directly offer their contribution to the IGC process. While they were not the same as Member States, they had acquired specific rights in the international context.

476. The Vice-Chair asked whether there was any Member State which would support suggestion 1 as a formal Member State proposal for further discussion.

477. The Delegation of Cuba put on record that its country would support any measure that would bring about more and better participation of indigenous peoples in the IGC.

478. The Vice-Chair asked whether the Delegation of Cuba specifically supported one of the two options under suggestion 1 as a formal proposal.

479. The Delegation of Cuba replied that it was speaking in more general terms, but that it would support option 2, that is, a new status for indigenous peoples, if this would bring about a more effective participation of indigenous peoples in the Committee.

480. The Delegation of the United States of America said that it would not support any of the options under this suggestion, nor anything that would elevate the status of indigenous representatives. It stated that such avenue would call the intergovernmental nature of the IGC into question.

481. The Delegation of Australia said that this discussion was useful as the IGC was addressing issues that regarded the knowledge and cultural expressions of indigenous peoples. It wished to have more clarity from the Indigenous Caucus on the scope of suggestion 1. It referred to the case of its country where there were different types of indigenous representative bodies, like land councils and the National Congress of Australia's First Peoples, or organizations which represented the interests of indigenous peoples but without being indigenous themselves. It wondered whether the scope of the suggestion embraced only a group of peoples who were truly recognized by the indigenous peoples of a particular area, region or country.

482. The Delegation of the Russian Federation said that it recognized two categories of participants, namely delegates and observers. It considered that the status of indigenous peoples' representatives as observers should remain unchanged and that any change in this status would require further clarification. Indigenous peoples and local communities already had a special status within the observers, referring to the WIPO Voluntary Fund, the membership of the WIPO Voluntary Fund Board and the indigenous panels.

483. The Delegation of the EU, speaking on behalf of the EU and its Member States, referred to the previous intervention made by the Delegation of the United States of America regarding the status of the discussion that was going on. It wondered how far any decision could be taken regarding an information document which the IGC had been invited to take note of.

484. The representative of the Métis National Council referred to the question asked by the Delegation of Australia. The revised status should be granted to those representatives who would be recognized by indigenous peoples as their official representatives of their choosing.

485. The representative of the Tulalip Tribes supported the statement made by the representative of the Métis National Council. He said that no gain should be expected from the option of "indigenous observers", beyond fancy plates of different colors in the meeting room. He said that what indigenous peoples wanted was some degree of qualitative change in the status of their representatives. He recalled that the proceedings of the indigenous panel earlier in the week put forward plenty of references to the human rights dimension of the issues involved in the IGC and to the fact that the UNDRIP provided for the rights of self-determined peoples to represent themselves and to have their representatives recognized.

486. The representative of the IPCB said that indigenous peoples were seeking that the category of peoples they were making up, and the term that was used to refer to them as a term of art in international human rights, be also recognized within the IGC as distinctive and worthy of a special status. She reiterated that representative of indigenous peoples in the IGC process did not consider themselves as observers, since they had distinct, inherent and unique rights and were the holders and the owners of the subject matter under discussion at the IGC. She added that indigenous peoples should not be assimilated to NGOs.

487. The representative of Tupaj Amaru referred to the statements made respectively by the United States of America and by the Russian Federation. He said that the United States of America, while standing for freedom and democracy, denied, in his view, its own indigenous peoples the fundamental right to participate in national and international forums. He was of the

view that the United States of America looted natural resources, including TK not only of indigenous peoples but of all the peoples of the world. He said that this country did not recognize the voice, the participation and the involvement of the indigenous peoples and of those representing them.

488. The representative of the Armenians of Western Armenia said that as a representative of an indigenous people he would like to keep the word "indigenous people". He said that indigenous peoples were those peoples who mainly preserve and conserve the culture from which they originated and in which they lived. The problem of categorization was less important than the nature of the rights their representatives had in the IGC process. He wished that those rights be identical to those of any state, so as to be enable indigenous peoples to decide on the eventual outcome of the negotiations.

489. The representative of FAIRA referred to the question asked by the Delegation of Australia. It was his understanding that organizations were so far the only category of groupings which might be accredited to WIPO. He was of the view, therefore, that the representatives who would receive the envisaged new status would be representatives nominated by organizations set up by indigenous peoples, that is, by indigenous organizations.

490. The Vice-Chair closed the discussion regarding suggestion 1. He opened the floor on suggestions 2 and 3, explaining that both suggestions were related. Given that none of the participants asked for the floor regarding those suggestions, the Vice-Chair opened the floor on suggestion 4.

491. The Delegation of Sri Lanka asked whether suggestion 4 would have any impact on the number of Vice-Chairs of the Committee.

492. Upon the request of the Vice-Chair, the Secretariat said that the suggestion made by the Indigenous Caucus as formulated would not have any effect, should it be implemented, on the number of Vice-Chairs of the Committee. The suggestion referred only to the composition of the Advisory Board.

493. The representative of Tupaj Amaru requested fair participation and representation by indigenous peoples on the WIPO Advisory Board. His organization had always called for transparency as regarded the donation of funds to the Voluntary Fund.

494. The Vice-Chair opened the floor on suggestion 5.

495. The Delegation of Australia congratulated both the Secretariat for organizing the indigenous panel at this session and the members of the indigenous panel who had made very relevant presentations of a high caliber at the present session. The Delegation would support the Secretariat consulting intersessionally with the Chair of the Indigenous Caucus regarding the selection of the indigenous panel.

496. The Delegation of Sri Lanka shared the view of the Delegation of Australia that the indigenous panel has been particularly interesting and vibrant. It was extremely happy with the initiative taken by the Secretariat in this regard.

497. The Delegation of Norway joined the Delegations of Australia and Sri Lanka regarding the high quality and usefulness of the indigenous panel at the present session. It said that this experience should be repeated. It added that it could support suggestion 5.

498. The Delegation of the Russian Federation considered that the indigenous panels were very useful for the Committee and considered that suggestion 5 was a good suggestion.

499. The Vice-Chair noted that there was quite a bit of support from Member States to maintain the indigenous panels and for the Secretariat to consult with the Chair of the Indigenous Caucus regarding the composition of the indigenous panels.

500. The Delegation of the United States of America stated that it again needed clarification as to whether the IGC was being asked to take decisions based on an information document.

501. The Delegation of the EU, speaking on behalf of the EU and its Member States, joined the Delegation of the United States of America in asking for clarification regarding the possibility of taking decisions based on an information document.

502. The Vice-Chair replied that the purpose of the current discussion was to get feedback from delegations and observers regarding the suggestions made by the Indigenous Caucus. He requested further guidance about the procedure to follow from the Secretariat.

503. The Secretariat confirmed that the document under discussion was an information document and that no decision could be taken based on that document. It stated that it understood the present discussion under the leadership of the Vice-Chair as being a way to see whether there were any formal proposals that Member States may wish to make flowing out of the information document and, in particular, the six suggestions made by the Indigenous Caucus. For example, up to then there seemed to be some State support for suggestion 5 and suggestion 5 could, therefore, give rise to a formal proposal by States that could be discussed as such and decided upon. Any decision would be taken only on the basis of a formal proposal from Member States, if any, and would, therefore, not be a decision taken directly on the information document itself.

504. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that it had never experienced this way of proceeding in WIPO or elsewhere before. It had still doubts about the procedure that was being followed.

505. The Vice-Chair took note of the statement made by the Delegation of the EU and opened the floor on suggestion 6.

506. The Delegation of Norway noted that this suggestion was interlinked with suggestion 5. It said that it was very useful to have the panelists directly addressing the working documents of the IGC.

507. The representative of FAIRA echoed the statement made by the Delegation of Norway and expressed hope that other Member States would support suggestion 6 as well and make a formal proposal in this regard.

508. The Delegation of Australia said that its comment regarding suggestion 6 was in a similar vein to the one it had made previously on suggestion 5. It said that it was still unsure about whether it was making a formal proposal or proposals out of suggestions 5 and 6, given the procedural implications of such a move. It found it extremely useful for the indigenous panel to focus on the substantive working documents of the IGC and to have an in-depth analysis and targeted discussion. Regarding whether the Delegation would formally make a proposal out of the suggestion, it said that it would encourage similar indigenous panels focusing on the IGC in the future.

509. The representative of Tupaj Amaru stated that he had always supported the participation of indigenous peoples and the possibility for them to freely express their concerns and problems as regarded their natural resources and TK. There was not sufficient transparency about the criteria applied by the Secretariat in organizing the indigenous panels. In the last ten years, indigenous panels had never contributed to the IGC's work.

510. The representative of GRTKF International reminded that he had been a past chairperson of the Indigenous Caucus and that the Secretariat had consulted him regarding the indigenous panel. He had also consulted the Indigenous Caucus for suggestions, comments or guidance. He had no fear that this would not continue and that the members of the Indigenous Caucus would be involved in one form or another in the composition of the indigenous panel.

511. The Vice-Chair closed the discussion on WIPO/GRTKF/IC/22/INF/10. He opened the floor for any other proposal or suggestion regarding the participation of observers.

512. Mr. Paul Kanyinke Sena, member of the Permanent Forum, reminded the IGC that the Permanent Forum was an advisory body to the UN Economic and Social Council (ECOSOC), with a mandate to discuss indigenous issues related to economic and social development, culture, environment, education, health and human rights of indigenous peoples. He added that the Permanent Forum was composed of sixteen independent experts, eight of them being nominated by indigenous peoples in their regions and the others by governments. He reported that, at its eleventh session that took place from May 7 to 18, 2012, the Permanent Forum had held an in-depth dialogue with WIPO. The Permanent Forum had commended the work of the IGC and expressed appreciation for WIPO's activities in support of indigenous peoples. He wished furthermore to have reflected in the present report that the Permanent Forum had agreed on Recommendations relevant to WIPO as contained in the report of its eleventh session (see the ECOSOC Official Record 2012, Supplement No. 23, E/2012/43-E/C.19/2012/13). He requested that the recommendations be issued as an information document in view of IGC 23 and the upcoming WIPO General Assembly. He referred to some of the recommendations as follows. The Permanent Forum recommended that WIPO seek the participation of experts on international human rights law specifically concerning indigenous peoples so that they provide input into the substantive consultation process, in particular with reference to the language in the draft text where indigenous peoples are "beneficiaries" and other language that refers to indigenous peoples as "communities", as well as the alignment of the draft text of the IGC with international human rights norms and principles. The Permanent Forum demanded as well that WIPO recognize and respect the applicability and relevance of the UNDRIP as a significant international human rights instrument that must inform the IGC process and the overall work of WIPO. Other recommendations included the undertaking of a study by a member of the Permanent Forum to examine challenges in the African region to protecting TK, GRs and folklore. He reported also that the Permanent Forum welcomed the decision of the IGC to organize, in cooperation with the Forum, expert preparatory meetings on the IGC process for indigenous peoples representing the seven geopolitical regions recognized by the Permanent Forum. The Permanent Forum requested as well that WIPO commission a technical review, to be conducted by an indigenous expert, focusing on the draft texts concerning TK, GRs, and TCEs and to provide comments thereon to the IGC through the Forum. The recommendation added that the review should be undertaken within the framework of indigenous human rights. He reported furthermore that consistent with article 18 of the UNDRIP, the Permanent Forum requested Member States to explore and establish modalities to ensure the equal, full and direct participation of indigenous peoples in all negotiations of the IGC. The Permanent Forum called upon the IGC to appoint representatives of indigenous peoples as members of any Friends of the Chair groups and as co-chairs of any working groups and drafting groups that may be established by the Committee. It also called upon the Committee to appoint an indigenous person as a co-chair of the Committee as a whole. He noted that two Members of the Permanent Forum had had the opportunity to participate in the indigenous panel this session. He observed that the panel had been regarded as highly successful and suggested that: first, future panels follow the same format, namely that the panelists be experts on IP and international human rights law, specifically concerning indigenous peoples and that they specifically address the draft text before the IGC; second, the IGC authorize a technical review to be conducted by an indigenous expert focusing on the draft texts of GRs, TK and TCEs and request the Secretariat to seek the help of the Forum on the selection of the expert and the development of terms of reference for the study; third, the IGC appoint an indigenous co-chair of the IGC as called upon by the Permanent Forum.



513. The Vice-Chair read out a proposed decision on this agenda item for the IGC's consideration.

*Decision on Agenda Item 7:*

514. *The Committee took note of and exchanged views on WIPO/GRTKF/IC/22/INF/10.*

**AGENDA ITEM 8: CONTRIBUTION OF THE IGC TO THE IMPLEMENTATION OF THE RESPECTIVE DEVELOPMENT AGENDA RECOMMENDATIONS.**

515. The Delegation of Brazil, speaking on behalf of the Development Agenda Group (DAG), noted that the Development Agenda was expected to guide activities, not only of the IGC, but of WIPO as a whole. With particular reference to the IGC, the Group recalled recommendation 18 which urged the Committee to accelerate the process on the protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs). It also recalled the importance of recommendation 15 with respect to norm-setting activities as a general guideline for the negotiations being carried out. It pointed out that since 2007, the IGC had engaged in meaningful work towards the attainment of its objectives. The Committee had produced working texts covering the three areas of its negotiation, and the General Assembly had given ambitious mandates in 2009 and 2011. As a result of the mandate given by the General Assembly in 2011, the IGC had convened three times in 2012, to focus thematically on negotiations on GRs, TK and TCEs, respectively. The meetings provided an opportunity for Member States to further share their views and make progress on the working texts. The Group, however, expressed its concerns over the pace of negotiations and noted that despite the progress made in the three areas of work, it was time to endeavor to strengthen efforts with a view to concluding the negotiations and fulfilling the mandate of the General Assembly. The Group explained that the adoption of a binding treaty or treaties was important in providing effective protection against the misappropriation of GRs, TK and TCEs. It was of the view that the protection and sustainable use of GRs, TK and TCEs could only be adequately addressed through the establishment of international rules and obligations that guaranteed the implementation of principles and objectives of the Convention on Biological Diversity (CBD), and of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol). It noted that the lack of commitment by WIPO Member States to the negotiations was unacceptable if an effective outcome was to be reached. It pointed out that the IGC had been working on the three issues for over a decade, and stressed that it could not wait another decade before an agreement that fulfilled the mandate of the Development Agenda was reached. In order to achieve a truly inclusive intellectual property (IP) system, the Group stressed the importance of identifying solutions from which all Member States could benefit. It further pointed out that the issues and negotiations in the Committee were of special relevance to developing countries and least developed countries (LDCs) and, therefore, urged Member States to pursue the speedy conclusion of the negotiations for the benefit of developing countries and LDCs in line with the principles and objectives of the Development Agenda.

516. The Delegation of South Africa, speaking on behalf of the African Group, provided an assessment of the contribution of the IGC to the implementation of the respective Development Agenda recommendations. It noted that the IGC, under the Development Agenda, was requested to accelerate the process on the protection of GRs, TK and TCEs. It recalled that the 2011 WIPO General Assembly mandate of the IGC, in the biennium 2012-2013, was to "expedite its work on text-based negotiations with the objective of reaching agreement on a text or texts of an international legal instrument or instruments which will ensure the effective protection of genetic resources, traditional knowledge and traditional cultural expressions." To aid the work of the IGC, it explained that three thematic sessions for GRs, TK and TCEs were agreed to be held in the first half of 2012. The Group expressed its appreciation for the

progress made in the work of the Committee this year and noted, in particular, the efforts of the Committee in developing a draft legal text for GRs. It pointed out that it had wished for the thematic sessions to accelerate the negotiations with a view to completing the legally binding instruments. It further welcomed the fact that the 2012 WIPO General Assembly would have the opportunity to assess the progress on the text of the international legal binding instrument(s) on GRs, TK and TCEs as transmitted to it by the Committee, with a view to agreeing on the way forward, especially regarding the convening of a Diplomatic Conference. It expressed its expectation that, in taking stock of the text on the three instruments, the General Assembly would make a landmark decision to ensure that the Committee completed its work towards the effective protection of GRs, TK and TCEs. It noted that a lot of technical work and discussions had already taken place over the past decades, and expressed the view that what remained was the political will of all Member States to conclude the work of the IGC. It urged all Member States to commit to the conclusion of the work of the IGC. In conclusion, the Delegation stated that it expected the Committee to adhere to implementing the relevant Development Agenda recommendations and also to adhere to the mandate given to it by the General Assembly which, it noted, was the highest decision-making body in WIPO.

517. The Delegation of the EU, speaking on behalf of the EU and its Member States, recalled that a number of recommendations of the Development Agenda were relevant to the IGC, in particular recommendation 18, which emphasized that the work of the IGC on GRs, TK and TCEs was without prejudice to any outcome. The Delegation was of the view that any instrument agreed upon should be flexible, sufficiently clear, and non-binding. It similarly reaffirmed its preference for separate texts. It expressed satisfaction that the IGC had witnessed continued progress in its negotiations over the last semester. It, however, believed that further substantive work on the texts was required so as to fulfill the mandate of the Committee. It noted that the norm-setting activities within the IGC had been member-driven and involved a participatory process which took into consideration the interests and priorities of all IGC members and the viewpoints of other stakeholders, including accredited intergovernmental organizations and non-governmental organizations (NGOs), in line with recommendation 15. The norm-setting process, according to the Delegation, had considered the boundaries, roles and contours of the public domain as required in recommendations 16 and 20, and had taken into account flexibilities in international IP agreements, as required in recommendation 17. It further noted that the WIPO Voluntary Fund for Accredited Indigenous and Local Communities, which had facilitated participation of the observers in the IGC sessions, as well as activities of the Indigenous Consultative Forum and the IGC Indigenous Panel, should be mentioned in the context of recommendation 42, which referred to the wide participation of civil societies at large in WIPO activities, in accordance with its criteria regarding NGO acceptance and accreditation, keeping the issue under review. With respect to recommendation 42, the Delegation also referred to the discussions held in plenary on the participation of observers which, it noted, had led to a number of decisions at IGC 20. The Delegation noted that it looked forward to another productive year for the IGC in 2013.

518. The Delegation of Italy, speaking on behalf of Group B, made reference to recommendations 15, 16, 17, 18 and 20, noting that the IGC had accomplished important progress in the present year in its work on GRs, TK and TCEs. Further work, however, remained to be done in order to fulfill the mandate of the Committee. The Group considered it essential that such work remained member-driven, inclusive, participatory, and took into account the interests and priorities of all WIPO Member States, and the viewpoints of other stakeholders, including accredited intergovernmental organizations and NGOs. It said that it was also important that the Committee continued to consider the preservation of a robust, rich and accessible public domain, and the obligations and flexibilities in international IP agreements as they may be relevant.

519. The Delegation of Iran (Islamic Republic of), speaking on behalf of the Asian Group, was of the view that development objectives were at the heart of the IGC, and the 45 recommendations of WIPO Development Agenda were immediately relevant to its

on-going work. It was happy to see that the Committee had implemented the various Development Agenda recommendations, especially in the area of norm-setting as stipulated in cluster B. It believed that WIPO's norm-setting activities in this area could be supportive of the development goals in countries, and could have a direct linkage with their development. It observed that, at the moment, there was no binding rule or convention to preserve the moral and economic rights of the beneficiaries of TK, TCEs and GRs. In the absence of internationally binding rules for the effective protection of TK, TCEs and GRs, bio-piracy and misappropriation of GRTKF for commercial benefit had become a prevalent phenomena all over the world, particularly in developing countries. This rather unfortunate and rampant situation continued to deprive developing countries of greater leverage over the use of their potential resources resulting in undermining their sustainable development and competitiveness in the international market. It advised that the only way to remedy this unfair situation was by establishing new international norms and binding rules to help developing countries protect their potential resources in order to utilize and commercialize them at the international level for the benefit of their people. The new mandate of the IGC provided a new momentum to the fulfillment of a long-standing aspiration of developing countries in pursuing a binding instrument on GRTKF. The constructive engagement of Member States had led to the drafting of three consolidated texts which reflected all views and opinions. It noted that it would be important that the Committee kept the momentum and tried to solve the remaining divergences, with a view to holding a Diplomatic Conference in the near future. It stressed that the adoption of a new treaty in this area would send a clear message to developing countries that their needs and requirements in the IP system had been taken into account. Such a trend could move IP rights towards a more balanced direction, and would increase the interests of developing countries in the IP system, provide an enabling environment for development in these countries and play an outstanding role in enhancing their economies through the use of IP. Consequently, it would increase the contribution of the developing countries in the global economy and global cultural partnership. It also said that although most of the developing countries were rich in TCEs, TK and GRs, they needed technical assistance in terms of developing coherent national systems to preserve their resources at the national and international level. The WIPO Secretariat was invited to provide technical assistance to developing countries, in order to enable them to formulate their national law protection systems, as well as develop strategies for commercialization of TK and TCEs for the benefit of their beneficiaries, in parallel with on-going negotiations in IGC. It also invited the Committee on Development and Intellectual Property (CDIP) to build on the South-South corporation project to assist different countries in formulating their national strategies in accordance with their needs and requirements.

520. The Delegation of the United States of America, in expressing its support for the intervention made by the Delegation of Italy, speaking on behalf of Group B, said that it supported the adoption of a non-binding international instrument pursuant to the current mandate of the WIPO General Assembly - one that was faithful to the WIPO Development Agenda, and recommendation 18, and that did not prejudice any outcome. In particular, it believed the Committee must respect those recommendations that call on WIPO to consider both costs and benefits to maintaining a rich and accessible public domain, and to take into account flexibilities in the international instruments. It thought that was necessary in order to preserve the policy space of Members on these complicated topics. It further stressed that one of the fundamental underpinnings of the WIPO Development Agenda, the notion that one-size-fits-all, was not the desired approach, and that policy space must be preserved. Just as existing norms on IP preserved such policy space by respecting a robust public domain and flexibilities, it believed that the Committee's work on TCEs, TK and GRs must also avoid movement towards a one-size-fits-all system.

521. The Delegation of India associated itself with the statements made by the Delegations of Brazil, speaking on behalf of the DAG and Iran (Islamic Republic of), speaking on behalf of the Asian Group, and expressed its support of the implementation of the mainstreaming of the Development Agenda recommendations, adopted by the WIPO General Assembly in 2007, in all areas of WIPO. It emphasized that the recommendations of the Development Agenda must

guide the activities of the IGC as such. It further recalled recommendation 18, which required the IGC to accelerate the process in the protection of GRs, TK and TCEs without prejudice to any specific outcome, including the possible development of an international instrument(s). It looked forward to an early and positive conclusion of a binding international legal instrument on all the three on-going norm-setting initiatives in the IGC, as mandated by the 2011 WIPO General Assembly. It finally affirmed its Delegation's continued commitment to engaging in the forthcoming discussions in the Committee, and looked forward to substantive progress.

522. [Note from the Secretariat: The following statements were submitted in written form and not delivered orally].

523. The Delegation of Argentina noted that the work of the IGC, as well as that of all the competent bodies of WIPO, needed to take into account the Development Agenda recommendations, in particular, through the mechanism approved at the 2010 General Assembly. It noted that the matter being addressed by the IGC was closely related to the general principles of the WIPO Development Agenda and, more specifically, to recommendation 18, which urged that the process on the protection of GRs, TK and TCEs be accelerated, without prejudice to any specific outcome, including the possible development of an international instrument(s). The Delegation expressed its interest in the progress made in terms of the work carried out and the substantive endeavors of the Committee, which were aimed at producing greater agreement on what was a multi-faceted issue. It noted that the negotiations within WIPO were a positive development, given that there was need for a debate concerning a reference framework within which IP rights could be deemed to be linked to TCEs, and which allowed the users and providers of such expressions to receive greater legal reassurance concerning access to and distribution of the benefits arising from their use.

524. The Delegation of Algeria expressed its support for the statements made by the Delegations of South Africa and Brazil, speaking on behalf of the African Group and DAG, respectively. It said that its Delegation took positive note of the fact that the 2010 General Assembly's decision on the implementation of the monitoring and reporting mechanism of the WIPO Development Agenda was being applied by the Committee. It looked forward to seeing all the relevant WIPO bodies reporting substantially on their contribution towards the implementation of the Development Agenda recommendations. It believed that this was the best tool that would ensure that the "development dimension" was fully integrated in the work of WIPO. More particularly, it was pleased that the IGC was currently undertaking text-based negotiations with the objective of concluding an appropriate international legal instrument(s) for the protection of TK, TCEs and GRs, adding that the three thematic sessions of the Committee had been very useful in expediting the work of the IGC, as mandated by the 2011 General Assembly. It was, therefore, of the view that the current negotiation process was, to a certain extent, in line with the Development Agenda recommendation 18 that urged the IGC "to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments." It, however, believed that a strong commitment from all delegations was still needed to achieve the spirit of the Development Agenda recommendations, especially recommendations 18, 15 and 21. In conclusion, it said that the Committee could count on the Delegation's commitment.

*Decision on Agenda Item 8:*

*525. 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 October 1 to 9, 2012, in line with the decision taken by the 2010 WIPO General Assembly related to the Development Agenda Coordination Mechanism.*

## **AGENDA ITEM 9: EXPRESSION OF VIEWS ON FUTURE MATTERS CONCERNING THE IGC**

526. The Delegation of Italy, speaking on behalf of Group B, stated that by requesting this agenda item, it had the genuine intention of promoting a fair and constructive discussion on the future work of the IGC within its existing mandate, with the benefit of the presence of experts, and without hampering the negotiations on the protection of TCEs. It also recalled that, in order to allow groups and delegations to be prepared, it had conveyed the Group's request to the WIPO Secretariat one month prior to the present session, as envisaged in the WIPO General Rules of Procedure. It said that, while it recognized that it was the prerogative of the General Assembly to decide on the future work of the IGC, it considered appropriate and within the competence of the Committee to make a recommendation on this issue to the General Assembly, and indeed the Committee had done so in the past. It was disappointing that the reluctance to discuss how the Committee's work could move forward had prolonged the approval of the agenda and delayed substantive work on TCEs. Moving forward, the Group acknowledged that important progress had been achieved in the two IGC sessions held earlier in the year, and in the current one. Further work was needed to streamline the text under discussion, and to address substantial differences in objectives and policy approaches. Its Delegation remained engaged in relation to the future work of the IGC.

527. The Delegation of the EU, speaking on behalf of the EU and its Member States, in view of the 41<sup>st</sup> session of the General Assembly in October 2012, said that considering the progress made in the last three sessions of the IGC in 2012, it was of the view that further work was required on the texts, in particular more work on the Objectives and Principles. In this respect, it recalled that the Committee had not yet reached a decision on the nature of the instruments to be adopted. Once the IGC had achieved solid, clear and consolidated texts, only then would it decide on the nature of the contemplated instruments. The Delegation also recalled its view that the instruments on all three topics should be non-binding and should make recommendations but not lay down legal obligations. Furthermore, its Delegation reaffirmed its strong support for equal treatment of the three topics being considered in the IGC, i.e., GRs, TK and TCEs, which were distinct and should, therefore, be addressed in separate instruments. Finally, it expressed its disappointment that all delegations were not ready or willing to engage in discussions at the present session on the future work of the IGC. It would have liked to replicate the good practice of last year, when IGC 19 prepared the decision to the General Assembly on the mandate. It, nonetheless, remained open to considering proposals that would be put forward on future work.

528. The Delegation of Hungary, speaking on behalf of CEBS, similarly expressed its disappointment that, in spite of the many experts present during the week, there was no willingness by some groups to engage meaningfully on the issue of the future work of the IGC. It considered it a missed opportunity that could have usefully assisted the stock taking and decisions to be taken at the 2012 General Assemblies. It said that CEBS had engaged actively in the work of the past two sessions of the IGC and in the current one. Although it acknowledged the useful work done and progress made during the sessions that took place in 2012, there were still important differences of positions reflected in the texts, and therefore, more work was required to close these important gaps. In particular, it believed that more work on the Objectives and Principles was required, keeping in mind that at the present session the IGC was not able to deal with the issue.

529. The Delegation of Australia expressed its appreciation for the Chair's strong leadership, wisdom, balanced and bipartisan approach in fostering progress in the work of the Committee, particularly during the experts meetings, and it felt that this significantly contributed to the progress made in recent meetings. It had repeatedly stated that the work of the Committee related to fundamental policy issues in its country, in particular, to how it protected and supported its unique and vibrant indigenous peoples and how it protected and gained economic value from its GRs as a megadiverse country. These policy interests touched on both moral and economic issues for the Delegation, and these interests, at a high level, were best articulated in Article 31 of the UN Declaration of the Rights of Indigenous Peoples. As such, it wanted real tangible outcomes from the work of the Committee, which met its policy interests but were flexible enough to address interests of all Member States, noting the complexity of the different national environments that these issues operated in. It said that flexibility at the national level was a key driver, noting that one size could not fit all. At the same time, if the Committee were to address the fundamental policy issues, protection and respect for unique cultures and maintaining accessibility of these resources and knowledge to support innovation and social good, and sustained economic development for these unique cultures, then balanced instruments were needed. A key policy interest here was ensuring certainty within the IP system, and also ensuring, where appropriate and with prior informed consent, access to knowledge and resources. Until recently, it did not believe that the participants had been negotiating; they had been simply restating their particular policy positions and refining texts. This had still been very productive and had enabled all policy issues across all the three areas to be put on the table and, therefore, the Committee knew what divided it. It further said that if the Committee were to make real progress, it needed to start gaining a shared understanding of the different positions, and to start to negotiate these, in particular those key policy divergences and approaches. In recent meetings, the Committee had started to do this - reflected in the productive progress made within the experts group. In addition, the Committee had seen countries with different views starting to reach out to each other bilaterally and through recent opportunities, such as, the LMCs consultations with a number of countries outside their Group. If the Committee was to make progress, this needed to be the focus of its efforts, not on minor textual issues or for that matter, inconsequential procedural issues, that were more about mistrust than substantive negotiations. From its perspective, it felt that it would be important that sufficient time and space was required to complete these negotiations. This would ensure that the negotiations had the best chance of success which could only be achieved when there was real political commitment across all Member States. Otherwise, any outcome was likely to be elusive. With this in mind, it asked the countries to continue to reach out to each other to discuss their differences. In the end, it would be this type of activity which would ultimately bring these negotiations to a conclusion. It believed that further work was necessary to enable the Committee to continue to make progress on the text covering GRs, TK and TCEs. It remained flexible on the options for future work, but its initial thoughts, without prejudice, were that thematic sessions were likely to provide better outcomes. Also expert groups supported by the Chair and facilitators provided a very effective mechanism to progress the Committee's work, in particular, supporting a shared understanding of the issues and opportunities for negotiation on key policy issues and mechanisms. It also noted that, notwithstanding that the General Assembly will obviously make recommendations going forward in 2012, the Committee had achieved significant momentum over the past two years. It was unfortunate that there were no further IGC meetings within the next six months, which may put the momentum achieved to date at risk. To address this, it asked the Member States to take this time to reflect on their positions, and reach out to each other, so that when the Committee returned it would be ready to negotiate in good faith. It also hoped that countries which had concerns regarding issues in which there was considerable consensus within the Committee, such as the terms "peoples" and "generation to generation", could seriously look at these issues between now and the next IGC. Its Delegation would, during this period, continue to engage in good faith with all Member States on the important substantive issues under consideration in the IGC with the objective of negotiating an effective international legal instrument(s) to protect GRs, TK, and TCEs.

530. The Delegation of Oman, in seeking clarification, noted that in the past two years two opinions had been expressed. The first concerned coming up with a text that was binding, comprising the three topics - GRs, TK and TCEs, and the second implied that there would be three different conventions or treaties, one for each of the topics. It, therefore, sought to know what the expected outcomes were, i.e., whether there would be a single treaty or three different treaties, whether this would be discussed and who would decide on the outcome.

531. The Chair, in response, said that the decision lay with the Member States, i.e., the stock taking and decision on the way forward would be discussed by the General Assembly. Ultimately, this was an organic process in which the Committee was negotiating with the possibility of an instrument(s), and it contemplated a decision in the future on whether it would be one or more instruments. The Committee was, however, not called upon at this point to make that decision, and the Chair had no basis on which to ask for an indication on this issue at that time. But as a Member State, the Delegation of Oman's capacity to raise it had been exercised.

532. The Delegation of the United States of America States, in supporting the statement made by the Delegation of Italy, speaking on behalf of Group B, said that it supported the inclusion of the agenda item on the future work of the IGC, in order to facilitate the progress of the Committee's work. The General Assembly's mandate for the current IGC biennium clearly contemplated future work beyond IGC 22. The clearly defined work program for the biennium set forth in the table of the mandate stated that IGC 23 in 2013 would "take stock of further work required." Thus, it had hoped to discuss the future work with a view to making a recommendation to the General Assembly, recognizing that only the General Assembly was empowered to establish the mandate of the IGC. Having the benefit of IGC experts present that week could have helped inform that discussion and the General Assembly's deliberations on the issue. It observed that while good progress had been made in the current session, it was clear that there were still significant differences in fundamental policy objectives and approaches in all three areas of TCEs, TK and GRs. It said that the Committee's main challenge was how it could advance the discussions in the face of such significant differences. The Delegation looked forward to working constructively with all WIPO Member States to address this challenge.

533. [Note from the Secretariat: This statement was provided only in writing and not delivered orally in the plenary]. The Delegation of Argentina was of the view that, in accordance with the renewal of the mandate of the IGC for the 2012-2013 biennium approved by the General Assembly in 2011 (WO/GA/40/7), it was established that "The General Assembly in 2012 will take stock of and consider the text(s), progress made and decide on convening a Diplomatic Conference, and will consider the need for additional meetings, taking account of the budgetary process." It felt that the mandate of the IGC for the 2012-2013 biennium, as approved by the General Assembly in 2011 (WO/GA/40/7), should not be reinterpreted within the framework of IGC 22.

534. The Chair read out a proposed decision on this agenda item for the IGC's consideration.

*Decision on Agenda Item 9:*

*535. Views were expressed on future matters concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).*

## **AGENDA ITEM 10: ANY OTHER BUSINESS**

536. The representative GRTKF International, speaking on behalf of the Indigenous Caucus, presented a statement which, he noted, had been signed and endorsed by several other members of the Indigenous Caucus. The statement reflected disappointment that, despite repeated demands of the Indigenous Caucus with respect to the recommendations of the Permanent Forum, the IGC had not taken substantive and concrete steps to ensure the full, equal and direct participation of indigenous peoples in WIPO processes that affected them. He requested that the Permanent Forum's recommendations to WIPO be brought to the IGC in the form of a discussion document, for action at the next IGC. He clarified that indigenous individuals could only speak on behalf of themselves, their organizations, communities and/or nations within the IGC process as they did not have the mandate to negotiate collectively on behalf of indigenous peoples of the Indigenous Caucus. He noted that the Indigenous Caucus had no standing for the purposes of negotiations in the IGC and that the failure of states to address adequately indigenous peoples' full and equal participation within the IGC processes brought to question the legitimacy of the outcomes of the process. He stated that indigenous peoples reserved their rights to every aspect of their cultural heritage, including their indigenous knowledge, indigenous cultural expressions and genetic and biological materials. He finally requested the Secretariat to transmit all communications directly to all indigenous peoples accredited to the IGC in a fair and transparent manner as was done with Member States.

537. The representative of FAIRA, speaking on behalf of FAIRA, Tulalip Tribes of Washington Governmental Affairs Department and RAIPON, welcomed the document WIPO/GRTKF/IC/22/INF/10 and the exchange of views on the suggestions contained within the document. He also welcomed the recommendations by the Permanent Forum, as listed in the report of its eleventh session (see the ECOSOC Official Record 2012, Supplement No. 23, E/2012/43-E/C.19/2012/13). He believed that it was important to continue, at future sessions of the IGC, the discussion on the issue of enhancing the participation of indigenous observers and their contribution to the work of the IGC, and noted that this future work should take into account the views expressed by the Member States and the observers during the discussion of the document WIPO/GRTKF/IC/22/INF/10 as well as the recommendations by the Permanent Forum and the statement made by the Indigenous Caucus on indigenous peoples' participation under agenda item 7. In this respect, he sought the intersessional support of Member States for the possible inclusion of the matters raised within the statement of the Indigenous Caucus, as a future agenda item of the IGC.

538. The Delegation of Australia, welcomed the intervention of the representative of FAIRA, on behalf of FAIRA, Tulalip Tribes of Washington Governmental Affairs Department, and RAIPON, and expressed its support for Member States discussing the issues raised intersessionally.

## **AGENDA ITEM 11: CLOSING OF THE SESSION**

539. The Delegation of the Islamic Republic of Iran, speaking on behalf of the Asian Group, said that the advancement of the work, through the expert group meetings, showed that progress could be made through dialogue and the understanding of existing challenges. It expressed its support for the methodology adopted for the session, which it described it as being conducive to progress, and was of the view that the approach should be replicated for future meetings.

540. The Delegation of Indonesia, speaking on behalf of the LMCs, was pleased that its contributions to the text had been taken into consideration, and that these had facilitated a forward movement in the text-based negotiation. It stated that it was prepared to engage constructively with all members in the future work of the Committee, an example of which, it noted, was the consultative meeting which it recently had organised on June 29, 2012 in Bali, with Australia, China, Norway and Switzerland in attendance. The Delegation was of the view that the session had built confidence and increased better understanding of each other's



concerns, which could only open up more room for bridging existing differences. It submitted that the Committee had made good progress towards achieving agreement on a binding international instrument for the protection of GRs, TK and TCEs.

541. The Delegation of Brazil, speaking on behalf of Development Agenda Group, hoped to see a speedy conclusion of the negotiations in light of the mandate given by the General Assembly.

542. The above-mentioned delegations, including the Delegation of South Africa, speaking on behalf of the African Group and the United States of America, speaking on behalf of Group B, thanked the Chair and the two Vice-Chairs, for their leadership and efficient conduct of the meeting which had ensured the productive and successful outcome of the session. The facilitator, Ms. Kim Connolly-Stone of New Zealand, was also thanked for her work which, delegations noted, had played a significant role in the progress recorded in the session. The Secretariat, the interpreters, the translators and other members were also thanked for their constructive inputs to the session.

543. The Chair closed the session and thanked delegations for their cooperation and for the confidence reposed in him. He, however, noted that none of the success recorded in the session would have been possible without the bottom-up approach, in which each delegation played its part. He recognized specially the facilitator, Ms. Kim Connolly-Stone of New Zealand, for her work, which he described as reflecting an amazing balance and blend of efficiency and time management. He further expressed his appreciation to the Secretariat for their dedication. He thanked specially the chair and members of the Indigenous Caucus as well as other NGOs present, for their openness in consulting with him on issues that were of great importance to the discussions. He thanked delegations for their hard work, and reminded all that despite the success of the session, there yet remained a long, tough battle ahead for the purposes of forging the kind of outcome that was expected by the mandate. He thanked the Vice-Chairs, Ms. Alexandra Grazioli of Switzerland and Mr. Bebeb A.K.N. Djundjunan of Indonesia, for their effective handling of the meetings in his absence. He also thanked Ms. Alexandra Grazioli for her efficiency in directing the affairs of the Advisory Board of the Voluntary Fund. The regional coordinators were thanked for their invaluable assistance with respect to the methodology and the allocation of time for the session. Finally, the Chair urged members to continue to engage their regional coordinators in constructive dialogue with a view to ensuring that the mechanism continued to assist the Committee to advance its work.

*Decision on Agenda Item 11:*

*544. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6, 7, 8 and 9 on July 13, 2012. 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 before September 30, 2012. 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 Twenty-Third Session of the Committee.*

[Annex follows]

**LISTE DES PARTICIPANTS/  
LIST OF PARTICIPANTS**

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ORGANISATION DES NATIONS UNIES POUR L'ÉDUCATION, LA SCIENCE ET LA  
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Alliance pour les droits des créateurs (ADC)/Creators' Rights Alliance (CRA)

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Arts Law Centre of Australia

Robyn AYRES (Ms.) (Executive Director, Sydney); Trish ADJEL (Ms.) (Indigenous Solicitor, Sydney)

Asociación Kunas unidos por Napquana/Association of Kunas United for Mother Earth (KUNA)

Nelson DE LEÓN KANTULE (Vocal-Directivo, Panamá)

Association américaine du droit de la propriété intellectuelle (AIPLA)/

American Intellectual Property Law Association (AIPLA)

Gabriel D. CALAB (Member, Special Committee on Genetic Resources, Traditional Knowledge and Folklore, Gurgaon)

Association internationale pour la protection de la propriété intellectuelle (AIPPI)/

International Association for the Protection of Intellectual Property (AIPPI)

Konrad BECKER (Chair of the Special Committee Q166, Zurich)

Center for Peace Building and Poverty Reduction among Indigenous African Peoples (CEPPER)

Casimir Kingston ANI (President, Enugu State)

Centre international pour le commerce et le développement durable (ICTSD)/

International Centre for Trade and Sustainable Development (ICTSD)

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Civil Society Coalition (CSC)

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Comité consultatif mondial des amis (CCMA)/Friends World Committee for Consultation (FWCC)

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Consejo Indio de Sud América (CISA)/Indian Council of South America (CISA)

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Coordination des organisations non gouvernementales africaines des droits de l'homme (CONGAF)

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Fédération internationale de la vidéo (IFV)/International Video Federation (IVF)

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Fédération internationale de l'industrie du médicament (FIIM)/

International Federation of Pharmaceutical Manufacturers Associations (IFPMA)

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Foundation for Research and Support of Indigenous Peoples of Crimea

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Hawaii Institute for Human Rights (HIHR)

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Leon SIU (Representative, Honolulu)

Indian Movement "Tupaj Amaru"

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Assembly of Armenians of Western Armenia, The

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Saoudata WALET ABOUBACRINE (Mme) (président, Ouagadougou)

Traditions pour demain/Traditions for Tomorrow

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