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

**Thirty-Ninth Session  
Geneva, March 18 to 22, 2019**

INITIAL DRAFT REPORT

*Document prepared by the Secretariat*

1. Convened by the Director General of the World Intellectual Property Organization (“WIPO”), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “the IGC”) held its Thirty-Ninth Session (“IGC 39”) in Geneva, from March 18 to 22, 2019.
2. The following States were represented: Albania, Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Bahamas, Barbados, Bhutan, Bolivia (Plurinational State of), Brazil, Brunei Darussalam, Canada, Chile, China, Colombia, Cook Islands, Costa Rica, Côte D’Ivoire, Croatia, Cuba, Czech Republic, Denmark, Djibouti, Dominican Republic, Egypt, El Salvador, Ecuador, Ethiopia, Finland, France, Gambia, Germany, Ghana, Guatemala, Guyana, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Kuwait, Latvia, Lebanon, Lithuania, Malaysia, Malawi, Mexico, Morocco, Myanmar, Nicaragua, Niger, Nigeria, North Macedonia, Oman, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Seychelles, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States of America, Venezuela (Bolivarian Republic of), Yemen, Zambia and Zimbabwe (94). The European Union (“the EU”) and its Member States were also represented as a member of the Committee.
3. The Permanent Observer Mission of Palestine participated in the meeting in an observer capacity.
4. The following intergovernmental organizations (“IGOs”) took part as observers: African Union (AU); Secretariat of the Convention on Biological Diversity (SCBD); South Centre (SC); United Nations Conference on Trade and Development (UNCTAD); and United Nations Educational, Scientific and Cultural Organization (UNESCO) (5).
5. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: Agencia Internacional de Prensa Indígena (AIPIN); Assembly of First Nations; European Law Students’ Association (ELSA International); Civil Society Coalition (CSC); Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ); CropLife International (CROPLIFE); Health and Environment Program (HEP); Incomindios Switzerland; Indian Council of South America (CISA); Indian Movement - Tupaj Amaru; Indigenous Peoples’ Center for Documentation, Research and Information (DoCip); International Indian Treaty Council; International Trademark Association (INTA); MALOCA Internationale; Massai Experience; Motion Picture Association (MPA); Native American Rights Fund (NARF); Pacific Islands Forum Secretariat; Società Italiana per la Museografia e i Beni Demoetnoantropologici (SIMBDEA); Société internationale d’ethnologie et de folklore (SIEF); Traditions for Tomorrow; and Tulalip Tribes of Washington Governmental Affairs Department (22).
6. The list of participants is annexed to this report.
7. Document WIPO/GRTKF/IC/39/INF/2 Rev. provided an overview of the documents distributed for IGC 39.
8. The Secretariat noted the interventions made, and the proceedings of the session were communicated and recorded on webcast. This report summarizes the discussions and provides the essence of interventions, without reflecting all the observations made in detail or necessarily following the chronological order of interventions.
9. Mr. Wend Wendland of WIPO was Secretary to IGC 39.

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

10. The IGC Chair, Mr. Ian Goss, opened the session. He thanked the Vice-Chairs, Mr. Jukka Liedes and Mr. Faizal Chery Sidharta, for their valuable contributions and advice. They worked as a team and were often engaged between meetings. He had consulted with Regional Coordinators (“RCs”) in advance of the session, and he thanked them for their support and constructive guidance. Despite some change in RCs, he was sure that meetings would continue in the excellent spirit and constructive working atmosphere as well as working method as before. He was very impressed with the RCs and the advice they gave to him. IGC 39, as previous sessions, was on live webcast on the WIPO website, which further improved its openness and inclusiveness. All participants were required to comply with the WIPO General Rules of Procedure. The meeting was to be conducted in the spirit of constructive debate, in which all participants were expected to take part with due respect for the order, fairness and decorum that governed the meeting. As the Chair, he reserved the right, where applicable, to call any participant to order based on the WIPO General Rules of Procedure and the usual rules of good conduct or whose statements were not specifically relevant to the issues. Under Agenda Item 2, opening statements of up to three minutes would be allowed by regional groups, the EU, the Like-Minded Countries (“the LMCs”) and the Indigenous Caucus. Any other opening statements could be handed to the Secretariat in writing or sent by e-mail to [grtkf@wipo.int](mailto:grtkf@wipo.int). Those would be reflected in the report as in past sessions. Observer statements and proposals would be interspersed with Member State statements as in the past. Member States and observers were strongly encouraged to interact with each other informally, as that increased the chance that Member States would be aware of and perhaps support observers’ proposals. He acknowledged the importance and value of the indigenous representatives as well as other key stakeholders, such as representatives of industry and civil society, with whom he intended to meet during the week. The IGC should reach an agreed decision on each agenda item as it went along. Each decision would be gavelled at the end of each agenda item. On Friday, March 22, the decisions as already agreed would be circulated or read out again for formal confirmation by the IGC. The report of the session would be prepared after the session and circulated to all delegations for comments. It would be presented in all six languages for adoption at IGC 40.

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

### *Decision on Agenda Item 2:*

11. *The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/39/1 Prov. 2 for adoption and it was adopted.*

12. The Chair opened the floor for opening statements. [Note from the Secretariat: Many delegations which took the floor for the first time congratulated and thanked the Chair, the Vice-Chairs and the Secretariat and expressed their gratitude for the preparation of the session.]

13. The Delegation of Indonesia, speaking on behalf of the Asia and the Pacific Group (“APG”), supported the working method and the work program proposed by the Chair. It conveyed its appreciation for the Chair’s Information Note. With regard to the Draft Articles, it preferred the discussion on the core issues in order to arrive at common landing zones on the issues of objectives, beneficiaries, subject matter, scope of protection and exceptions and limitations. How to define traditional knowledge (“TK”) and traditional cultural expressions (“TCEs”) would lay down the foundation of the IGC’s work. Most of the members of APG believed that the definitions of TK and TCEs should be inclusive and capture their unique

characteristics. Furthermore, there should be a comprehensive definition that did not require separate eligibility criteria. Most of the members were also in favor of a differential level of protection for TK and TCEs and believed that such an approach offered an opportunity to reflect the balance referred to in the IGC's mandate and the relationship with the public domain as well as balancing the rights and interests of owners, users and the wider public interest. However, some members were in a different position. Establishing the level of rights based on the characteristics of TK or TCEs could be a way forward towards narrowing the existing gaps with the objective of reaching agreement on international instruments that would ensure the balanced and effective protection of TK and TCEs in addition to the protection of TK associated with genetic resources ("GRs"). The main beneficiaries of the instrument were indigenous peoples and local communities ("IPLCs"). Some members of the APG had a different position, however, most of the members were of the view that it was pertinent to address the role of other beneficiaries in accordance with national law, as there were certain circumstances in which TK or TCEs could not be specifically attributable to a particular IPLC. On the issue of scope of protection, most of the members were in favor of providing maximal possible protection, depending on the nature or characteristics. On exceptions and limitations, it was of fundamental importance, given differing national circumstances, to have flexibility for Member States to decide on appropriate limitations and exceptions. Though some members of the APG had different positions, most of the members reiterated the need for a legally binding instrument(s) providing effective protection to TK and TCEs. It welcomed the 2018 General Assembly ("GA") decision that called upon members to reaffirm their commitment to the IGC's mandate and to expedite its work in the achievement of its objective as laid out in the mandate. It looked forward to a fruitful session in a positive direction for all. It assured the Chair of its full support and cooperation in rendering that session a success. It was hopeful that the discussion would lead to visible progress in the work of the IGC.

14. The Delegation of Uganda, speaking on behalf the African Group, hoped that a balanced and flexible international intellectual property ("IP") framework was in everyone's interest. An international instrument(s) on TK and TCEs would promote equity, as TK and TCEs generated value that was not compensated by the IP system, and prevent appropriation of TK and TCEs by unauthorized parties. The launch of the IGC process and the biennial renewal of the IGC mandate since 2001 was recognition by WIPO Member States of the difficulties of mediating the relationship between IP rights and TK systems. Those difficulties had further been proven by incontrovertible evidence contained in the updated Gap Analyses on TK and TCEs and numerous core materials on TK and TCEs prepared by the WIPO Secretariat. In line with traditional norms of international IP rule-making, the IGC should only lay out a legally binding international framework or principles and minimum standards with well-defined policy objectives, addressing the characteristics and diversity of TK systems. While helping to harmonize existing national IP roles and providing a framework for future national IP rule-making where there were no rules in place, the instruments should leave enough flexibility for national law to elaborate. The instrument should only bind signatories and ratifying parties. While it had been difficult to reach agreement on those complex issues, it was encouraged by the significant progress made in recent sessions as evidenced, for example, by a much-improved GRs text and more aligned TK and TCEs texts. It was possible to reach the finish line in the very near future. It underlined the importance of strict compliance with the current mandate. The IGC out to avoid open-ended exploratory studies that could drift its focus from text-based negotiations. Whereas it gave for respect to rights of Member States to submit proposals for other studies, such as on national frameworks, nothing prevented the search for an international framework on TK and TCEs at that stage. History suggested that it was entirely possible to start with an international framework to provide a basis to develop national laws. For example, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) had established new international norms in an area that was still virgin territory for most national laws. Similarly, the Washington Treaty on Intellectual Property in Respect of Integrated Circuits (1989) had been inspired by legislation that only the United States of America ("USA"), the EU

and Japan had adopted at the time. The Group continued to approach IGC sessions with immense flexibility and constructive engagement. It urged all members to be of the same flexibility to achieve positive results.

15. The Delegation of Guatemala, speaking on behalf of the Group of Latin American and Caribbean Countries (“GRULAC”), thanked the experts of the *Ad Hoc* Expert Group for their work. It looked forward to the report, which would make valuable contributions to the discussions. The IGC’s mandate stated that the IGC would expedite its work to reach agreement on one or various international legal instruments. From that point of view, discussions should concentrate on cross-cutting issues that remained unresolved in respect of TK and TCEs, such as objectives, subject matter, scope, and exceptions and limitations. At IGC 38, there had been a very positive exchange of views among delegations, which had helped to clear up the concepts behind the positions. On that basis, it hoped to be able to build a compromised option that would accommodate the main concerns and interests. That would enable moving towards a more concrete result to achieve the IGC’s mandate. It expressed its trust in the work of the Facilitators and expressed its appreciation for the efforts and work. It highlighted the importance of the participation of IPLCs and their contribution to the work of the IGC. It appealed to Member States to make contributions to the Voluntary Fund. It urged other delegations to remain open minded to adopt pragmatic positions so as to achieve results on all those issues.

16. The Delegation of China was pleased to participate in IGC 39. It had been supporting the work of the IGC and hoped to make substantial progress in the protection of GRs, TK and TCEs as soon as possible so as to form an international binding instrument(s). It supported the proposed working methodology, because it had played a positive role in improving efficiency in discussions at previous sessions. It would participate in the discussions of many unresolved and specific issues on TK and TCEs in an active and pragmatic manner and appealed to all parties to work together, demonstrate flexibility, remain focused and bridge differences. Under the leadership of the Chair and with the participation of all parties, the IGC would make positive progress.

17. The Delegation of Canada, speaking on behalf of Group B, acknowledged the progress made by the IGC during the current mandate on GRs, TK and TCEs. More work needed to be done to narrow existing gaps, with a view to reaching a common understanding on core issues. It was hopeful that further progress could be made in resolving outstanding issues related to TK and TCEs during the week. It reiterated its firm belief whereby the protection relating to GRs, TK and TCEs should be designed in a manner that both supported innovation and creativity, and recognized the unique nature and importance of those three subjects. In that process and to that end, it was critical that the IGC continue its work consistent with its mandate and made meaningful advancements, being guided by using sound working methods, supported by an evidence-based and inclusive approach that took into account the contributions of all Member States. Negotiations should include discussion of the broader context and of the practical application and implications of proposed protection for GRs, TK and TCEs, including Member States’ experiences. In that regard, it thanked the *Ad Hoc* Expert Group for its work and it looked forward to the report of the co-chairs under Agenda Item 6. While it was up to the Member States to decide on how to use the outcomes, the report would remain a useful source of information on the issues under discussion. It looked forward to the active participation of IPLCs as well as other stakeholders. It acknowledged their valuable and essential contribution to the work of the IGC. It remained deeply concerned that the WIPO Voluntary Fund remained empty. It was hopeful that the Voluntary Fund would be replenished soon. It remained committed to contributing constructively toward achieving a mutually acceptable outcome.

18. The Delegation of Croatia, speaking on behalf of the Central European and Baltic States Group (“CEBS Group”), expressed its appreciation for the meeting of the *Ad Hoc* Expert Group

at which the CEBS Group had been represented by its four members. It was convinced that fruitful discussions had been held on cross-cutting issues of TK and TCEs, and looked forward to hearing the report. It appreciated the hard work of the Facilitators who had prepared the Rev. 2 documents based on the discussions at IGC 38. Being aware that there was only one meeting ahead under the current mandate, it wished to be able to narrow gaps. It encouraged Member States to be as flexible and pragmatic as possible in future discussions. Some progress had been achieved on the uses of terms, subject matters and scope of protection but it was fully aware of the remaining divergent positions among Member States. It thanked the Chair for his Information Note as well as for the preparatory briefing which guided Member States to further focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s). It could not neglect the various proposals by the Delegations of Canada, Japan, the Republic of Korea, Norway, the Russian Federation and the USA, who were willing to share their experience and views on how some thorny issues might be overcome. It supported an evidence-based approach and was convinced that the experience of others might be useful in discussions within national legislative contexts. It also supported the proposals by the Delegation of the EU, on behalf of the EU and its Member States, to undertake studies which would enrich future discussions. It thanked the Secretariat for updating the Gap Analyses on TK and TCEs and for the reports on the compilation of materials on databases as well as on disclosure regimes relating to GRs and TK. It deplored the fact that the Voluntary Fund was depleted and encouraged future financial contributions to help the crucial participation of IPLCs. It was convinced that the Chair would lead a transparent and inclusive process and looked forward to a constructive dialogue.

19. The Delegation of the EU, speaking on behalf of the EU and Member States stated that, in accordance with the decision adopted at IGC 38, it had nominated two experts to participate in their personal capacity in the *Ad Hoc* Expert Group. They had actively contributed to discussions. It looked forward to hearing the report of the co-chairs. IGC 38 had been the second of four consecutive IGC sessions to discuss TK/TCEs under the current mandate. It focused on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s). Such instrument(s) should be non-binding. While divergent positions remained, some progress had been made on issues concerning use of terms, subject matter and scope of protection as reflected in the Rev. 2 documents prepared by the Facilitators. It thanked the Chair for his helpful Information Note. Regarding the methodology, transparency and inclusiveness remained a necessity. It welcomed that the current mandate placed the evidence-based approach at the heart of its methodology. It looked forward to using the various possibilities provided for in the mandate in that context. In particular, it had previously submitted two proposals (contained unchanged in documents WIPO/GRTKF/IC/39/16 and WIPO/GRTKF/IC/39/17) for the IGC to consider. It thanked the Secretariat for updating the Gap Analyses on TK and TCEs and for re-issuing them for IGC 39. It was crucial to have mutual understanding about how the IP system could, or could not, assist in serving the interest of the holders of TK and TCEs. It thanked the Secretariat for updating and re-issuing the reports on the compilation of materials on databases relating to GRs and associated TK, as well as on disclosure regimes relating GRs and associated TK. It looked forward to participating constructively in discussions on TK and TCEs at IGC 39.

20. The Delegation of Indonesia, speaking on behalf of the LMCs, assured of its full support and cooperation in rendering IGC 39 a success. TK and TCEs were products of human minds and ideas that interacted with culture and society that deserved protection. It was in line with WIPO's mission to create a fair and balanced global IP system for everyone, including IPLCs, as well as national culture and expressions that were unique and close to the character and identity of a nation. Unfortunately, TK and TCEs had sometimes been used without authorization or benefit-sharing. It was time for the IGC to make progress and finalize the two texts. It recalled the objective of the session to undertake negotiations on TK and TCEs with a focus on addressing unresolved issues and considering options for a draft legal instrument(s).

With that objective, the IGC needed to minimize distractions and use the valuable time efficiently by not prolonging discussions on issues where positions had already been well laid out and understood by all IGC members. It looked forward to discussing the cross-cutting issues on subject matter, scope of protection, as well as exceptions and limitations. The issues discussed at the IGC were important, not only for all Member States but also for IPLCs everywhere that had developed and generated tradition-based knowledge and innovation long before the modern IP system had first been established. All communities had the right to maintain, control, protect and develop IP over their culture. The IGC needed to push for a greater recognition of both economic and moral rights over traditional and cultural heritage, including GRs, TK and TCEs. Substantial progress had been made within the IGC, notably regarding GRs and associated TK at IGCs 35 and 36, as well as regarding TK and TCEs at IGCs 37 and 38. It recalled the 2018 GA decision that called upon members to reaffirm their commitment to the IGC's mandate and to expedite its work. The current and future sessions would yield progress towards achievement of the IGC's objectives. Noting the importance of effective protection of GRs, TK and TCEs, the IGC should move towards taking the next step for the convening of a diplomatic conference with a view to adopting a legally binding instrument(s). At the conclusion of IGC 39, the IGC would have completed two-thirds of its work program approved under the mandate for biennium 2018/2019. With a constructive spirit and commitment to progress, it could soon reach the finish line. It expressed its confidence to the Chair and Vice-Chairs in guiding the discussion to make progress in that important IGC session.

21. The representative of the International Indian Treaty Council, speaking on behalf of the Indigenous Caucus, was grateful for the opportunity to address the IGC members on issues of critical importance to indigenous peoples across the world. She thanked the Secretariat for supporting their participation and for the hard work in organizing and compiling the materials to support the work of the IGC. The temporal requirements that had been proposed by some Member States in the text continued to be a problem and would serve as a barrier for the protection of TK and TCEs. Establishing a particular number of years was a nonstarter. It reflected a misunderstanding of the nature of TK, which was an ongoing, dynamic process within an indigenous framework, which could include TK being given to indigenous people by the spirit world. Requiring 50 years, for example, before TK and TCEs could be protected would result in a lack of protection during that period. Anyone who wanted to exploit or use TK or TCEs should be required to use due diligence to discover potential owners and engage in free, prior and informed consent ("FPIC") to determine whether they could legally access and use the TK and TCEs. Any definition of TK included in the text had to reflect indigenous peoples' views. Any definition had to take into account the collective ownership of such knowledge, even where TK was rightfully held by an individual or a group of individuals. Indigenous laws determined how TK was held and transmitted to future generations. Any definition of TK had to take into account the political, cultural, spiritual, ceremonial and other aspects of indigenous peoples' social norms. She remained concerned of the public domain in the proposed legal instruments. TK and TCEs were not part of the public domain and all references to the public domain should be eliminated from the texts. What required protection were the TK and TCEs of indigenous peoples. The Updated Gap Analyses demonstrated that the existing IP regime did not adequately protect TK and TCEs of indigenous peoples. The new instruments had to support indigenous nation's jurisdiction over cultural heritage. It was essential that that they be developed quickly to provide indigenous peoples with effective protection. She was concerned about the positive introduction of balancing language in those discussions, as self-determination rights of indigenous peoples could not be balanced against other stakeholders. TK and TCEs were integral to their life and should not be seen as raw materials for innovators, businesses or society as a whole against their FPIC. Indigenous peoples had to be fully involved in all decisions on access to their TK and TCEs. Their laws, traditions and jurisdiction had to be fully recognized and respected. Conflicts could not be resolved by States. She stressed the importance of the participation of indigenous peoples in the IGC negotiations. Unfortunately, none of the indigenous representatives were funded. She called upon Member States to

support the Voluntary Fund through financial contributions or directly funding indigenous peoples from their countries to participate. She acknowledged and thanked those Member States who had made contributions in the past. As the IGC discussed the IP rights of indigenous peoples, it was essential that their participation be secured to ensure the international regime was relevant and responsive to their unique circumstances. She thanked the delegations that had made statements on their support. She looked forward to constructive dialogue with Member States on the proposals made by the indigenous representatives, including those related to the rights of indigenous peoples and application of standards contained in the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) and their fundamental respect for nature. She asked Member States to engage with indigenous peoples to gain a better understanding of those fundamental issues and how they could develop strong protection of TK and TCEs.

22. [Note from the Secretariat: the following opening statements were submitted to the Secretariat in writing only.] The Delegation of Japan expressed its sincere appreciation for the preparatory work conducted by the Chair and the Secretariat. The Chair would properly guide the IGC to a better understanding of the current situation and the future steps that needed to be taken. It commended the Facilitators for their continued dedication. The IGC had made good progress thus far under the current work program. Nevertheless, even after many years of discussion, it had not been able to find a common understanding on the fundamental issues, namely, objectives, beneficiaries, subject matter, and scope of protection. In addition, many gaps still remained in terms of the Member States’ understanding on those issues. Sharing domestic experiences and practices was useful for everyone to gain a better understanding on those issues. In fact, the IGC had been able to have valuable discussions at IGC 38 based on interventions given by some Member States. Therefore, it was critical for the IGC to hold discussions using sound working methods, supported by an evidence-based and inclusive approach that took into account the contributions of all Member States. According to the Substantive Background Note prepared for the *Ad Hoc* Expert Group (document WIPO/EXP/IPTK/GE/19/2) and the Chair’s Information Note, both the subject matter and the scope of protection would be two of the main topics for discussion at IGC 39. Core elements such as subject matter and scope of protection should be clearly defined in the TK and TCEs texts. Unfortunately, the Member States still had different opinions on that point. Based on this, the Delegation wished to advance discussions to close the gaps among the Member States and reach a common understanding on such issues. Regarding TK, it suggested that, at IGC 39, the IGC should focus on finding the importance of preventing the erroneous granting of patents. That could be done by establishing and utilizing databases stored with non-secret TK. In that context, the Delegation, together with the Delegations of Canada, the Republic of Korea and the USA, resubmitted the document entitled “Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources”. The discussion on that recommendation could complement and even facilitate the text-based negotiations. The IGC needed to reach a common understanding on the definitions of TK and TCEs first, before starting negotiating the text. To reach that goal, it was crucial to gather concrete examples of relevant national laws as well as to know the ways and effect of implementing them and the actual impact that they would have on each TK. It co-sponsored document WIPO/GRTKF/IC/39/12, and supported the proposal made by the Delegation of the USA in document WIPO/GRTKF/IC/39/11. It stood ready to engage in work with a constructive spirit.

23. The Delegation of Nigeria aligned itself with the statement delivered by the Delegation of Uganda, on behalf of the African Group. It was committed to working together with all stakeholders to ensure that the IGC build upon the progress made in the textual work of the past three sessions. As IGC 39 was the third session on TK and TCEs in the biennium, it was an opportunity to further bridge the gaps on those conceptual issues that had posed immense difficulties in the course of the negotiations. It was critical that flexible and pragmatic



approaches, including a willingness to explore the scope of protection as envisioned in the concept of tiered and differentiated option, was considered in an open-minded manner, with a view to filling any gaps that might be identified. It also recognized the importance of reaching a better understanding of the subject matter of protection – TK and TCEs. It would be helpful to appreciate the unique nature of those issues. It also considered it important to explore how the framework for the protection of TK and TCEs related to the imperative for a *sui generis* approach in the work of the IGC. An international legal instrument that would protect TK and TCEs was a matter of great importance. Such an agreement would enhance the contributions of the holders of such knowledge, protect and preserve their knowledge systems, as well as advance fair and equitable sharing of benefits. It wanted to see a greater emphasis on closing existing gaps. It encouraged all parties to be flexible and to negotiate in a manner that would enable the IGC to reach a much-anticipated consensus on its mandate. The premise for the IGC's mandate was the paucity of conventional IP to accommodate TK/TCEs hence the need for a *sui generis* instrument. Pursuant to the IGC's operative mandate, that instrument had to "relate to intellectual property" but did not have to be constrained by the IP system, recognizing that there were aspects of conventional IP that provided some degree of protection to TK/TCEs. It urged caution with regard to arbitrary placing of limit on TK/TCEs. That would be insensitive to IPLCs and the nature of their TK/TCEs. Similarly, it encouraged the IGC to be prudently guided in the negotiations over how the public domain was implicated and deployed. The notion of public domain or its parallel among IPLCs might not correlate with the use of that expression under the conventional IP system. The role of public domain in the context of TK/TCEs needed to be critically interrogated before acceptable language could be reached if the IGC agreed that reference to the public domain was necessary, possibly as part of the preamble. The public domain argument had been used to undermine TK/TCEs and there was a need to save TK/TCEs from the public domain. It saw merit in the work done by the *Ad Hoc* Expert Group towards the progress of negotiations in the IGC as a methodological strategy. It appreciated the contributions of the *Ad Hoc* Expert Group towards the session, and looked forward to the report to assist in reaching common understanding and achieving progress in the negotiations. It was pleased to note that in the past, the *Ad Hoc* Expert Groups had proven helpful in narrowing gaps and building trust among delegates. It emphasized the importance of the session and the opportunity it presented to the delegates to produce concrete and meaningful outcomes from collective deliberations under the 2018/2019 biennium. It hoped that at the end of IGC 39, the IGC would have recorded sufficient progress on TK and TCEs, as done in the GRs text. Such an outcome would enable the IGC to ensure that IGC 40 truly became the stock-taking session that it was scheduled to be. It would also provide a robust basis for the IGC to make meaningful recommendation(s) to the GA on its mandate for the next biennium and create a pathway to a diplomatic conference.

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

24. The Chair referred to the draft report of IGC 38 and recalled that it was not a verbatim report, and it summarized the discussion without reflecting all the observations in detail. Any intervention under this item had to be solely related to submissions made at and the report of IGC 38.

*Decision on Agenda Item 3:*

25. *The Chair submitted the draft report of the Thirty-Eighth Session of the Committee (WIPO/GRTKF/IC/38/16 Prov. 2) for adoption and it was adopted.*

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

*Decision on Agenda Item 4:*

26. *The Committee unanimously approved the accreditation of Te Rūnanga o Toa Rangatira Inc. as an ad hoc observer.*

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

27. The Chair referred to the statement by the Indigenous Caucus that no members nominated to be supported by the Voluntary Fund were present, said it was a strong indicator of a significant issue. The Chair recalled that the Voluntary Fund was depleted and recalled the decision of the 2018 GA, representing the importance of the participation of IPLCs in the work of the IGC and encouraging Member States to consider contributing to the Voluntary Fund and to consider other alternative funding arrangements. He called upon delegates to consult internally and contribute to the Voluntary Fund. The importance of the Voluntary Fund went to the credibility of the IGC, which had committed itself to supporting indigenous participation. The decision of the 2018 GA indicated that the IGC could potentially look at other mechanisms to contribute to the Voluntary Fund. He drew attention to document WIPO/GRTKF/IC/39/INF/4, which provided information on the current state of contributions and applications for support, and document WIPO/GRTKF/IC/39/3, which concerned the appointment of members of the Advisory Board. He requested the Vice-Chair, Mr. Chery Faizal Sidharta, to take the responsibility of chairing the Advisory Board. The outcomes of the Advisory Board's deliberations would be reported in document WIPO/GRTKF/IC/39/INF/6.

28. [Note from the Secretariat]: The Indigenous Panel at IGC 39 addressed the following topic: "Draft Articles on Intellectual Property and Traditional Knowledge/Traditional Cultural Expressions: Indigenous Peoples' and Local Communities' Perspectives on Subject Matter and Scope of Protection". The three panelists were: Ms. Jennifer Tauli Corpuz, Coordinator, Tebtebba Indigenous Peoples' International Center for Policy Research and Education, Philippines; Ms. Edith Bastidas, Lawyer, *Resguardo Indígena Ipiales*, Colombia; and Mr. Áslat Holmberg, Vice President of the Saami Council, Finland. The Chair of the Panel was Mr. Stuart Wuttke, General Counsel, Assembly of First Nations. The presentations were made according to the program (WIPO/GRTKF/IC/39/INF/5) and are available on the TK website as received. The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat which is reproduced, as summarized, below:

"Ms. Jennifer Corpuz gave a presentation on TK and TCEs relating to concepts currently under discussion in the IGC. She noted there was a conceptual divide regarding the objectives among Members States. Some preferred the framework to establish minimum international standards, while others sought for a fully elaborated international instrument. She provided two examples of TK and TCEs from the Philippines and highlighted the impracticality of applying a temporal timeframe for the protection of these two examples. If one were to apply the 50 year temporal requirement, the Philippines would be prevented from providing IP protections to their indigenous peoples during the 50 year period. Ms. Corpuz also reflected on the tiered approach. In the Philippines, there were certain types of TK that were meant to be shared, while others were to remain secret and sacred. Regardless of their status, the moral, economic and other rights required protection. Ms. Corpuz believed that rights-based and measures-based approaches were not mutually exclusive, and there must be means to return or repatriate the TK which had been diffused against the intent of indigenous peoples.

Ms. Edith Bastidas stated that the TK and TCEs of the indigenous peoples of Colombia had a strong linkage to culture, traditions, territory, sustainable use of biodiversity, collective memory and the spirit world. She urged the IGC to adopt similar protection contained in other international instruments such as the Convention on Biological Diversity (“CBD”) and the UNDRIP. The international IP regime must incorporate standards established by indigenous peoples. Regarding objectives contained in document WIPO/GRTKF/IC/39/4, Ms. Bastidas advised that Alternative 1 was the most appropriate as it requested to prevent misappropriation, the unauthorized use of TK and employed elements of legal access, prior informed consent (“PIC”), and mutually agreed terms (“MATs”). She asserted that the inclusion of the public domain into the objectives of the proposed instruments was problematic. The public domain offered no protection for indigenous peoples. Regarding the scope of protection, she believed that Alternative 2 offered more appropriate terms for IPLCs, which were the need to protect the collective rights of indigenous peoples. The text could be further enhanced to support the customary laws of indigenous peoples and cover oral transmission of TK.

Mr. Áslat Holmberg provided two examples of misappropriation of Sami TCEs. The first example demonstrated how Sami culture, music, clothing and other characteristics were reproduced in a film without permission. The second example was that the name of their nation, “Samer” (the Sami People), was registered by a jewelry company as a trademark in Demark and how their designs were being reproduced without permission. In both cases, the Sami people were not receiving any benefits. He highlighted that the Sami need to collectively decide whether TK should become publicly available, or how that knowledge was used in governance. He emphasized the need to require FPIC, MATs and benefit-sharing with indigenous peoples, including processes for enforcement. In accessing TK and TCEs, third parties, researchers, corporations and others should be required to obtain the FPIC of Indigenous people prior to the accessing of TK or TCEs. He concluded that an international IP regime was needed to provide protection to those indigenous peoples who resided in more than one country.

A brief question and answer period followed the panelists’ presentations.”

29. [Note from the Secretariat: This part of the session took place on March 20, 2019.] The Delegation of Canada acknowledged the presence of the representatives from the Assembly of First Nations in Canada. It recognized the important work of the IGC to establish one or more international instruments for the protection of GRs, TK and TCEs held by IPLCs. That work closely aligned with the Government of Canada’s commitment to advancing reconciliation and renewing the relationship with indigenous peoples in Canada, based on recognition of rights, respect, cooperation and partnership. It also closely aligned with the implementation of UNDRIP. Reconciliation was a Canadian imperative for the well-being and economic health of the country. Advancing that journey took a whole new government approach involving partners at all levels. It continued the work of reconciliation in partnership with First Nations, Inuit as well as provinces and territories and stakeholders to support healthier and more prosperous indigenous communities. The Government of Canada understood that advancing reconciliation included ensuring the preservation and protection of indigenous knowledge and cultural expressions. In further answer of that objective, in April 2018, as part of its IP strategy, which helped Canadian entrepreneurs better understand and protect IP, the Government of Canada had committed to supporting indigenous participation in national and international discussions about the IP system and the protection of indigenous knowledge and cultural expressions. In implementing those initiatives, the Government of Canada was working with and providing financial support to organizations that represented indigenous peoples in Canada, to build their capacity, engage with their communities and participate in the IGC meetings. Any international framework developed at WIPO had to be informed by the views of and involve the active participation of representatives of IPLCs from around the world, as the holders of such

knowledge and cultural expressions. Since its establishment in 2005, the WIPO Voluntary Fund had been instrumental in facilitating such participation. The Voluntary Fund could not continue to support that important work without the help from countries and organizations around the world. It announced with great pleasure that the Government of Canada was contributing 25,000 Canadian dollars to the Voluntary Fund to help support the participation of representatives of IPLCs in those important negotiations. It looked forward to continuing to work with other Member States and observers, including representatives of IPLCs over the course of IGC 39 to fulfill the objectives of the IGC.

30. The representative of the Saami Council, speaking on behalf of the Indigenous Caucus, welcomed the announcement from the Delegation of Canada, and said that it would have a huge impact on the result of the negotiations. The TK of indigenous peoples encompassed knowledge, know-how, skills, innovations and practices. TK also encompassed TCEs, including dances, songs, handicrafts, designs, ceremonies, tales or other artistic or cultural expressions. Within the current system of western law, the Saami handicraft tradition was generally unprotected from misuse. The tradition was exploited and products manufactured in other countries and cheap imports were sold as genuine Saami handicrafts. The dress was also misused in many ways. Products resembling the Saami dress were sold as souvenirs. Misappropriation of cultural heritage by the tourism industry disregarded the rights of IPLCs over their cultural property and had damaging effects on their identity and self-image, which especially affected the youth. IP mechanisms had great potential to protect the TCEs of the Saami against misappropriation and to enable communities to control and benefit collectively from commercial exploitation. Existing national and international mechanisms to protect IP of the Saami were insufficient and lacked the necessary cultural sensitivities and understandings of the traditional protection of material cultural heritage. The Saami and other indigenous peoples should have, and states should support, the right to maintain, control, protect and develop their cultural heritage, as Article 31 of UNDRIP stated. She was appreciative of the possibilities of indigenous peoples to participate in the IGC, the chance to give an opening statement, to participate in the *Ad Hoc* Expert Groups, informals and contact groups, and the possibility to share with the IGC the experiences and views of indigenous peoples through the Indigenous Panel. However, indigenous peoples had to be even more involved. They were the creators and holders of TK and TCEs, and their views were of critical importance for the hopefully soon-to-be-reached agreement on protective instruments of TK and TCEs. Indigenous participation was crucial for the IGC process. The results of the discussions at the IGC would particularly affect the cultures and lives of indigenous peoples. The IGC should not only take into consideration the indigenous views, but respect and generally listen to the opinions, and understand indigenous views. The views of indigenous peoples should be the foundations of the future instruments. Indigenous participation was a key element, not only for the substance of the IGC's work but also for the credibility of the IGC process. She emphasized the importance and meaning of the work of the IGC for indigenous peoples, including for the Saami people. She wished to see results of reaching international protection for their TK and TCEs soon.

31. The Chair thanked the Government of Canada for the timely and very welcome contribution.

32. [Note from the Secretariat]: The Advisory Board of the WIPO Voluntary Fund met on March 20, 2019 to select and nominate a number of participants representing indigenous and local communities to receive funding for their participation at the next session of the IGC. The Board's recommendations were reported in document WIPO/GRTKF/IC/39/INF/6 which was issued before the end of the session.

33. The Chair thanked again the Government of Canada for the contribution. He called upon other delegates to consult internally and contribute to the Voluntary Fund.

*Decisions on Agenda Item 5:*

34. *The Committee took note of documents WIPO/GRTKF/IC/39/3, WIPO/GRTKF/IC/39/INF/4 and WIPO/GRTKF/IC/39/INF/6.*

35. *The Committee welcomed an announcement by the Government of Canada that it would be contributing 25,000 Canadian dollars to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities and strongly encouraged and called upon other members of the Committee and all interested public and private entities to contribute to the Fund.*

36. *Recalling the Decisions of the Fiftieth Session of the WIPO General Assembly, the Committee also encouraged members of the Committee to consider other alternative funding arrangements.*

37. *The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Martín Correa, Counsellor, Permanent Mission of Chile; Mr. Alexander Da Costa, Minister Counsellor and Deputy Permanent Representative, Embassy of the Gambia to Switzerland and Permanent Mission of the Gambia; Ms. Jessica Forero, Representative, Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ); Mr. Jeremy Kolodziej, Representative, Assembly of First Nations; Ms. Geise Perrelet, Representative, Indian Council of South America (CISA); Ms. Shelley Rowe, Senior Project Leader, Innovation, Science and Economic Development Canada (ISED), Canada; Mr. Gaziz Seitzhanov, Third Secretary, Permanent Mission of Kazakhstan; and Ms. Navarat Tankamalas, Minister Counsellor, Permanent Mission of Thailand.*

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

## **AGENDA ITEM 6: REPORTING ON THE AD HOC EXPERT GROUP ON TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS**

39. The Chair said that, as agreed at IGC 38, an *Ad Hoc* Expert Group had met on March 17, 2019. He thanked Ms. Sharon Le Gall and Mr. Chidi Oguamanam for acting as Co-Chairs of the *Ad Hoc* Expert Group. In their capacities as Co-Chairs, they would report on the outcomes and results of the experts' work, and that report would be included in the report of IGC 39. They would report the factual outcomes as they saw them from the meeting, after which any of the experts could make comments on what had been reported. The IGC would not make a decision on the merits of the different outcomes of those discussions, but they were available for Member States to consider in their deliberations. The contact groups (to be established) would consider some of the key areas discussed in the *Ad Hoc* Expert Group. He invited Ms. Le Gall and Mr. Oguamanam to take the floor.

40. Ms. Le Gall and Mr. Oguamanam reported as below:

“1. The *Ad hoc* Expert Group on Traditional Knowledge and Traditional Cultural Expressions met at the World Intellectual Property Organization Headquarters (WIPO), Geneva, on March 17<sup>th</sup>, 2019. The overall objective of the *Ad Hoc* Expert Group, as indicated in the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the IGC”) and the Decisions of the Thirty-Seventh Session of the IGC (“IGC 37”) and the Thirty-Eighth Session of the IGC (“IGC 38”), was to address specific legal, policy or technical issues. The results of this meeting are contained in this report to the Plenary Session of Thirty-Ninth Session of the IGC (“IGC 39”).

2. The Co-Chairs of the meeting were Mr. Chidi Oguamanam (Professor of Law, University of Ottawa, Canada) and Ms. Sharon Le Gall (Senior Lecturer, University of the West Indies, Trinidad and Tobago), nominated by the IGC Chair, Mr. Ian Goss (Australia), pursuant to the Decisions of IGCs 37 and 38. Mr. Oguamanam is one of the experts nominated by the African Group and Ms. Le Gall is one of the experts nominated by the WIPO Secretariat.

3. The *Ad Hoc* Expert Group was about building consensus on principles and approaches that would inform the negotiations and drafting that will take place in the IGC. The experts participated in their personal capacities and were invited to discuss the following issues in relation to traditional knowledge (“TK”) and traditional cultural expressions (“TCEs”):

- Subject matter, including related definitions
- Scope of protection including
  - Further consideration of a possible “tiered approach” (differentiated protection)
  - Criteria for eligibility for protection
  - Related definitions

4. In relation to “Subject Matter of Protection”, which was the first issue to be discussed, the participants were invited to share their views and perspectives based on the following questions posed to them:

- As a matter of form, should there be definitions for TCEs and TK in the respective Draft Articles?
- If there should be a definition, should the definition of TCEs and the definition of TK be in the “Use of Terms” section or in stand-alone substantive articles concerning subject matter of protection?
- As a matter of substance, what are the important qualifiers which define the subject matter in relation to TCEs on the one hand and TK on the other?
  - For example, some qualifiers concern how the TCEs and TK came into existence/or exist, namely they are “created, generated, expressed, developed and maintained”;
  - Other qualifiers concern the connection between the beneficiaries/source community and the TCEs or TK, namely linked with, directly linked with, integral to the social/cultural identity;
  - Other qualifiers concern the transmission of the TCEs and TK, that is the TCEs or TK is passed between or from generation to generation;
  - Other qualifiers concern the nature of the TCEs or TK, in that they are dynamic and evolving;
  - Should there be a temporal qualifier? Should there be a time after which subject matter can be considered either “TCEs” or “TK”?
- Are those qualifiers the same for defining TCEs and TK or are there any differences?
- What are the key qualifiers to describe TCEs and TK and should they be included in the Draft Articles?
  - In relation to TCEs, they can consist of artistic and literary expressions, tangible or intangible or a combination of these, for example, actions, materials, music, sound;
  - In relation to TK, it may take the form of know-how, skills, innovations, practices, teachings or learnings.
- Should there be references to “protected TCEs” and “protected TK” given that once the TCEs and/or TK meets the eligibility criteria it is “protected”?
- Should there be a definition of “traditional”?

5. There was a very engaging discussion in response to the questions posed in a spirit of collegiality and inquiry, with consensus on some issues and very good interventions for inclusion of additional language to existing draft texts. Specifically, the following are some of the outcomes in relation to the discussion on subject matter:

- There was very broad consensus that there should be broad definitions of TK and TCEs in the draft articles. There was a view that such definitions should be broad and not restrictive, and allow a level of flexibility at the national level. How much flexibility to leave to the national level was discussed.
- Key eligibility criteria are needed to set minimum standards which relate to the scope of protection.
- While most experts believed the instruments should provide minimum standards (a “floor”), some preferred maximum standards (a “ceiling”).
- Participants seemed to be flexible in terms of whether there should be stand-alone definitions in the substantive provisions of the draft instruments or whether the definitions should be contained in the “Use of Terms” section (or a definition section). There was perhaps general support for deletion of the stand-alone articles 3 in the TK and TCEs texts, and for the definitions to be in the “Use of Terms” sections.
- There were very insightful interventions for the inclusion of qualifiers relating to how TK and TCEs come into existence and it was felt that the existing qualifiers in the draft texts did not capture the diverse ways in which these may occur. It

was suggested that the following qualifiers, namely “held” and “received” (and what they mean) be considered by the IGC for possible incorporation into the current draft articles.

- Some participants emphasized the point that TCEs and TK were maintained in accordance with customary laws and practices and stressed the importance of the linkage between TCEs and TK with the social/cultural identity of the beneficiaries.
- Another key qualifier was the transmission of TCEs and TK between or from generation to generation, taking into account unfortunate breaks in such transmissions for reasons beyond the control of the beneficiaries.
- There was broad support for dispensing with any temporal qualifier or criterion in relation to subject matter and the point was made by the indigenous experts and others that the more important element was the linkage between the TCEs/TK and the beneficiaries. However, some participants were of the view that a temporal qualifier was necessary.
- There was a discussion about whether TCEs and TK shared similar qualifiers, however there was a recognition that with reference to the specific qualifier, namely, “expressed”, that was more suitable in relation to TCEs rather than TK. However, it was recognized that there was complementarity between TCEs and TK and in some instances TK can be or is expressed. Generally, alignment as far as possible between the TK and TCE texts was widely supported.
- There was a discussion about the relevance of other international conventions that defined related subject matter, and how they could provide guidance for the IGC, for example, the experience with the implementation of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage could be useful.
- There was clarification that the IGC is working on creating a *sui generis* instrument(s) which attempts to fill the gaps in the conventional IP system (as discussed in the Gap Analyses provided by the Secretariat) by creating an IP-similar system which could complement the conventional IP system. It was noted that performances of TCEs are already protected by two WIPO instruments, the WPPT, 1996 and the Beijing Treaty, 2012.
- There was emerging consensus that a stand-alone definition of “traditional” was not needed or useful.
- There was emerging understanding that the inclusion of “protected traditional knowledge”/“protected traditional cultural expressions” was redundant; however, a few experts were inclined to have the terms retained.

6. In relation to “scope of protection”, which was the second issue to be discussed, the participants were invited to share their views and perspectives based on the following questions posed to them:

- Should there be a rights-based approach to protecting TCEs and TK?
  - A rights-based approach affords beneficiaries rights to their TCEs and TK which they can enforce themselves or through the relevant competent authority.
- Should there be a measures-based approach to protecting TCEs and TK?
  - A measures-based approach requires States to provide measures for the protection of TCEs and TK which could include a wide range of legal and practical civil, administrative or criminal measures.
- Should there be a combination of both approaches?

7. Participants were also invited to consider the tiered or differentiated approach to protecting TCEs and TK (which could include whether the TCEs/TK is secret, the level of



control retained by the beneficiaries, the degree of diffusion, and the circumstances of diffusion (particularly whether diffusion occurred with or without the consent of the beneficiaries). The draft and initial matrix below was used simply as a starting point to stimulate and facilitate the discussion:

Rights/measures	Moral and related rights	Economic rights	Other compensation options	Measures
Kinds of TK/TCEs				
Secret (including sacred)				
Narrowly diffused (including sacred)				
Widely diffused (including sacred)				

8. The following are some of the outcomes in relation to the discussion on “scope of protection”:

- There was emerging consensus that the rights-based and measures-based approaches are not mutually exclusive and in fact complementary and that future deliberations should continue with this in mind.
- It was also noted that the measures-based approach afforded greater flexibility at the national level.
- One expert remarked that from the perspective of indigenous peoples and local communities, for example, a rights-based approach may be preferable with corresponding obligations on the part of users of TCEs and TK. From the perspective of governments, the relevant bodies would be responsible for implementing the necessary measures for protection of TCEs and TK.
- There was broad consensus on the merit in having a tiered approach and experts saw the merit in moving it forward, for example, revisiting the tiers and expanding the nature of the rights and accommodating the contexts for diffusion (taking into consideration the internal understandings of diffusion (from the perspective of the indigenous peoples and local communities) and the external understanding of that concept). Further development of the tiered approach should also recognize that “measures” are also relevant, in addition to “rights”, in a tiered approach.
- Several experts proposed removal of the word “safeguard” from the texts.
- There was a recognition of the evolution of the tiered approach and some delegates pointed out that the tiers as expressed would require further elaboration.
- For example, there was a shared observation that while moral rights are relevant to TK/TCEs, it does not fully capture the interests of Indigenous and Local Communities hence the need to accommodate for “moral and related rights”, which should take priority over other forms of economic rights.

9. The deliberations ended at approximately 4:40pm with the overall sense that some progress was made and broad agreement in some areas was achieved.”

41. The Chair thanked the Co-Chair. He invited the experts who had attended the *Ad Hoc* Expert Group to add any comments.

42. The Delegation of the Islamic Republic of Iran thanked the Co-Chairs of the *Ad Hoc* Expert Group for their very good job in delivering a balanced and complete report. It said that concepts should not be repeated over and over in the document. The text should be streamlined to avoid repetition across the articles. Instead of having a definition in one article and the criteria in another, the IGC should focus on the content of a particular article. The article on subject matter would need to clearly state what the document was going to do with the TK. Simply stating that the document was related to TK or describing TK as appeared in the definition was not good enough. The text had to state that the document was related to TK on what subject or what area, either in the utilization of TK or the protection of TK. With regard to the different tiers, although sacred or secret TK was important, the protection should also apply to other forms of TK, including diffused TK. The level or type of protection could be different. On the temporal issue, there was no consensus. TK should not be identified by a number of years or generations. The text should clearly state that it would not apply retroactively.

43. The Chair opened the floor for comments by Member States that were not present at the *Ad Hoc* Expert Group. There were none.

*Decision on Agenda Item 6:*

44. *The Committee took note of the oral report from the Co-Chairs of the ad hoc expert group on traditional knowledge and traditional cultural expressions, Ms. Sharon Le Gall (Senior Lecturer, Faculty of Law, University of the West Indies, St. Augustine, Trinidad and Tobago) and Mr. Chidi Oguamanam (Professor of Law, University of Ottawa, Canada).*

**AGENDA ITEM 7: TRADITIONAL KNOWLEDGE/TRADITIONAL CULTURAL EXPRESSIONS**

45. The Chair said that he had consulted with the RCs regarding the methodology and program for IGC 39, especially for Agenda Item 7. There were no comments. He presented the methodology and program, recalling the decision of the 2018 GA. The same methodology used at IGC 38 would be followed at IGC 39. The methodology and program would be flexible and dynamic, based on the progress made. IGC 39 should undertake negotiations on TK and TCEs pursuant to the mandate. The cross-cutting issues to be focused on were objectives, subject matter, scope of protection, and exceptions and limitations. If time allowed, other issues would be addressed. At the end of IGC 39, he would assess the progress made and make suggestions to the issues, whether cross-cutting issues or issues unique and specific to TK or TCEs, respectively, to be addressed at IGC 40, noting that IGC 40 also included a stock-taking session where the IGC would review the progress made and consider recommendations to the 2019 GA. Regarding the results of IGC 39, they would be the revised versions of document WIPO/GRTKF/IC/39/4 and document WIPO/GRTKF/IC/39/5. A similar methodology to that used in previous sessions would be followed. IGC 35, 36 and 38 had shown that small *ad hoc* contact groups were useful. He intended to establish one or more contact groups. The mandate of the contact groups was to reduce the number of options and alternatives and to narrow gaps. Each regional group might nominate no more than two delegates per contact group. The EU, the LMCs and the Indigenous Caucus might each nominate one delegate per contact group. He would appoint one of the Vice-Chairs or Facilitators to coordinate the discussions in such contact groups and to report to the plenary. Those contact groups had a short-term mandate within the current session and would need to report back to the plenary. He

intended that the plenary meet at least once a day to hear reports from the contact groups; that would allow the plenary to comment thereon. That would also enable the Facilitators to receive and keep track of positions, views and any proposals emanating from the contact groups in plenary so as to produce Rev. 1s and Rev. 2s. The plenary remained the decision-making body and its discussions would be reported on as usual. He proposed that Mr. Paul Kuruk from Ghana and Ms. Lilyclaire Bellamy be the Facilitators. They would assist the plenary and informals by following the discussions closely and keeping track of views and proposals, including drafting proposals. They might take the floor to make proposals and review all the proposals. He further stated that IGC 39 was the last meeting under the current mandate at which the IGC would be able to focus solely on TK and TCEs, noting IGC 40 included a stock-taking session and consideration of recommendations to the GA. He did not intend to open the discussion on the issue of beneficiaries, unless there was an opportunity to narrow the gaps. The IGC had much work to do to arrive at a common understanding of objectives, subject matter (including related definitions), scope of protection (including eligibility criteria for protection), and limitations and exceptions. He believed that there were several key barriers affecting the IGC's ability to achieve an outcome. The IGC was hindered by Member States' different policy perspective and focus, in particular between protecting interests of the users and the holders of TK and TCEs. If it was to make progress, the IGC needed to recognize those were not competing or mutually-exclusive interests. As stated in the mandate, the IGC's task was to develop instruments that would ensure the balanced and effective protection of TK and TCEs, though where that balance lied was another question. The IGC was requested to consider the protection of TK and TCEs within the IP system. He did not suggest that that balance was equally distributed, but it was up to Member States to work out what the fair distribution was, other than to recognize there was a need for balance. Within the IP system, the norm was to balance the interests of the holders, providers, beneficiaries or creators, and the users or parties who wished to utilize TK and TCEs, such as industry, and the public interest. To that end, delegations needed to move outside their comfort zones and recognize the legitimate interests of all Member States and stakeholders. There was a fundamental conceptual and legal divide in relation to how indigenous peoples' belief systems and customary laws and practices interacted with IP policy, laws and practices. From an indigenous peoples' perspective, the very concept of ownership in the conventional IP system was incompatible with notions of responsibility and custodianship under customary laws and practices. The divide was also captured in the Updated Draft Gap Analyses on TK and TCEs. Those materials highlighted a number of key concerns of IPLCs regarding the protection of the interests and rights within the IP system, such as the originality requirement, derivative works, ownership within a collective context, terms of protection, and limitations and exceptions. However, at the same time, it needed to be recognized that notwithstanding those gaps in existing IP regimes, it was also necessary to protect the fundamental role that the IP system played in promoting and supporting innovation and creativity, transfer and dissemination of knowledge and economic development for the benefit of all. In that respect, ensuring legal certainty within the IP system and supporting an accessible public domain were key elements in preserving the integrity of the IP system. In some cases, there were competing policy interests and the IGC needed to bridge the gap in those competing interests. That was the greatest challenge. Indigenous peoples well recognized that they lived in two worlds. It was maybe not their choice, but their reality. That was a sentiment strongly expressed in the Uluru Statement from the Heart issued by Aboriginal and Torres Strait Islander delegates to a constitutional reform referendum convention in 2017 in Australia. He quoted one paragraph: "We seek constitutional reforms to empower our people and to take a rightful place in our own country, when we have power over our destiny, our children would flourish, they would walk in two worlds, and their culture would be a gift to their country." That sentiment from Australian indigenous peoples reflected that they lived in two worlds. If they could recognize that truth, Member States could also recognize that truth. If the life and experience of IPLCs were imbedded in the copyright or patent system, it would require some leap of faith and some understanding and engagement. That was a challenge. That also suggested that simply adapting existing IP systems such as copyright was also a

challenge, as policy interests were not always compatible. Perhaps a new or *sui generis* approach within the IP system would be needed. The discussions relating to the definitions of TK and TCEs, in particular, the temporal aspect, highlighted that situation, as indigenous peoples did not have the same western view of time. They believed that TCEs, even if produced the day before, were an expression directly linked to their unique culture and social identity. It was also important to recognize the widely divergent environments in which indigenous peoples operated across the world, including the different legal frameworks and approaches to protecting the rights of indigenous peoples. Some countries had treaties or specific laws relating to the protection of indigenous peoples, such as Australia, while others had no legal frameworks. Some indigenous peoples were not restricted to one country and in some countries, there were more than one indigenous peoples with different languages and cultures. For example, in Australia there were 200 nations and 200 different languages. The land was different, the environment was different and their understandings, though they linked through some ways, were not the same. In essence, a one-size-fits-all approach was unworkable. That reinforced that the IGC's approach, similar to other IP instruments, should be able to establish, at the international level, framework instruments or principles and standards, minimum and/or maximum or a combination of both. The IGC needed to work those through and analyze them. There should also be flexibility for implementation at the national level. There had been a tendency in the negotiations to discuss the types of mechanisms that might be able to protect TK and TCEs, before establishing the framework. It should be noted that many of those mechanisms would be determined at the national level, based on the unique circumstances and legal frameworks. As the IGC progressed its work, it developed alternative frameworks of how it approached the core issues. That was particularly relevant to the linkage between subject matter, eligibility criteria and scope of protection, which were fundamental issues. The IGC needed to work hard to address that, if it was to move forward. Lastly, he recalled that most Member States were signatories to UNDRIP, noting some members had included reservations as part of their agreement. UNDRIP, in particular Articles 31 and 25, provided high-level guidance to the IGC's work. The Chair recalled one of his observations relating to GRs that there was a significant growth of domestic and regional regimes in the area of GRs and associated TK. The same was occurring domestically and regionally with the protection of TK and TCEs. For example, New Zealand was completing its review of the Waitangi Tribunal's recommendations, which include IP. Australia had a parliamentary report on fake art, which was a significant problem. There were a number of recommendations that had come out of that report, including that the IP Office in Australia had consultation papers around domestic work that would need to occur in relation to the protection of TK and TCEs. In Africa, South Africa had done significant work, just like many other countries. Unless the IGC came up with standards, the world would end up with disjointed and fragmented domestic regimes, which, from a user perspective, were not desirable, as it increased legal uncertainty, costs and regulatory burdens for those who wished to operate across multiple jurisdictions. As stated at the 2018 GA, the IGC needed to expedite its work.

46. The Chair proposed to establish contact groups and presented the methodology for the contact groups as follows:

"The mandate of the contact groups is to reduce the number of options/alternatives and narrow gaps.

The contact groups are requested to focus on the specific questions set out in the annex.

Each group would be chaired (see below) and each group should elect a rapporteur from among the delegates present.

The groups will meet from 10am to 1pm and from 3pm to 4pm on Tuesday, March 19, 2019.

There will be two contact groups:

1. Objectives, chaired by Jukka Liedes, a Vice-Chair, meeting in the Red Room; and
2. Subject matter, chaired by Paul Kuruk, a Facilitator, meeting in the Bilger Room.

Each Regional Group may each nominate no more than two delegates per contact group. The EU, the LMCs and the Indigenous Caucus may each nominate one delegate per contact group. The Chair of each group should check implementation of this at the beginning of each group's meeting. The members of the contact groups should ideally and as far as possible be subject-matter experts who attended the *ad hoc* expert group on traditional knowledge and traditional cultural expressions that met on March 17, 2019.

The rapporteurs will report back to the plenary at 4pm, on Tuesday, March 19, 2019. The plenary will listen to the reports of the rapporteurs, and the Facilitators will take note of them for purposes of Rev. 1. The plenary should be completed by 6pm on Tuesday.

The contact groups will work in English only, because interpretation facilities are not available for them.

The specific questions for each contact group are in the annex.

## **Annex**

### **OBJECTIVE(S)**

This contact group is invited to review the articles on objectives within the TK and TCEs texts and develop:

- a consensus text on the objective(s) for the protection of TK; and
- a consensus text on the objective(s) for the protection of TCEs.

In developing these texts, and with reference to the report of the Co-Chairs of the *ad hoc* Expert Group that met on March 17, 2019, the contact group should:

- attempt to achieve complementarity between the two texts;
- attempt to strike an appropriate balance between the different interests of the holders and users; and
- remove any material which is not germane to the goal of the work of the IGC (which is to reach "an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection" of TK and TCEs), by, in particular, removal of broad concepts or notions which are best reflected in the preamble and of objectives which are not related to the subject matter or able to be operationalized within the substantive articles.

### **SUBJECT MATTER**

With reference to the report of the Co-Chairs of the *ad hoc* Expert Group that met on March 17, 2019, this contact group is invited to identify the:

- key descriptors that should be used to describe TK and TCEs in general terms; and

- key qualifiers (or “eligibility criteria”) that should be used to identify which TK and TCEs should be protected.

Based on these descriptors and eligibility criteria, the contact group is invited to develop a simple definition for each of TK and TCEs respectively. As far as possible, the structure/architecture of the definitions of TK and TCEs should be the same (without implying that their content would necessarily be the same).

In developing these definitions, the contact group should consider the complementarity of TK and TCEs, and identify whether the definitions may diverge or not, and, if so, how.

The contact group also needs to consider what framework would be needed to link subject matter, eligibility criteria and scope of protection.”

47. The Delegation of South Africa said that the Chair had been quite thorough and robust in his guidelines to the contact groups. On the issue of the subject matter, it was concerned that the IGC would focus on the form and structure but not the content.

48. The Chair answered that the discussion on subject matter would start with agreeing on the elements of key eligibility criteria, and then construct a draft definition and see if the IGC could get consensus. The contact group would be looking at content, structure and form.

49. [Note from the Secretariat: Two contact groups were established as the Chair announced above, and they met from 5 p.m. to 6 p.m. on March 18, 2019, and from 10 a.m. to 1 p.m. and from 3 p.m. to 4 p.m. on March 19, 2019. This part of the session took place on March 19, 2019 after the meeting of the contact groups.] The Chair invited the rapporteurs from each contact group to present their report.

50. Mr. Jukka Liedes, one Vice-Chair and the Chair of the contact group on objectives, said that the group had met for four hours. The group had been capable of handling complex issues in a short time. There was active participation from all representatives. The whole spirit was friendly and constructive. Many kinds of proposals were made and seriously considered. The result did not fully follow the Chair’s instruction, which was to arrive at a single consensual text, yet the result represented significant steps forward and simplified the basis on which the negotiations would take place in the future if that simple model could be maintained. The group also looked at the preamble because the preamble and the objectives were normally not part of the text, and there were similarities and overlap. The group had to be able to consider what should be moved to the preamble, what should be maintained in the preamble and not repeated in the objectives. The group considered in parallel both texts on TK and TCEs. There was a discussion on the meaning of alignment of both texts and the conclusion was that it was possible to align elements in the texts. The group decided to delete paragraphs 3 and 4 in the TK text, and paragraph 3 in the TCEs text. The group then read Alt 2 and Alt 1, in that order, element by element. A proposal was made that a new article be drafted and presented to the plenary. He warmly thanked all the members of the group.

51. Ms. Margo Bagley from the African Union, speaking as the Rapporteur of the contact group on objectives, said that there was a good spirit of cooperation in the group with very helpful, enlightening discussions on positions. The primary goal was to make the objectives consistent between the two texts as far as possible, to reduce the number of alternatives within each of the texts and to streamline the language within the alternatives. The discussion began with many delegations expressing support for Alt 2 and, as the discussions continued, it was clear that brackets would need to remain around certain terms and that the group was limited in the changes that it could make to that alternative. There was also quite a bit of support for Alt 1, though the specific supported elements differed by delegation. There was not much support for

Alt 3 and Alt 4 in the TK text, since they appeared to be largely redundant with Alt 1. The group went through and read all the alternatives. It recognized that Alts 1, 2 and 3 in the TCEs text were almost identical to Alts 1, 2 and 4 in the TK text, therefore, it eliminated Alts 3 and 4 in the TK text and Alt 3 in the TCEs text. As it eliminated Alts 3 and 4, it noted all elements were reflected either in Alt 1 or Alt 2 or in the preamble or could be added to Alt 1 which was what it had ultimately done. Alts 1 and 2 represented two distinct approaches, with Alt 1 being more prescriptive, specifying particular elements, and Alt 2 being a more positive, general formulation of the objective. That was positive in the sense that it talked about ensuring or supporting the appropriate use and protection of TCEs or TK while Alt 1 spoke of preventing misappropriation. When it had first been introduced, it was as a more positive formulation. In looking at Alt 2, it noticed that the chapeau was more concrete than what was originally present in Alt 1. It streamlined the chapeaus in Alt 1 of the TK and TCEs texts to be more concrete and clearer by replacing “should provide beneficiaries with the means to” with “the objectives of this instrument are to”. By removing “beneficiaries”, it also needed to delete “their” before TCEs or TK in paragraphs (a) and (d) of Alt 1. To make sure that information or ideas that were in Alt 3 or 4 were captured and reflected, a delegation requested adding “while respecting the public domain” to paragraph (b) of Alt 1. There was quite a bit of discussion on that because that concept was certainly included in the preamble. Nevertheless, there were strong requests to insert it in paragraph (b). There was also a good discussion about whether paragraph (b) itself should be included. It thought that it should remain for the time being, and delegations might want to revisit that. In paragraph 3 of Alt 1, a delegation asked for the addition of “acquisition in bad faith by third parties”. It read: “prevent the erroneous grant, acquisition or assertion of intellectual property rights over traditional cultural expressions.” A number of delegations thought that was an idea that could be explored further, and that it could be included. One delegation suggested including the phrase “making the most out of the intellectual property systems.” There was also a suggestion to include “prevent the unauthorized use of traditional cultural expressions” or “traditional knowledge”. There was no agreement to include that wording and there was quite a bit of discussion about that. Agreement was reached instead to suggest inclusion of a new article entitled “Continued Application of Existing Laws”. It would be developed and made clear that existing IP regimes would still be available for use of the subject matter of the instruments where applicable. That delegation reserved the possibility of returning to that issue and language at a later point. It was important to recognize that while Alt 2 contained more brackets than Alt 1. That did not indicate a greater level of agreement within the contact group regarding Alt 1. Rather, there was more of a focus on Alt 1 in trying to include elements from Alt 3 and Alt 4 that might have been missed as well as addressing elements from a new proposal made by a delegation and trying to make the TK and TCEs versions consistent and streamlined. There was bracketed text in the TCEs text that was not in the TK text. Making that consistent, some brackets had been removed, but it did not mean that there was agreement on the use of terms. There was still disagreement on concepts in each of paragraphs (a), (b), (c) and (d) of Alt 1. Alt 1 and Alt 2 presented different approaches that delegations could consider in formulating the objectives.

52. The Chair invited the contact group on subject matter to present its report.

53. Mr. Paul Kuruk, the Facilitator and the Chair of the contact group on subject matter, said that the discussions were conducted in a collegial manner. The representatives provided recent arguments for their respective positions. The group strove to understand differing perspectives and worked hard to narrow differences. As part of the mandate, the contact group had been invited to identify the key descriptors that should be used to describe TK and TCEs in general, and the key qualifiers or eligibility criteria that should be used to identify which TK or TCEs should be protected. Based on the descriptors and eligibility criteria, it had been invited to develop a simple definition for each of the subject matters, TK and TCEs, respectively. It used as key resources the draft texts of TK and TCEs supplemented by the report of the *Ad Hoc* Expert Group. At the outset, it determined that it would not be possible to have one simple

definition that could include the key descriptors as well as the qualifiers or eligibility criteria in a satisfactory manner. It agreed on a framework that would comprise two separate provisions, the first of which would deal with the descriptors while the second would emphasize the protection criteria. It sought to differentiate the two positions of articles by not duplicating in one provision information or terms that were found in the other. There was an understanding that some of the eligibility criteria could be used as well in descriptors of the definitions in the first provision, but for reasons of clarity and functionality, it determined that it was expedient to place the eligibility criteria only in Article 3. The goal of the discussions was, in respect to Article 1, to develop a working definition that was very broad, universal or global in outlook and which would not leave out any matter that could cause issues with what was being protected under the instrument. It recognized that it was not the intention that protection be extended by any means to every matter that could possibly be under the definition. The goal in crafting the definition was simply to create a big tent or umbrella that would include all matters currently within the contemplation of all Member States. However, Article 3 on eligibility criteria would seek to identify, therefore narrow what would be protected under the instrument. In drafting eligibility criteria, it was not only concerned about not replicating provisions in Articles 1 and 3, it certainly sought to identify the respective criteria and came up with four basic criteria. The three matters on which there was common agreement were subparagraph (a), which focused on the matter of creating, receiving, generating TK or TCEs; subparagraph (b), which linked the TK and TCEs with the cultural and social identity of IPLCs; and paragraph (c), which focused on the manner of transmission from generation to generation. Those were three areas in which all contact group members agreed. The fourth, where there was no such agreement, dealt with the temporal aspects. The need was expressed by some Member States to limit protection for TK or TCEs to have been in place for some period of time before it would be protected under the instrument. There were specific terms proposed, such as 50 years, 30 years, five generations, etc. As a way of introducing flexibility, it carved out a separate subparagraph to take care of that. The group removed some references to a criterion found in the draft texts on TCEs and TK dealing with TK or TCEs being dynamic and evolving. That could not possibly fit in as a condition of protection but was better seen as a descriptor. It moved that to the definitions. That was an important deletion in the texts on TK and TCEs. The group, in the good faith effort, tried to work out a single provision for eligibility criteria but despite good faith efforts there was an insistence that the idea about temporal aspects be included. There were strong objections by many delegations, who said that time dimensions were not an intrinsic part of TK or TCEs. Therefore, the group came up with two alternative provisions.

54. Mr. Martin Devlin from Australia, speaking as the Rapporteur for the contact group on subject matter, said that the contact group had started by looking at the existing definitions for TK and TCEs. It was agreed that in the definitions there were descriptive and qualifying or eligibility criteria elements. It was noted that some of those elements were also repeated in Article 3. There was consensus that the definition should be clear and broad, but that it should also leave space for national settings. There was agreement that the eligibility criteria should be distinct from the definition so that Article 3 itself had a strong purpose. As such, efforts should be made to avoid duplication between the two articles. New language on Articles 1 and 3 was a reconsideration of existing textual proposals and that tried to streamline the text. The objective was to come up with two clear provisions describing the subject matter and the other article on eligibility criteria. There was a clear understanding that the definition would not seek to protect everything therein. The eligibility criteria would seek to narrow and guide what was protected. Within the contact group, there was a broad agreement. However, there was a difference in opinion on whether to incorporate some elements of Article 3 into the definition in Article 1. Some delegations, for example, preferred subparagraphs (a) or (c) to be brought up into the definition from Article 3. However, all group members appreciated the efforts to have a broad definition. There was also a discussion on how to address knowledge within the definition of TCEs. Some delegations added brackets or terms, exemplified by the brackets around “peoples”, “customary laws and protocols” and “beneficiary”. They were not discussed



deeply as they were subject to a different set of discussions. Terms such as “received”, “revealed” and “held” were added to the criteria in paragraph (a) in Article 3. The qualifier there was also modified to reflect how TK and TCEs were created and collectively maintained. A delegation expected a potential gap in eligibility criteria and how it related to secret and sacred under the tiered approach considered under Article 5. The temporal qualifier aspect was discussed; however, no agreement could be reached. The Group also discussed how the temporal aspects might relate to how TK and TCEs arose. Arguments were made on both sides and the discussion was held in good spirit. Ultimately, it was decided that the best way to progress was to create two alternatives. The language was very similar with the temporal aspect added to subparagraph (c). Many considerations for TCEs were the same for TK. That was the framework which emerged from the contact group, noting that reservations were mentioned and evidenced in the brackets or alternatives.

55. The Chair invited the members of the contact group on objectives to make comments.

56. [Note from the Secretariat: all delegations that took the floor thanked the Chairs, Rapporteurs and members of the contact groups.] The Delegation of Japan said it had participated in the contact group on objectives. It appreciated all participants’ efforts to move the discussion forward. However, participants could not reach consensus on some points. It was disappointed that Alt 3 and Alt 4 in the TK text and Alt 3 in the TCEs text had been deleted without the consensus of the participants. Although it had presented a proposal combining some alternatives to fill the gap among the Member States, its proposal had not been considered carefully and deleting alternatives was the only choice made in the contact group. Recognizing the value of the public domain, it was highly important to strike an appropriate balance between the different interests of holders and users. Knowledge that was widely known or used for a certain period outside IPLCs could be considered as examples of knowledge in the public domain. If such knowledge in the public domain became limited, it might cause confusion. It noted that Recommendations 16 and 20 of the WIPO Development Agenda indicated the importance of safeguarding the public domain. Therefore, the sentence “protecting, preserving and enhancing the public domain” should be kept in both texts. Preventing the misappropriation, misuse and unauthorized use of TK and TCEs should be ensured with making the most of existing IP systems. Regarding making the most of existing IP systems, continuous consideration was needed. Regarding the value of the public domain, it should be retained in Rev. 1s. It looked forward to discussing the text further.

57. The Delegation of Niger said that the discussions in the group on objectives were very useful. It had concerns regarding the public domain, which was not an objective, in its view. No existing IP treaty had the objective of respecting or protecting the public domain. It had expressed that concern in the contact group and it continued to have concerns about it. Looking at current realities, TK and TCEs were not challenging the public domain. In the field of IP, new fields, such as databases, were eroding the public domain in the conventional IP system, while TCEs or TK were not.

58. The Delegation of the Plurinational State of Bolivia said that the fact that a binding treaty was designed to protect TK was vital for indigenous peoples. Alt 3 had been eliminated on the basis of consensus of all of the members of the contact group and new Alt 1 was kept for the various delegations that wanted to retain Alt 3. The reference to the public domain had been discussed at length and was not supported by all. The IGC needed to move forward with a sincere and frank dialogue.

59. The Chair opened the floor for comments by the experts in the contact group on subject matter. There were none. He opened the floor for discussion on the reports of the contact groups.

60. The Delegation of the USA said it had not participated in that contact group. In hearing the report, it noted that the original Alt 3 had not been included in the results of the contact group. Like the Delegation of Japan, it was disappointed with that particular outcome, as there were elements in that alternative that it considered valuable, such as the protection of innovation and the transfer and dissemination of knowledge. It was prepared to propose a new alternative that would capture some of those elements and improve the text by combining some of the elements of Alt 3 with Alt 2. The new alternative read as follows: “The objective of this instrument is to support the appropriate use of traditional knowledge within the patent system, in accordance with national law, respecting the values of traditional knowledge holders by: (a) contributing toward the protection of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of protected traditional knowledge and in a manner conducive to social and economic welfare into a balance of rights and obligations; (b) recognizing the value of a vibrant public domain, the body of knowledge that is available for all to use and which is essential for creativity and innovation, and the need to protect, preserve, enhance the public domain; (c) preventing the erroneous grant of patent rights over non-secret traditional knowledge.” From the perspective of TCEs, the Delegation had listened carefully and found value in the report of the contact group. It was disappointed to find that Alt 3 had been deleted and looked forward to studying more carefully the streamlining of the chapeau. It would take all of those under consideration. For the moment, however, it continued to find value in elements from both Alt 2 and Alt 3 in the TCEs text and as a result it proposed a new Alt 4, which had a new element. Over the course of the sessions, one of the underlying objectives was to protect and promote TCEs so they could be a basis for community-based development, where so desired by IPLCs. The new Alt 4 read as follows: “The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, respecting the interests of Indigenous peoples and local communities to (a) prevent the misappropriation, misuse and unauthorized use of their traditional cultural expressions; (b) encourage and protect creation and innovation, whether or not commercialized, recognizing the value of the public domain and the need to protect, preserve and enhance the public domain; (c) prevent the erroneous grant or assertion of intellectual property rights over traditional cultural expressions; and (d) promote the appropriate use of traditional cultural expressions for sustainable, community-based development, where so desired by indigenous peoples and local communities.”

61. The Chair was concerned because while the IGC was supposed to narrow gaps, it was instead moving to an Alt 5 and Alt 4. However, Member States were entitled to make any interventions they wanted. He had spent a lot of time as a policy officer dealing with objectives, and had reviewed most of the IP objectives which were referred to. An objective should be a clear, succinct statement for the purpose of the instrument, which had to be actionable and relevant. He asked all members to carefully consider their interventions.

62. The Delegation of Argentina said, having read and listened very carefully to the results of the contact group on objectives, that it seemed that one way that would be worth exploring in order to reduce the options further might be to merge the two alternatives proposed by the contact group. It requested the Secretariat to put up on the screen those two alternatives. It would submit the proposal to the Facilitators.

63. The Delegation of Switzerland said that it had participated in the contact group on objective. It had listened to the interventions and sought clarification as to the methodology. Its understanding was that the IGC worked in contact groups, which then presented their work in plenary for the Facilitators to take up, as appropriate, and produce Rev. 1s. It was confused that some delegations were proposing additional alternatives, which were actually the work that the contact group had done.

64. The Chair clarified that Member States were allowed to put forward a proposal. The Facilitators would take into consideration all suggestions and proposals, and produced Rev. 1s which would not be a verbatim revision of all proposals.
65. The Delegation of Nigeria said that it had not participated in the contact group on objectives. The interventions by the Delegations of the USA and Japan could not have been necessary. It called the attention of the Facilitators to paragraphs 11 and 12 of the preamble, which they should take into consideration. A distinction had to be made between rehashing objectives and principles in the preamble. Clearly, paragraphs 11 and 12 of the preamble seemed to deal with what had been heard so far. The mandate was to try and streamline the texts. A situation of two steps forward and three steps backward was not going to take the IGC anywhere.
66. The Delegation of the Plurinational State of Bolivia proposed not to get into the negotiation of new alternatives, because the contact groups had already done work on that.
67. The Delegation of Indonesia stated that the work of the contact groups and of the IGC was to reduce the number of alternatives and to streamline the language. The objective of the TK and TCEs texts should be to protect TK and TCEs from misappropriation and unauthorized use. New alternatives were constantly brought into the text, which then had to be merged to find a middle ground. After that, new alternatives were brought in again and again. It suggested letting the alternatives there and focusing on streamlining language of the different alternatives.
68. The Delegation of South Africa was concerned about the new proposals and alternatives. The IGC needed equity and fair play. Otherwise, all the work done in the contact group was futile. It asked the Chair for his support in making sure that the procedures that he had outlined were followed.
69. The Delegation of the EU, speaking on behalf of the EU and its Member States, said it had participated in the contact group. It echoed the comments made by the Delegation of Switzerland and others that shared their concerns as to the methodology. It had made some substantive points as a participant. When it came to the elimination of Alt 3 and Alt 4, it had considered for a while how to reduce the number of the alternatives. Alt 1 was to encapsulate all of the elements that had been previously in Alt 1, Alt 3 and Alt 4 in one single alternative. That was the consensus in the contact group. There was indeed a proposal made aiming at merging Alt 2. It had considered and discussed that proposal, and the majority view was that there was a significant conceptual divide between Alt 2 and Alts 1, 3 and 4. The majority was in favor of keeping that conceptual divide.
70. The Delegation of Egypt said it had prepared drafts for all three instruments under consideration. However, it had respected the fact that the IGC had agreed upon bridging the gaps. Therefore, it did not propose additional alternatives. It had already worked together with Mr. Paul Kuruk in the contact group on subject matter and it did not want to present and submit its drafts.
71. The Delegation of the Islamic Republic of Iran said that the Chair had given the contact group a clear mandate to produce compromise and agreeable language. Member States were not coming to the IGC just to stick to their preferences, but to narrow the gaps. It shared the concern with regard to the procedure. What had been done in the contact group to reduce the number of alternatives and to avoid redundancies was a good approach. It expected the Facilitators to follow the same approach in the preparation of Rev.1s. With regard to contact group on subject matter, it had a very specific question with regard to the new wording:

“received” and “reviewed”. That new concept required more clarification as to who would receive and review. It asked for clarification on those two terms.

72. The Delegation of Niger said the contact group on objectives had tried, in line with the mandate given by the Chair, to reduce differences of views. Regrettably, the Delegation of the USA continued to increase the differences. For the sake of equity, it requested the Facilitators to delete “while respecting the public domain” in Alt 1, should the alternative be adopted.

73. The Delegation of Thailand said it had joined the contact group on subject matter and appreciated the spirit of frank discussions and the hard work. However, it shared the concern expressed by the Delegations of Switzerland, Indonesia and others about some Member States proposing alternatives in plenary. The methodology note, particularly paragraph 13, provided clear guidance.

74. The representative of Tupaj Amaru said that after 20 years, the process of negotiation with the aim of drafting three international instruments had failed. The objectives were becoming longer and more complicated. The eligibility criteria had been introduced. He asked who would decide that the cultural heritage or TCEs would be eligible or not. Regarding definitions, after 20 years, the IGC could not get into new discussions and think up new definitions. The objective of the legally binding instrument was quite clear, which was to prevent the misappropriation of TK and TCEs in all their forms, whether tangible or intangible. The new proposals could not be accepted at that stage. He requested the IGC to negotiate in the plenary with the participation of indigenous representatives.

75. The Chair emphasized that indigenous representatives had participated in all contact groups.

76. The Delegation of the USA recognized that the IGC was a member-driven process and Member States’ output was an important element of the process. It recognized the importance of the contact group process, which it supported. Regarding the results of the contact group on subject matter, it had participated in that contact group, and there had been no agreement or consensus on the matter of temporal limitations. The contact group had not had the opportunity to discuss the placement of criteria for eligibility within a broader context. It would reflect on those issues, especially the placement of the eligibility criteria.

77. The Chair said it was the job of the Facilitators to produce Rev.1s, taking into consideration, in particular, the work of the contact groups and the interventions in plenary. The Facilitators’ job was to narrow gaps. They had a degree of flexibility to draft the text. He asked Member States to carefully consider their position, particularly on objectives. The IGC had made progress in the area of subject matter and that was very good, as indicated by the Delegation of the USA. He emphasized that objectives should be short, concise and actionable. He asked members to look at the objectives of the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), the Paris Convention for the Protection of Industry Property (“Paris Convention”), the CBD and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (“Nagoya Protocol”).

78. [Note from the Secretariat: This part of the session took place on the following day, March 20, 2019.] The Chair made a few comments reflecting on the discussions of the day before. The IGC existed because of the concerns of IPLCs regarding their interests and rights as reflected in UNDRIP in relation to adequately protecting TK and TCEs within the IP system. WIPO had produced two Updated Draft Gap Analyses that identified a significant number of gaps. The IGC was to look at whether or not the current IP system adequately protected the interests of IPLCs, particularly in respect to TK and TCEs. He mentioned a case study taken

from the media, which highlighted some concerns of indigenous peoples. There had been a report of cultural misappropriation relating to the highly popular Netflix series “After Life”. That Netflix series had been seen by millions of people. The main character frequently sat in his living room in front of what appeared to be an Australian aboriginal dot-painting from the Papunya in remote central Australia. After social media figured out who the artist was, it emerged that it was fake and produced by an English female painter in the 1990s. A spokeswoman from the Papunya revealed it as belonging to the Papunya style and depicting men’s business, and should not have been painted by a female artist. In her words: “I was shocked when I looked at it... It shouldn’t be copied... This is stealing... They don’t understand... They just see it as something that goes on display, but we don’t see it that way. We see it as that’s our history, that’s our connection to who we are. This is our connection to our land, our country, our people. It’s amazing. This knowledge has been passed on for generations.” The Chair said that the positive side to that story was that the artist had sincerely apologized and truly regretted for causing offense, and she said that she would never paint such a work. However, the producers of “After Life” and Netflix provided no response when inquired about that issue. It would be interesting to see if the painting was still displayed in later series of “After Life”. The Chair emphasized the role of contact groups, which had proven successful in the past. They were designed to allow a small group of experts to work in a spirit of cooperation in a trusting and open environment to develop consensus positions, or at least allow positions which had not gotten full consensus to be brought forward to be considered by all Member States. It was about gaining a shared understanding and working in a spirit of compromise. In essence, to make progress, Member States needed open minds to challenge themselves and be open to new ideas. After all, the IGC was part of a system focusing on innovation and creativity. The IGC was creating the future, and that should be its focus. As reflected in the “After Life” incident, it was not some intellectual activity occurring within a vacuum. It was real world problems and harms inflicted on real peoples, who were struggling with cultural survival and who did not have the resources to defend or protect their legal rights. Every Member State had a right to put its positions forward and the IGC needed to find an appropriate balance. In relation to objectives, his goal was to try to see if Member States could finally challenge themselves and look outside the box. He might work with the Facilitators to look at a single objective and come forward with one option to balance all interests, picking up from the idea from the Delegation of Argentina.

79. [Note from the Secretariat: The Vice-Chair, Mr. Jukka Liedes from Finland, was chairing the session at this point.] The Vice-Chair invited the Member States who had submitted documents to make presentations on their proposals for working papers or recommendations. He invited the Delegation of the USA to introduce documents WIPO/GRTKF/IC/39/10, WIPO/GRTKF/IC/39/11 and WIPO/GRTKF/IC/39/12.

80. The Delegation of the USA introduced document WIPO/GRTKF/IC/39/10 entitled “The Economic Impact of Patent Delays and Uncertainty: U.S. Concerns about Proposals for New Patent Disclosure Requirements.” That document was relevant to disclosure requirements and the IGC’s mandate to use an evidence-based approach in its consideration of national experiences with IP and TK. That document had first been introduced in IGC 36. Following the release of the report on the economic impact of disclosure requirements and patent applications for GR-based innovation, commissioned by IFPMA and Croplife International at a side-event at IGC 36, it had updated the document to incorporate findings of its report. The paper analyzed the impact that disclosure requirements would have on research and development in the field of biotechnology and pharmaceuticals due to the uncertainties that they would introduce into the patent system. It was based on recent peer-reviewed economic studies. The paper considered the effect of patent review delays on business growth, including employment and sales growth for start-ups. Among its findings were that, each year, patent review delays would reduce employment growth for a start-up by an average of 19.3 percent and sales growth by an average of 28.4 percent over five years following the first action decision on the patent

application. The paper considered legal uncertainty which might encourage companies to forgo patent protection in favor of weaker or non-disclosed forms of protection such as trade secrets, or worse yet, companies might decide to innovate less and instead rely on research done by others. A new disclosure requirement could lead to legal uncertainty in granted patents which could affect a firm's overall market competitiveness, including negative effects on licensing, research and development, investment, and litigation. The Delegation had significant economic-based concerns about proposals for new disclosure requirements that were under consideration by the IGC and urged Member States to exercise caution when exploring those proposals. It invited the IGC to give careful consideration to that revised paper. The Delegation was also pleased to introduce document WIPO/GRTKF/IC/39/11 entitled "Identifying Examples of Traditional Knowledge to Stimulate a Discussion of What should be Protectable Subject Matter and what is not Intended to be Protected." It had re-tabled that document based on discussions in the past IGC sessions, when some delegations had expressed interest in that document. Its objective was to inform the IGC on what TK should be protected and what was not intended to be protected. One of the examples described in the paper explained how pre Columbian Aztecs and other indigenous groups used plants before modern antibiotics had been created. It was known that ancient Egyptians used moldy bread before penicillin had been created. That would be protectable subject matter by identifying some of the many well-known products and activities based on TK. Such an understanding would help the IGC move forward in its work on TK. It wished to continue the discussion on that paper, because it was a valuable tool that used an evidence-based approach, as mandated by the GA. The Delegation was also pleased to introduce a proposal made by the Delegations of Japan and the USA for a "Study by the WIPO Secretariat on Existing *Sui Generis* Systems for the Protection of Traditional Knowledge in WIPO Member States" as contained in document WIPO/GRTKF/IC/39/12. After it had introduced that document during IGC 37, a number of Member States had expressed their interest in the study. The proposal contained in that document was intended to provide a valuable contribution to the IGC's work on reaching agreement on an international legal instrument(s) for the effective protection of TK. The IGC's work included updating and conducting studies that included domestic legislation. It understood that the tasks facing the IGC involved balancing a complex set of issues that included responding to the concerns of indigenous peoples over the use of TK, especially in a commercial context, while allowing active exploitation of TK by the originating community itself, and also safeguarding the interests of other stakeholders such as industry, museums, archives and libraries. Over the past 20 years, a number of WIPO Member States had introduced in their national laws provisions to protect TK. For example, according to the WIPO website, Kenya and Zambia had passed laws on TK and TCEs in 2016. It wanted to learn more about those and other regulations related to the protection of TK. The IGC would benefit from a better understanding of the scope of those laws, the nature and the effectiveness of their implementation and their overall impact. The proposed study aimed to build upon the body of work developed in the IGC and gather further information that would provide the IGC with a better understanding of *sui generis* systems for protecting TK. The proposal included questions relating to the nature of existing TK systems, the extent to which countries had implemented and enforced such laws and regulations, and examples of how such laws and regulations had been applied, whether or not those laws could apply to subject matter, use by the public, and any exceptions and limitations that might apply. The study was different from other studies, and was the next step which would build upon existing studies. The IGC was there to develop an instrument that worked in practice with clear parameters that could be used by IPLCs and governments. It would look beyond the language of the laws and agreements covered in existing studies and other referenced material, and consider how those laws and agreements worked in practice, how they were implemented and how they affected those involved. The proposed study would not delay progress or establish any preconditions for the negotiations, rather it reflected a good faith effort to gather more specific and relevant information than envisioned under previous studies and to capture updates from those Member States that had recently passed new TK laws. Thus, the study was

intended to generate important information to inform the IGC and support its work. The Delegation invited other members to support that proposal.

81. The Vice-Chair opened the floor for comments.

82. The Delegation of Egypt did not want to comment on the studies and recommendations made by other countries, because it had already done so in previous sessions. In brief, after 20 years, the IGC did not need any further documents. Time was short and there was a need to concentrate on the draft texts. It did not want to get into discussing philosophical issues.

83. The Delegation of Japan expressed its appreciation to the Delegation of the USA for providing document WIPO/GRTKF/IC/39/10. As indicated in the document, including the mandatory disclosure requirement would result in delaying the current patent-granting process and create uncertainty for patent applicants. In addition, the mandatory disclosure requirement might hinder the healthy growth of industries utilizing GRs in emerging and developing countries, both now and in the future. It shared a common, grave concern about the mandatory disclosure requirement. The analysis based on objective data shown in that document was highly useful to advance the work of the IGC, using an evidence-based approach. For example, taking into account the fact that the terms of patent rights were limited (basically 20 years from the filing date), both panel A and panel B shown in figure 4 in the document were very persuasive. In addition, the document shed light on the effect of the disclosure requirement on start-up companies. Since supporting start-up companies was critical for emerging, developing and developed countries, the document also afforded all Member States valuable insight for that highly important aspect. It remained committed to contributing to constructive discussions in the IGC in an evidence-based manner, based upon the various lessons obtained from the detailed information shown in the document. It also expressed its appreciation to the Delegation of the USA for providing document WIPO/GRTKF/IC/39/11. There were lots of things to be considered before initiating the discussion of scope of protection. That document listed many well-known products and activities that might possibly be related to TK and that was a good starting point for the discussions. For example, regarding tea, it invited comments from Member States as to whether tea should be protected as TK, even though tea was enjoyed everywhere in the world. If any Member States responded yes, it would like to ask additional questions, such as why and based on what criteria. It would ask who should own the rights to tea, who the beneficiaries would be, and what the exact scope of protection would be for tea. Before those questions could be answered, one needed to first determine specific criteria and reach a universal understanding about the subject matter, tea. Furthermore, it thanked the Delegation of the USA for presenting document WIPO/GRTKF/IC/39/12. The IGC was to follow an evidence-based approach as stipulated in paragraph (c) of the mandate, in particular to paragraph (d) of the mandate, which established the evidence-based approach as the approach for conducting or updating studies covering *inter alia* examples of national experiences that included the respective Member States' domestic laws. As a cosponsor of that proposal, it proposed that the WIPO Secretariat invite those WIPO Member States that had a *sui generis* national law for protecting TK to respond to the questions contained in the annex to that document. Compiling the responses obtained by conducting that study would undoubtedly lead to effective discussions in the IGC.

84. The Delegation of the Republic of Korea supported document WIPO/GRTKF/IC/39/10, as presented by the Delegation of the USA. It shared the concern that the new disclosure requirement could cause delays in the patent application process and put a burden on inventors or applicants, eventually hindering the development of GRs based inventions. It had had a meeting with GR users and stakeholders and had a chance to hear their opinions on the possible impact of introducing disclosure requirements in the patent system. The participants had expressed their concerns that patent filing dates could be significantly delayed when attempting to meet the disclosure requirement for each GR used in an invention. It supported

document WIPO/GRTKF/IC/39/11 because the paper would contribute towards a common understanding by identifying some of the many well-known products and activities based on TK and therefore, facilitate a discussion on which TK should be protected and what should be available for all to make and use without restrictions. With regard to document WIPO/GRTKF/IC/39/12, it supported the study proposal as it could provide a useful basis for Member States to discuss the TK issues in a more balanced way. It stood ready to constructively discuss those documents.

85. The representative of Tupaj Amaru said he had participated from the beginning of the IGC. He was perplexed and did not understand why after 19 years, new documents continued to come in. It supported the statement by the Delegation of Egypt. To be able to say what knowledge could be protected and what knowledge did not need to be protected, the IGC had to ask indigenous peoples. There was sacred and spiritual knowledge that could not be the subject of negotiations. He requested Member States to support the three draft texts he proposed in 2012. He requested the Chair not to accept any new documents and stressed that there was no time to discuss those new documents.

86. The representative of the Tulalip Tribes said that there were many meanings of “balance”. There was the balance contained in the Paris Convention, the Berne Convention and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”). There was also the idea of equitable or just balance. When talking about balance, there was a need for a full balance. When doing a cost-benefit analysis, one should try to bring in all the relevant perspectives and issues, all the costs and the benefits and all the negatives and all the opportunities. He saw a very unbalanced presentation. For example, in the GRs text, there were two options: disclosure of origin and databases. He had never seen a study proposed on the impacts of databases on IPLCs. There was a study produced by the Croplife International, which seemed to have vested interest on the potential costs. The IGC really had to look into assumptions on those potential costs to the pharmaceutical, agricultural or other industries. No study said what would the failure of disclosure of origin have on indigenous peoples or what were the harms or the benefits to indigenous peoples of disclosure of origin. “Evidence-based” was fine, but there had to be full accounting. Member States had to look at the social, economic, human rights and cultural impacts on identity and spiritual value. On the issue of complete understanding, he agreed with the suggestion to have a universal understanding of tea, but it would not have it in time to produce a meaningful set of instruments in the IGC. The IGC was moving towards a framework approach, so he asked to get the framework in place, and get the experience to generate that evidence base. An evidence base could not be generated without having a regime in place to create the evidence, to evaluate the impacts on both industry and IPLCs. There was no need for studies, which were just a delaying tactic. He asked for studies on impacts on IPLCs as well as to have their opinions inserted into the process and for evidence from their point of view.

87. The Delegation of Nigeria said that there was nothing wrong with an evidence-based approach. The African Group was not afraid of evidence-based studies. However, there were so many new things constantly happening on that subject. It wondered if the IGC would perpetually remain talking about new developments. It wanted to believe that the Member States that were tabling those studies were doing so in good faith. It was important to recognize that the IGC would not freeze time. Referring to *sui generis* examples, the countries mentioned had not practiced that for up to five years. The question was how one could get a credible experience. The making of international law was like making a framework document, taking insights from national experiences and global experiences. That was why the IGC was doing a framework document. To point to African countries and others that had developed *sui generis* regimes for the protection of TK would pull back and wait for them to develop experiences. It referred to the statement made by the representative of the Tulalip Tribe regarding fairness and balance. One should not be partisan in selectively using the studies that one wanted to present.



Nobody seemed to care about the cultural impact and the harms of biopiracy, or the abuse of the patent system against IPLCs. The IGC was struggling to bring in indigenous representatives, and yet it was supposed to be protecting their information. The IGC could not be there in perpetuity involved in studies without balance.

88. The Vice-Chair invited the Delegation of the Republic of Korea to introduce document WIPO/GRTKF/IC/39/13.

89. The Delegation of the Republic of Korea introduced document WIPO/GRTKF/IC/39/13, entitled "Joint Recommendation on Genetic Resources and Associated Traditional Knowledge", cosponsored with the Delegations of Canada, Japan, Norway and the USA. The joint recommendation had been previously introduced in IGCs 36, 37 and 38. That recommendation could take forward the IGC on issues concerning GRs and associated TK. The proposal would promote the use of opposition systems to allow third-parties to dispute the validity of a patent, the development and use of voluntary codes of conduct and the exchange of access to databases, among other things, in order to prevent the erroneous granting of patents for inventions based on GRs and associated TK. The Delegation could not overstress the importance of protecting GRs and associated TK. It wanted to continue the discussion on the proposed joint recommendation because it captured key objectives and facilitated the establishment of effective mechanisms for the protection of GRs and associated TK. It invited other delegations to express their support for that proposal and recommend any further discussion.

90. The Vice-Chair opened the floor for comments.

91. The Delegation of Japan, as a cosponsor, supported the joint recommendation contained in document WIPO/GRTKF/IC/39/13, which was a good basis for the discussion on the issues regarding IP and GRs and associated TK, especially on preventing the erroneous granting of patents. It looked forward to continuing discussions on that joint recommendation.

92. The Delegation of the USA supported the proposed joint recommendation introduced by the Delegation of the Republic of Korea. That document could be used as a confidence-building measure to help the IGC move forward on key issues concerning GRs and associated TK. The proposal would promote the use of opposition systems to allow third parties to dispute the validity of a patent, the development and the use of voluntary codes of conduct and the exchange of access to databases, among other things, in order to prevent the erroneous grant of patents for inventions based on GRs and associated TK. It gave a few examples. With respect to opposition systems, US patent law provided a mechanism for third parties to submit printed publications of potential relevance to the examination of a patent application with concise descriptions of the asserted relevance of each document submitted. That provision had been introduced in 2012 under the America Invents Act. Such submissions had to be made prior to the date of the notice of allowance. Third-party submissions did not delay or otherwise interfered with the examination of patent applications because they merely provided additional information to patent examiners without creating procedural requirements. Almost half of the third-party submissions were filed in technology centers that examined biotechnological, pharmaceutical and chemical inventions as well as those related to food and chemical engineering. With respect to voluntary codes of conduct, a number of pharmaceutical and biotechnology inventions, including life-saving medicines, biofuels and agricultural products, utilized compounds and processes that existed in nature and some of those included associated TK. Many companies had established guidelines and rules for proper bioprospecting. It wished to continue the discussion on that proposed joint recommendation because it captured key objectives and facilitated the establishment of effective mechanisms for the protection of TK associated with GRs. It invited other delegations to express their support for that proposal and welcomed additional cosponsors. It looked forward to continued discussions on that proposal.

93. The Delegation of Egypt said that the joint recommendations reflected the interests of those who presented them. Documents WIPO/GRTKF/IC/39/10, WIPO/GRTKF/IC/39/11, WIPO/GRTKF/IC/39/12, WIPO/GRTKF/IC/39/13, WIPO/GRTKF/IC/39/14, WIPO/GRTKF/IC/39/15, WIPO/GRTKF/IC/39/16 and WIPO/GRTKF/IC/39/17 were futile. There was only one more session to go. It was best to go back to the texts in order to undertake a constructive discussion.

94. The Delegation of the Russian Federation agreed with the recommendations contained in document WIPO/GRTKF/IC/39/13, which contained those definitions and the additional measures concerning the development of a guide to protect GRs using an evidence-based approach, which should be taken into account by patent offices. It needed additional information to ensure a high-quality assessment and to prevent any erroneous granting of patents. That was a good proposal and a good foundation for the work of the IGC, and might be accepted by the IGC.

95. The Delegation of South Africa aligned itself with the comments made by the Delegation of Egypt. It did not see the relevance of the discussion as the IGC had been talking about the same thing over and over again. There was definitely no regard for IPLCs who were the ultimate holders of that knowledge. It wanted to continue with the texts under discussion.

96. The Vice-Chair invited the proponents to introduce documents WIPO/GRTKF/IC/39/14 and WIPO/GRTKF/IC/39/15.

97. The Delegation of Japan introduced the “Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources”, contained in document WIPO/GRTKF/IC/39/14. Paragraph 18 laid out several key issues, including the contents to be stored in databases and the allowable format for the content. Those were important aspects in terms of understanding the function and the benefit of the databases. Paragraph 19 referred to the necessity of the WIPO Secretariat conducting feasibility studies. Particularly, a prototype of the proposed WIPO portal site would greatly help see all aspects of those databases and define future steps. Most of the Member States shared a common recognition in terms of the importance of establishing databases as a defensive measure to prevent the erroneous granting of patents for inventions dealing with TK and associated GRs. Based on that recognition, it had been contributing to the discussions at the IGC and other fora. It would be more appropriate to establish databases that provided information required by examiners to conduct prior art searches and judge novelty and inventive steps in patent claims, rather than introducing a mandatory disclosure requirement. The use of the proposed databases during the patent examination process would improve the quality of patent examination in the area of TK and ensure the appropriate protection of TK. It looked forward to continuing discussion on the joint recommendation with Member States.

98. The Delegation of Canada introduced the “Proposal for the Terms of Reference for the Study by the WIPO Secretariat on Measures Related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing Access and Benefit-Sharing Systems”, contained in document WIPO/GRTKF/IC/39/15. It was cosponsored together with the Delegations of Japan, Norway, the Republic of Korea, the Russian Federation and the USA. The proposed study would provide up-to-date information on existing national laws and their implementation, as well as concrete information on practices and experiences of all parties impacted by patent disclosure regimes. That would be consistent with and support the IGC’s mandate, which called for an evidence-based approach, reaching a common understanding on core issues, and conducting and updating studies. It welcomed the Secretariat’s continued invaluable work in compiling and making available information on existing disclosure laws and measures, such as the 2004 Technical Study on Disclosure Requirements in Patent Systems Relating to Genetic

Resources and Traditional Knowledge and the 2017 Report on Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge. However, those reports did not provide a comprehensive, comparative overview and analysis on how those laws and measures operated in practice. Some important questions remained unaddressed, such as how the provisions were applied and interpreted by users and administrative and judicial bodies, and what had been the impacts of patent disclosure laws and measures on IPLCs, users (including academia and industry) and the public in general. Despite increased adoption of patent disclosure requirements by Member States, approaches and experiences differed significantly, as did the impacts. The IGC would, therefore, benefit from detailed information on concrete Member State practice and experience with patent disclosure requirements on GRs and associated TK and could draw on what could be learned from such study to help identify the most appropriate way forward. The proposal was complemented by other proposals for studies on TK and TCEs. Such studies, which could be undertaken in parallel to the IGC meetings, and therefore not impact the text-based work, would inform and enrich the text-based work and enhance the chances of reaching a common understanding on the operation and impacts of patent disclosure requirements, which was the foundation to and a pre-requisite to reaching a consensus on any instrument regarding GRs, TK and TCEs. It invited other Member States to seriously consider the merits and value that such studies could bring to an understanding of the issues being negotiated and to be open to contributing to and supporting such proposals. It welcomed and encouraged a further discussion of that proposal, whether formally in plenary or informally.

99. The Vice-Chair opened the floor for comments.

100. The Delegation of the Republic of Korea, as a cosponsor, supported the joint recommendation in document WIPO/GRTKF/IC/39/14. It was aware that well-developed databases were a very practical and feasible method for reducing the number of erroneously granted patents in each Member State and for promoting the protection of GRs and associated TK. Developing an integrated database system and WIPO portal system would effectively and efficiently enhance the protection of GRs and associated TK. As a cosponsor, it supported the proposal for the terms of reference for study by the WIPO Secretariat. Currently, it did not fully comprehend the impact of disclosure requirements on the patent system. The proposed study would provide fact and evidence-based information on current national experiences, through that study one could hear diverse opinions or experiences, not only from GR providers, but from patent examiners and patent users who would be directly influenced by the introduction of a disclosure requirement. That study would help reflect the views from various stakeholders in a balanced manner, contribute to assessing the possible impact of a disclosure requirement in the patent system and understand core issues in the IGC better.

101. The Delegation of the USA supported the comments made by the Delegation of Japan regarding document WIPO/GRTKF/IC/39/14. As a cosponsor, it viewed that proposal as a valuable contribution to the work of the IGC to develop an international legal instrument(s) for the effective protection of TK. In particular, the proposal helped to address concerns raised in the IGC relating to the erroneous granting of patents. Moreover, it was essential that the IGC further engage on that proposal, in order to address questions and concerns raised about the use of databases in past discussions. It looked forward to discussing the WIPO portal proposal. It invited other delegations to express their support for that proposal and welcomed any suggestions for improving that proposal. It supported the proposal made by the Delegation of Canada regarding document WIPO/GRTKF/IC/39/15. It recalled the IGC mandate and its reference to studies. In past sessions, the IGC had had constructive discussions about national laws, and how disclosure requirements and access and benefit-sharing (“ABS”) systems functioned. Those discussions had helped inform the text-based negotiations. Questions in the study explored issues such as the impact that national disclosure requirements had had in securing compliance with ABS systems and the penalty associated with non-compliance. For

example, there was a new provision in the Industrial Property Act of Uganda of 2014 that provided a mandatory disclosure requirement. It wanted to learn more about how that law was being implemented and used. The study was intended to generate important information to support the IGC's work. It invited other delegations to express their support for that proposal, and welcomed any additional questions or suggestions for improving the proposed study that other Member States might have.

102. The Delegation of Egypt said that documents WIPO/GRTKF/IC/39/13 and WIPO/GRTKF/IC/39/14 reflected only the interests of their cosponsors. Those Member States could always express their viewpoint when it came to databases and those views might be accepted or not. As to document WIPO/GRTKF/IC/39/15, the IGC was not an academic or cultural forum to conduct studies. The IGC had to solve the problems that indigenous peoples and developing countries faced, because of biopiracy, which affected and impacted TCEs and TK. Those proposals would not lead to any progress.

103. The Delegation of Japan, as a cosponsor, supported the proposal contained in document WIPO/GRTKF/IC/39/15. The importance of an evidence-based approach had been recognized by many Member States. That proposed study was an effective and productive way to foster a common understanding on core issues on TK associated with GRs without delaying text-based negotiations.

104. The Delegation of the Russian Federation recalled that one of the goals in establishing the TK databases was to prevent the erroneous granting of patents and nobody could dispute that. It supported the proposal contained in document WIPO/GRTKF/IC/39/14 concerning a comprehensive database system through the WIPO portal so that the patent examiners could carry out more comprehensive searches and have better information, particularly regarding GRs, so as to prevent the erroneous granting of patents. As to document WIPO/GRTKF/IC/39/15, it supported the issues relating to the avoidance of the erroneous grant of patents and it was interested in further consideration of that matter, particularly regarding disclosure requirements.

105. The representative of Tupaj Amaru agreed with the position expressed by the Delegations of Nigeria and Egypt that new proposals obstructed and paralyzed the IGC's mandate. He wondered why the cosponsors of those proposals did not contribute to improving the existing texts. The IGC should complete its mandate of drafting binding instruments and those new proposals could undermine the work. The major problem was biopiracy. Through Internet, there had been an increase in the plundering of the TK of IPLCs.

106. The Vice-Chair invited the EU, on behalf of the EU and its Member States, to introduce documents WIPO/GRTKF/IC/39/16 and WIPO/GRTKF/IC/39/17.

107. The Delegation of the EU, speaking on behalf of the EU and its Member States, took note of the Updated Gap Analyses relating to the protection of TK and TCEs, respectively. It said that the practical perspective of using existing IP frameworks to protect TK/TCEs could offer some advantages. It was crucial to have a common understanding about how the IP system could or could not assist in serving the interests of the holders of TK/TCEs. Further technical discussions would benefit from building up the national experiences accumulated in addressing issues relating to perceived gaps. It advocated for solely evidence-based discussion that considered real-world implications and feasibility in social, economic and legal terms. Some terms, including the public domain, should be thoroughly examined. It recalled its two proposals for studies contained in documents WIPO/GRTKF/IC/39/16 and WIPO/GRTKF/IC/39/17. Its proposal for a study relating to TK had first been issued in document WIPO/GRTKF/IC/32/9, and its proposal for a study relating to TCEs had first been circulated in document WIPO/GRTKF/IC/33/6. The proposals had been re-tabled for IGC 37 as documents

WIPO/GRTKF/IC/37/10 and WIPO/GRTKF/IC/37/11, with some adjustments made in consideration of the current IGC's mandate. It proposed that the Secretariat should undertake studies of national experiences and domestic legislation in relation to TK and TCEs, respectively. To inform discussions at the IGC, the studies should analyze domestic legislation and concrete examples of protectable subject matter, and subject matter that was not intended to be protected and take into account the variety of measures that could be taken, some of which could be measured-based while others could be rights-based.

108. The Vice-Chair opened the floor for comments.

109. The Delegation of Japan thanked the Delegation of the EU, on behalf of the EU and its Member States, for the proposals contained in documents WIPO/GRTKF/IC/39/16 and WIPO/GRTKF/IC/39/17, which suggested the necessity to conduct a study of national experiences, domestic legislation and initiatives in relation to the protection of TK and TCEs. It supported the proposals because those were a good basis for the discussion on the issues regarding IP and TK/TCEs, especially from the evidence-based approach. It looked forward to continuing discussions on those proposals.

110. The Delegation of Egypt was relieved because the festival of proposals was finally over. The IGC had used an enormous amount of time to discuss those documents. It appealed for a stop and suggested immediately starting to discuss Rev. 1s.

111. The Delegation of Croatia, speaking on behalf of the CEBS Group, supported documents WIPO/GRTKF/IC/39/16 and WIPO/GRTKF/IC/39/17.

112. [Note from the Secretariat: This part of the session took place after the distribution of Rev. 1s dated March 20, 2019, prepared by the Facilitators. The Chair was chairing the session again at this point.] The Chair opened the discussion on Rev. 1s and recalled that they were work-in-progress. They had no status. The plenary was the decision-making body. If Member States had questions, it was best to talk to the Facilitators directly. It was important to listen carefully to the rationale behind the changes, rather than to jump to particular words.

113. Mr. Paul Kuruk, speaking on behalf of the Facilitators, said that the Facilitators had been called upon to review the draft texts on TK and TCEs and to propose text for Member States' consideration that were concise, narrowed gaps, eliminated repetitions, and preserved the integrity of the proposals of Member States. In line with that mandate, the Facilitators proposed new definitions for the terms TK and TCEs in Article 1, made some revisions to Article 2, and proposed a new set of provisions on Article 3. The revisions had taken into account the results of the work of the contact groups as well as the interventions made in plenary. It contained the text of the three articles that they had worked on, and not the texts of all articles of the two instruments. In Article 1, the Facilitators had deleted the definition of "traditional" and introduced definitions of TK and TCEs. The new definitions for TK and TCEs were essentially the same as those proposed by the contact group on subject matter. They reflected the effort of the contact group to provide general and global definitions with a clear understanding. The definitions also reflected a conscious effort to exclude the references to eligibility criteria found in the previous definitions and to place those instead in Article 3. Such placement had the advantage of eliminating the duplication found in previous Articles 1 and 3 with regard to the eligibility criteria. It also allowed for a clearer delineation of the different functions of Article 1. The new definition of TCEs was as follows: "Traditional Cultural Expressions comprise verbal, musical or tangible forms of expression, expressions by movement, or combinations thereof, which are expressed, appear or are manifested by indigenous [peoples], local communities and/or [other beneficiaries] in a traditional context." TK was defined as follows: "Traditional Knowledge refers to knowledge originating from indigenous [peoples], local communities and/or [other beneficiaries] that may be dynamic and evolving and is the result of intellectual activity,

experiences or insights in a traditional context, including know-how, skills, innovations, practices, teaching, or learning.” That definition responded to some Member States that had highlighted the content of what would be protected under the instrument. The provisions of Article 3 in both draft texts had been adapted from the work of the contact group on subject matter with some minor changes. Article 3 comprised two alternatives. Alt 1 contained two subparagraphs: Article 3.1 and Article 3.2. Article 3.1 set forth three criteria that emphasized the manner of its creation, its link with the social identity and heritage of IPLCs, and the nature of its transmission. Article 3.2 focused on the temporal aspects, which some delegations had advocated as a criterion of protection. The new Alt 2 resembled Alt 1, except for the addition of the temporary reference in Article 3.1(c). It was determined that in certain time references as part of the eligibility criteria in Article 3.1(c) of Alt 1 would have affected the integrity of the provision, and for that reason, the new Alt 2 was found to be a more appropriate placement to accommodate the request of the Member States. An eligibility criterion found in the existing texts on TK and TCEs, which referred to their dynamic and evolving nature, was considered to be more descriptive rather than a condition of protection. For that reason, it had been removed from Article 3 and placed in Article 1. The Facilitators had deleted references to “safeguarding” in the title of Article 3. They had inserted it as a new title for Article 3 “Protection Criteria/Eligibility Criteria”. The structure and content of Article 3 in the draft texts on TK and TCEs were the same. Alt 1 of the TCEs text read as follows: “3.1 Subject to Article 3.2, protection shall be extended under this instrument to traditional cultural expressions which are: (a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively [in accordance with their customary laws and protocols]; (b) linked with, and are an integral part of, the cultural and social identity and traditional heritage of indigenous [peoples], local communities and/or [other beneficiaries]; and (c) transmitted between or from generation to generation, whether consecutively or not. 3.2 A Member State/Contracting Party may under its national law, condition protection on the prior existence of the traditional cultural expressions for a reasonable term as determined by the Member State/Contracting Party.]” Alt 2 was the same as Alt 1, except for the reference in Article 3.1(c) to a term of “not less than 50 years or five generations”. An identical set of provisions on Article 3 was also provided in the TK text.

114. Ms. Lilyclaire Bellamy, speaking on behalf of the Facilitators, said that the Facilitators had sought to reduce the gaps in Article 2. They had considered the work done by the contact group and in plenary. There was a convergence of opinion. The objectives as presented were a reflection of the status as it related to the objectives. The changes made were not that significant. In Alt 1, in the TK text, the most significant modification was the amendment to the chapeau. They had tried to have some consistency between the TCEs and TK documents. In Alt 1(a), in the TK text, there had been square brackets around the words “misappropriation, misuse and unauthorized use”. In the TCEs text, there had been no square brackets. For the sake of consistency, they had removed the square brackets in the TK text, bearing in mind that the whole alternative was in square brackets, and so was the entire article. Alt 1 in the TK text read: “The objectives of this instrument are to: (a) prevent the misappropriation, misuse, and unauthorized use of traditional knowledge.” They had deleted the word “their” in front of TK to make it read better. Alt 1(b) read: “encourage and protect tradition-based creation and innovation, whether or not commercialized.” There had been an insertion of “while respecting the public domain.” The contact group on objectives had sought to reduce the number of alternatives to Alt 1 and Alt 2. To achieve that reduction, the Facilitators had taken text from Alt 3 and incorporated it in the provisions of Alt 1 and Alt 2. However, based on the interventions in plenary, and in an effort to retain the integrity of the individual alternatives, the Facilitators had taken out “while respecting the public domain”. There were no changes to paragraph (c). In paragraph (d), they had deleted the word “their” before TK. In Alt 2, they had retained them in the main and just replaced “traditional knowledge holders and beneficiaries” with “indigenous peoples and local communities and/or beneficiaries”. In the TCEs text, brackets were added for consistency with the TK text. In Alt 3, they had added two paragraphs

(d) and (e) to reflect concepts identified by delegations in the contact group and in plenary. They were trying to retain the integrity of the original Alt 1, so they captured the specific insertions, now listed as paragraphs (d) and (e). Paragraph (d) read: “prevent the misappropriation, misuse, and unauthorized use of traditional knowledge while making the most of the existing intellectual property system;” and paragraph (e) read: “encourage and protect [tradition-based] creation and innovation, whether or not commercialized while protecting, promoting and enhancing the public domain.]]” They put back what they had taken when trying to merge the alternatives to reduce them. Concerning Alt 4 in the TK text, they had maintained the deletion by the contact group and had not reinserted Alt 4, which was largely redundant with Alt 1 and Alt 3. There was a lot more work to be done and they would try to craft a better objective before the end of the session.

115. [Note from the Secretariat: This part of the session took place after a short break when delegations reviewed Rev. 1s.] The Chair announced that he would take general comments from regional groups and others, followed by Member States providing specific comments on the material presented. He recalled that Rev. 1s were a work-in-progress. It had no status, and would have no status.

116. [Note from the Secretariat: All speakers thanked the Facilitators for their work.] The Delegation of Indonesia, speaking on behalf of the APG, recognized that it was not an easy task to try to streamline the text, making sure that all Member States’ interventions in the plenary and the contact groups were taken into account, while at the same time respecting the integrity of Member States’ positions. In general, both Rev. 1s were a good basis for further deliberations.

117. The Delegation of Uganda, speaking on behalf of the African Group, noted that it was not an easy task to compress and reflect interests of all Member States in a balanced manner. It had examined the two Rev. 1s. Some progress had been made in terms of streamlining both texts. However, different positions of Member States remained. Overall, Rev. 1s could be used as a basis for further discussions.

118. The Delegation of Guatemala, speaking on behalf of GRULAC, said it had familiarized itself with the documents in a preliminary way. They contained interesting elements for further discussion. While respecting the methodology adopted at that meeting, and following up on it, it proposed holding informals. Using that format, the IGC would have the possibility of introducing constructive proposals to help achieve the objectives of IGC 39.

119. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that Rev. 1s were a good basis for further discussions at IGC 39. It would come back with more detailed, technical comments.

120. The Delegation of Indonesia, speaking on behalf of the LMCs, noted that there were some positive developments in Rev. 1s, as well as some elements on which it wished to make comments. However, the Rev. 1s were a good basis for further discussion. It would make more detailed comments later on.

121. The Delegation of Croatia, speaking on behalf of the CEBS Group, said that the Facilitators had a very demanding and challenging task to draft Rev. 1s on the basis of the inputs received from the contact groups and the plenary. Rev. 1s were more streamlined than before. It considered them still as work-in-progress. It looked forward to continuing the work.

122. The Delegation of China said that efforts still needed to be made to resolve difference and reduce alternatives. The objective should focus on the gaps of the current IP system in the protection for TK and TCEs. It emphasized the public domain contradicted with TK and TCEs.

The IGC should build a rational, fair and impartial legal framework for TK and TCEs. Rev. 1s could be the basis for further deliberations. It would make specific remarks at a later stage.

123. The representative of International Indian Treaty Council, speaking on behalf of the Indigenous Caucus, said that Rev. 1s were a good basis for further discussion. The focus of the instrument was to protect something that currently did not enjoy adequate protection, i.e. TK and TCEs, not the public domain. She would have more specific comments later.

124. The Delegation of Colombia said that Rev. 1s represented great strides towards consensus. It would make more specific comments on the definition of TCEs and would make contributions in the informals.

125. The representative of Tupaj Amaru noted that there had been no tangible progress. The Facilitators had not been able to consider the CBD, the Nagoya Protocol, and the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. His proposal was very simple: "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." He urged the IGC to listen to indigenous peoples. He said he had contributed with examples of TK. TK was not tangible. The definition of TK read as follows: "For the present international instrument, TK is the cumulative process of ecological TK or traditional environmental knowledge closely linked to traditional life systems based on biological resources innovations, creative and practical language, spirituality, natural cycles, conservation, and sustainable use of biological diversity, as well as the very close relationship of indigenous peoples with land, cosmovision, the soil, the material aspects that were preserved by indigenous people and protected and had been since time immemorial, transmitted from generation to generation." He thanked the interpreters for interpreting his rather confused ideas.

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

127. The Chair opened the floor for comments article by article.

128. The Delegation of Indonesia, speaking on behalf of the LMCs, made some specific comments with regard to the definitions in Article 1 of both Rev. 1 texts. It underlined the importance of maintaining integrity in the process, particularly in view of some Member States' requests to move into informals. It was very important to maintain the integrity or sanctity of Member States' positions. With regard to Article 1 in the TCEs text, it preferred the outcome of the contact group. The definition of TCEs in Rev. 1 somehow took away the focus of the definition coming from the contact group. However, it could work on that definition as a basis for further discussion. Regarding TK, it welcomed the new definitions, and looked forward to further discussion. Either in contact group, informals or plenary, it was a Member State process, and everybody was entitled to their own opinions and position, but all had to respect and maintain the integrity or sanctity of Member States' positions. With respect, members could overcome any differences.

129. The representative of the Tulalip Tribes, speaking on behalf of the Indigenous Caucus, made a textual suggestion regarding the definition of TK. It would read: "Traditional knowledge refers to knowledge originating from indigenous peoples, local communities and/or other beneficiaries that may be dynamic and evolving, and is the result of intellectual activity, experiences, spiritual means, or insights in a traditional context, which may be connected to land and environment...". Those additions were important because "insights" did not capture the spiritual origin of TK from any indigenous peoples. He had added the text "which may be



connected to land and environment” because the connection of TK to land and environment was a very important dimension of many (not all) forms of TK.

130. The Delegation of South Africa supported both contributions made by the representative of the Tulalip Tribes, on behalf of the Indigenous Caucus.

131. The Delegation of Egypt said that anything that had to do with the public domain was not required, because the protection system was for TK and TCEs. The presence of the public domain meant that there was a protection system that had always been there, whereas the IGC was trying to create TK/TCEs protection for the first time. It supported the definitions of TK and TCEs, and supported the proposal made by the representative of the Tulalip Tribes, on behalf of the Indigenous Caucus.

132. The Delegation of the Islamic Republic of Iran welcomed the attempt to come up with compromise language in the definitions of TK and TCEs. Regarding TCEs, the contact group had managed to reach a compromise. Unfortunately, the definition of TCEs had changed during the production of Rev. 1. The Delegation was willing to work with the compromised language of the contact group as the agreed text. The IGC should revert back to that compromise language for the TCEs definition.

133. The Chair said that the language had changed for the sake of clarity but the substance had not changed.

134. The Delegation of the Russian Federation said that the definitions of TK and TCEs were shorter and clearer. However, one main feature had disappeared, i.e. transmission from generation to generation, and it was not clear why it had been deleted from the definition.

135. The Chair explained that that feature was part of the eligibility criteria in Article 3.

136. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that Rev. 1s were going in the right direction. It appreciated the efforts to eliminate some overlaps, because it had repeatedly commented that it was not fortunate to have parallel elements in both places. It was appreciative of the Article 3, where its concerns had been considered. In Article 3, it had a preference for Alt 2. As to the definition, it wanted to make some further technical comments in the informals, because it could still be debated which element should be placed in the definition itself. In general, Rev. 1s had proceeded in positive ways.

137. The Delegation of Croatia, speaking on behalf of the CEBS Group, said that, on Article 3, there was an elimination of descriptions in Article 1 from qualifiers which appeared before in Article 3, and which explained in more detail what should be protected. It preferred, within Article 3, Alt 2, as it exactly provided qualifiers which explained what should be protected.

138. The Delegation of Indonesia, speaking on behalf of the LMCs, was not keen on discussing or even having eligibility criteria within the TK and TCEs texts. That represented an attempt to carve out protection for TK and TCEs and would compromise scope of protection. The discussion about eligibility criteria was not only within the definition but also scope of protection. The LMCs had been trying to build a middle ground with the tiered approach to make sure the long discussion on eligibility criteria could be diverted towards tiered rights. Should the LMCs engage on eligibility criteria, it would prefer Alt 1 over Alt 2. Article 3.2 in Alt 1 was a good drafting effort. The IGC might actually find middle-ground language to overcome the deadlock with regard to eligibility criteria and temporal issue with Article 3.2 in Alt 1.

139. The Delegation of Nigeria reinforced what had been said by the Delegation of Indonesia, on behalf of the LMCs, regarding Article 3. It took serious note of Article 3.2 as an attempt to

reconcile the retention of 50 years or five generations, as the case may be, in Article 3.2 of Alt 2. In Article 3.1(c) of Alt 2, it wondered if it was possible to eliminate all of what was remaining in Alt 2 and consider Alt 1 as accommodating all sentiments. Regarding Article 3.2, it commended the Facilitators for their ingenuity in bringing a very strong point of reconciliation. That had been the most outstanding issue in relation to having a unified Alt 1.

140. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, said that on Article 3, the Facilitators had rightly identified the link with the cultural identity of indigenous peoples. Article 3.2 of Alt 1 was very good compromise language. In the informals, she would be making comments related to the fact that the knowledge system, not the TK or TCE itself, should have had prior existence. She was very concerned with Alt 2 for many reasons, and she had provided many examples why that would not be appropriate for indigenous peoples. Specifying a temporal requirement limited what countries could do at the national level, and was not in accord with how indigenous peoples regarded their TK and TCEs.

141. The Delegation of the Islamic Republic of Iran welcomed the reduction of the alternative forms in Article 1. Article 1 should set the criteria just for the protection of TK or TCEs. Those characteristics which were inherent to TK or TCEs might not to be listed as criteria for protection. The idea of Article 3 was to say what type of TK could be protected under that instrument, or to make a distinction between protectable TK and non-protectable TK. Listing characteristics which were not related to that distinction would not be helpful. The number of criteria should be minimal. Article 3.2 was a good remedy for resolving the difficult issue of the temporal issue. It was a good attempt to resolve that, taking into account different circumstances and national situations. The temporal criterion of 50 years was not the answer for that problem, even though there were different alternatives that carried different forms of answers to that question. That should not be the way forward, as any knowledge or cultural expression was eligible for instant protection. It did not see why TK should wait for 50 years or so to be able to be eligible for protection. That sentiment was in line with the thoughts of those who believed that TK was mostly in the public domain. TK, just like any other knowledge, should be eligible for protection without having to wait 50 years.

142. The Delegation of Italy said that the definitions in Articles 1 and 3 had been modified. As a result, the first part of the definitions was a list of protected expressions that corresponded, in one way or another, to the Berne Convention, which contained the different elements protected by copyright. That meant that the IGC needed to assess the links between that legal instrument and the Berne Convention, because there were no doubts that verbal, musical or intangible expressions, which were contained in the definition of TCEs, were also protected by copyright. The problem was to see whether there was an overlap of protection or not, and to determine where protection began. Copyright applied immediately from the moment of creation. It asked if that created a link with the protection of TCEs. The IGC needed to find a solution that stated that the protection of TCEs began at the moment where the protection of copyright ended. That linked to the point of the generation-to-generation transmission or the temporal dimension of 50 years. That had to be reflected on to avoid double protection or an overlap which might give rise to conflicts. That was also related to the issue of the public domain, because the protection of TCEs posed a problem for the public domain.

143. The Delegation of the USA said that Rev. 1 of the TK text was an acceptable basis for the IGC's work. In Article 1, the term "misappropriation" had an open bracket but did not have a closed bracket. It suggested adding a closed bracket. It suggested that the individual alternatives for that definition be maintained in brackets to be consistent with the format used in Article 1, to imply that none of those options were agreed at that point in time. In Alt 3, after "access", it suggested inserting the word "to" to correct the grammar of that particular paragraph. As to the term "misuse", between "such" and "new," it suggested adding the word "as" to correct the grammar. In "protected traditional knowledge", it suggested adding the word

“substantive” between the words “is” and “traditional knowledge” in both of the two alternatives, to distinguish protected TK from other TK, and it would continue to help to make that distinction. The numbering of the paragraphs had evolved. It suggested that the reference to Article 1 in the first of the two alternatives be a reference to Article 3, and the reference to Article 3 be a reference to Article 5. In the second alternative of “protected traditional knowledge”, it suggested replacing “beneficiaries as defined in Article 4” with “indigenous peoples and local communities”. With respect to the definition of public domain, it preferred to maintain that definition. It had heard that at least one other delegation did not support that definition, so it would be happy to maintain it in brackets. In Article 3, it had promised to revisit the placement of eligibility criteria, and it would be prepared to make a proposal on that later. It proposed to bracket the title and to reinsert the former title of “Subject Matter of the Instrument”. It suggested creating a new Alt 3: “This instrument applies to patents and traditional knowledge.” It also suggested to take the criteria for eligibility and to create a new Alt 5 of Article 5, since edits to Article 3 corresponded with edits to Article 5. New Alt 5 read as follows: “Where traditional knowledge is distinctively associated with the cultural heritage of indigenous peoples and local communities, and created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation for a term as had been determined by each Member State, but not less than for 50 years or a period of five generations, traditional knowledge should be protected according to the scope and conditions defined below: 5.1 Where the protected traditional knowledge is secret, whether or not it is sacred, Member States should encourage that: Indigenous peoples and local communities that directly communicate traditional knowledge to users, have the possibility under national law to maintain, control, use, develop, authorize or prevent access to and use/utilization of their protected traditional knowledge; and receive a fair and equitable share of benefits arising from its use by said users. Users identify clearly discernible holders of said protected traditional knowledge and use the knowledge in a manner that respects the cultural norms and practices of the indigenous peoples and local communities. 5.2 Where the protected traditional knowledge is narrowly diffused, whether or not it is sacred, Member States should encourage as a best practice that: indigenous peoples and local communities that directly communicate protected traditional knowledge to users receive a fair and equitable share of benefits arising from its use by said users; and users identify clearly-discernable holders of the protected traditional knowledge when using said traditional knowledge, and use the knowledge in a manner that respects the cultural norms and practices of the indigenous peoples and local communities. 5.3 Member States should use best endeavors to archive and preserve traditional knowledge that is widely diffused.” The purpose was to take the conditions contained in the criteria for eligibility and to create a new chapeau in Article 5 that would borrow from provisions contained within Alt 3 of Article 5.

144. The Chair was concerned that the Delegation of the USA had suddenly introduced a new material that actually touched on the framework itself. He said it would be very difficult for Member States to understand the interventions, as the proposed wording was on two different articles. He said he could take the intervention to have it on the record. However, he preferred to talk about the proposals in the informals, where delegations had an opportunity to consider them, engage with them, query them, question them, understand them, discuss them and think of them. The Delegation of the USA had to validate the rationale for its changes.

145. The Delegation of the USA said that since its proposal was made in plenary, it would provide it in writing to the Secretariat and circulate it to Member States. It would also repeat it in informals and would welcome any discussion on it. Its intention was not to withdraw its proposal. It looked forward to discussing it later that week and hoped to see it in any further revisions. Regarding the definition of TCEs, the Delegation said that the phrase, “expressions by movement” was used. Performances of TCEs were already extensively protected in the Beijing Treaty on Audiovisual Performances or the WIPO Performances and Phonograms Treaty (“WPPT”). The work of the IGC should build on the work of previous negotiators, and not

muddy the waters. The phrase “expressions by movement” should thus be changed to “performances”. In the phrase, “appear or are manifested”, the word “appear” was grammatically incoherent. “Manifest” was a synonym for “express”. It requested that the phrase “appear or are manifested” be deleted. Finally, after the bracketed word “beneficiaries”, it had studied carefully the definition of TK, and found the value of the phrase, “the result of intellectual activity, experiences or insights”. It requested that the phrase be inserted in the definition of TCEs, immediately before the phrase “in a traditional context”. In Article 3, Alt 2, subparagraph (b), it proposed to change the opening to “linked with, an integral part of, and are distinctively associated with...”. It requested that Article 3.2 be deleted, because it conflicted with the language of Article 3.1(c). That concept had already been taken into account in Article 3.2 of Alt 1. There would be a conforming change to Article 3.1, because Alt 2 would only have a single subparagraph. It would begin, without the phrase “Subject to Article 3.2,” with the word “Protection”. It asked to replace the word “shall” with “should”. It was prepared to continue the discussion on the rationale in informals.

146. The Delegation of Thailand said that the integrity or sanctity of the text from the contact group had to be respected. On Article 3 of both the TK and TCEs texts, at the previous IGC meetings, it had opted for Alt 1 as it appeared in documents WIPO/GRTKF/IC/39/4 and WIPO/GRTKF/IC/39/5, because the use of terms already contained the descriptors and qualifiers of TK and TCEs. However, after the contact group meeting, and with clearly streamlined Articles 1 and 3 in Rev. 1s, it supported Alt 1 in Article 3 for both texts. Paragraph 3.2 should be a compromise in resolving the temporal issues.

147. The Delegation of Egypt said that, regarding Article 3 in both texts, Article 3.2 represented a normative solution to the problem of the temporal aspect. It supported Alt 1. The process of the contact groups was to enable reaching joint results, not to hamper or to slow down the work. The outcome of the contact group should be respected.

148. The Delegation of the Philippines expressed its concern over the use of any arbitrary timeframe to qualify what should or should not be considered as traditional because its own experience, insofar as indigenous peoples were concerned, showed the practical and conceptual difficulty of trying to put a date on TK and TCEs. In order to help better understand Article 3 as well as the new paragraphs, it requested clarification from the proponents of the temporal reference, in particular, about the actual experiences of indigenous peoples in the proponents’ own countries that would support the 50-year threshold or any threshold for that matter. It would be happy to hear about that particular experience of indigenous peoples on the temporal reference.

149. The Delegation of Indonesia aligned itself with its statements made on behalf of the LMCs and the APG. Articles 1 and 3 were related to Article 2. There seemed to be a very wide gap in objectives. One would be to prevent misappropriation, misuse and unauthorized uses of TK and TCEs. The other was for the preservation of the public domain, which was a very different kind of objective. For reasons of clarity and better understanding, it proposed two things. First, it would really appreciate it if the Delegation of the USA could put its proposals in writing, so that it could study them before the discussion in informals. Second, given that the objectives were so different, it proposed separating them into two versions. The IGC could only narrow gaps if the extreme point of the gaps were known.

150. The Delegation of Japan appreciated all Member States’ constructive discussions in the plenary. Enhanced clarity was necessary for the eligibility criteria of the instrument in order to ensure predictability and share minimum standards through the instrument. It proposed to set time elements as concise and objective criteria. It preferred Alt 2, because it included “not less than fifty years or five generations”. It looked forward to discussions on the texts with all Member States in a constructive manner.

151. The Delegation of Canada said that it would raise a few points about the text in informals, where there was an opportunity to exchange between participants. It raised a procedural point about contact groups. It had heard several interventions to the effect that the IGC should accept the outcomes of contact groups and retain the integrity and sanctity of those proposals. Contact groups were a small subset of the IGC. The Delegation of Canada, for example, had not been able to participate in those contact groups. Therefore, it had to be expected that Member States, particularly those that had not had an opportunity to comment in the contact groups, would want an opportunity to make comments or submit proposals. It accepted using the format of contact groups as a way to try to advance the texts, but Member States that had not participated might have comments and/or proposals to make.

152. The Delegation of Australia, looking at Articles 1 and 3 in combination, supported the framework put forward for the definition and the eligibility criteria. In Article 3, it recognized that TK was not static or frozen in time but instead evolving and dynamic. It appreciated the Facilitators' approach in Article 3.2 as a way to move forward, recognizing the different views on that issue. It was willing to engage in the wording to help find a middle ground to move forward.

153. The representative of the International Indian Treaty Council, speaking on behalf of the Indigenous Caucus, thanked the Delegation of the Philippines for asking for more clarification from the proponents for the temporal requirement. The Indigenous Caucus had tried to conduct consultations to find examples and she looked forward to hearing concrete examples of where that type of temporal requirement would actually assist and not harm indigenous peoples. In the USA, there had been at least two "listening sessions", in which the Delegation of the USA had met with representatives of over 235 Native Nations, the National Congress of American Indians and the International Indian Treaty Council. She looked forward to reading the actual text of the proposals by the Delegation of the USA, because none of those proposals sounded like any of the requests that had been made by the Native Nations in the USA. She wanted to see the text to see if any of those proposals matched any of the concerns that had been addressed at those listening sessions.

154. The representative of the African Union said that her intervention responded to the assertion made by a delegation that a specific term of years or temporal limitation was necessary for Article 3 of the TCEs text because TCEs protection needed to begin where copyright protection ended. The possibility of overlapping protection was not at all uncommon in the existing IP system. To take a well-known example, the iconic Coca-Cola bottle shape was eligible for protection under industrial design law, trademark law, and possibly copyright as well, as a work. Each regime had different terms of protection, different requirements for protection and different remedies for violation of rights. Creators could often cumulate protection under those differing regimes. There might be circumstances in which an individual in a current communal context might create a TCE but not be eligible, for reasons of customary law, to seek copyright protection because the origin of the creative content was held by the community. If one recognized TCEs as worthy of protection, limiting protection under a TCEs protection instrument to noncumulative scenarios was not justified.

155. The Delegation of Argentina thanked all delegations for their contributions. All delegations were entitled to make statements and explain their views. Taking into account the number of the delegations in the room, the working methodology proposed by the Chair was the most appropriate in order to achieve a result, if the IGC wanted to achieve a result. It had already put forward the idea to further reduce the number of options in Article 2. In Rev.1, Alt 1 and Alt 2 of Article 2 were two faces of the same coin and could be merged. It would not make a textual proposal in plenary because, based on consultations within GRULAC, it would do that in the informals. In Article 2, it did not want to have any mention of the public domain. The public

domain could possibly be considered in the preamble, since that was the part of an instrument that provided the legal and interpretative framework.

156. The Delegation of Republic of Korea commended Rev. 1s, which had clarified the distinction between Articles 1 and 3. Regarding Article 2, the objective had to be precise and concise to avoid redundancy in relation with the preamble. In that respect, subsection (d) of Alt 1 was redundant, considering paragraph 9 of the preamble. In addition, more explanation was needed to clarify why TK and TCEs were regulated differently in Article 2, especially in Alt 3. Regarding Article 3, in order to understand the qualifiers more precisely, newly introduced qualifiers such as “receive” and “reveal” needed some explanations. Concerning the relationship between Articles 3.1 and 3.2, there remained several issues to be discussed. For example, where there was conflict between Articles 3.1(c) and 3.2 in Alt 2, it wanted to know which provision would prevail. For purposes of legal certainty, the temporal element was an important factor in Article 3.

157. The representative of Tupaj Amaru said that the Delegations of the USA, Canada and Japan were trying to obstruct progress, because they analyzed things in terms of profits and the market. For indigenous peoples, the concepts of TK and TCEs were the fruit of a collective intellectual and creative activity. In essence, they constituted the living memory of the indigenous peoples and belonged to future generations, since they were an intrinsic part of their cultural and historic identity. When states proposed the term of 50 years, he wondered if that meant that after 50 years, the indigenous peoples would no longer exist. He wondered what they were trying to achieve. Moreover, beneficiaries should mean collective ownership, by the creators, guardians and owners of TCEs and folklore, which were IPLCs. He requested to delete the square brackets around “indigenous peoples”.

158. The Chair said that in relation to the initial intervention by the representative of Tupaj Amaru, all participants were required to comply with the WIPO General Rules of Procedure, and in particular, in relation to due respect for the order, fairness and decorum that governed the meeting. The initial comment was close to the wind in relation to not adhering to that. He reminded the representative of Tupaj Amaru to adhere to being appropriately respectful to the Member States within the IGC. The Chair said that he and the Facilitators would craft a revision of the objective and the delegations would be invited to review it in the informal.

159. [Note from the Secretariat: This part of the session took place after the distribution of Rev. 2s on March 22, 2019.] The Chair was pleased with the progress on objectives in the informals, though there were still alternatives, which could potentially be merged in the future. He noted the critical linkage between the eligibility criteria and scope of protection. At IGC 40, he intended to focus on those areas: scope of protection and exceptions and limitations. The Chair invited the Facilitators to introduce Rev. 2s for consideration by Member States.

160. Mr. Paul Kuruk, speaking on behalf of the Facilitators, said that the Facilitators had been called upon to review the draft texts on TK and TCEs and to propose text for consideration as Rev. 2s that were concise, narrowed gaps, eliminated repetition and redundancies, and preserved integrity of proposals of Member States. In line with that mandate, they had made revisions to the definitions of TK and TCEs in Article 1. They had also revised Article 2 and Article 3. The revisions took into account the discussions in the plenary and informals. They had not been able to accommodate the request of the Member State to revise Article 5, as that article was not open for discussions during IGC 39, but would be taken up in future meetings. In the TCEs text, in Article 1, they had acceded to the request of many Member States to revise the TCEs definition to conform to the definition originally proposed by the contact group on subject matter in the context of the references to categories of forms of expressions. They had reinserted the footnotes that provided examples of those forms of expressions. They had been unable to take onboard a request by a Member State to delete the term “expressions of

movement” and to replace it with “performances”. They had determined that the word “performances” was not as distinct a form of expression as the other categories, neither was it a synonym for movement, to the extent that there were performances that did not involve movement. The definition read as follows: “Traditional Cultural Expressions are any forms in which traditional culture and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms<sup>1</sup>, musical forms<sup>2</sup>, expressions by movement<sup>3</sup>, tangible<sup>4</sup> or intangible forms of expression, or combinations thereof.” In the definition of TK, the revised definition read as follows: “Traditional Knowledge refers to knowledge originating from indigenous [peoples], local communities and/or [other beneficiaries] that may be dynamic and evolving and is the result of intellectual activity, experiences, spiritual means, or insights in or from a traditional context, which may be connected to land and environment, including know-how, skills, innovations, practices, teaching, or learning.” They had made some slight changes to other terms. In Article 3 of the TK text, in Alt 1, they had added the word “and” to Article 3.1(b). They had deleted Article 3.2 and the words “subject to Article 3.2” in Article 3.1 of Alt 2. They had deleted the word “or” in Alt 2 and added “and are distinctively associated with”. They had reinserted a previous alternative provision that had been deleted from Rev. 1. That provision was considered to be conceptually different from the eligibility criteria which were the focus of Article 3. They had identified the provision as “Alternative Article 3” entitled “Subject Matter”. They had revised Alternative Article 3 to reflect other changes requested by that Member State. In Article 3 of the TCEs text, they had revised Articles 3.1 and 3.2 of Alt 2 in the same manner as had been done in Alt 2 of Article 3 of the TK text. However, unlike the TK text, there was no reinsertion of an alternative provision from earlier documents.

161. Ms. Lilyclaire Bellamy, speaking on behalf of the Facilitators, stated that they had made a good-faith effort to develop text that would incorporate the interventions and suggestions expressed by delegations while endeavoring to maintain the integrity of the positions and narrow the gaps in the instrument. There were three alternative formulations of the objectives. Alt 1 was a new formulation based on the text introduced by the Chair, with several modifications introduced by various delegations in the informals. Alt 1 read: “The objective of this instrument is to provide effective, balanced and adequate protection relating to intellectual property against: (a) unauthorized<sup>5</sup> and/or uncompensated<sup>6</sup> uses of traditional knowledge; and (b) the grant of erroneous intellectual property rights over traditional knowledge, [*while supporting the appropriate use of traditional knowledge*].” The last part was in italics because that was text introduced by the Facilitators. They had tried to capture the desire expressed by several delegations for the language to be more positive. Concerning the words “unauthorized” and “uncompensated”, footnotes had been added. With the use of those terms, they had tried to make clear that acts of misappropriation, misuse and unlawful uses of TK were all unauthorized uses. “Unauthorized” was a very broad term that would cover not only scenarios where no authorization was ever given for a use, for example, misappropriation, but also situations where there was authorization but it did not extend to that type of use. There were also situations where authorization was not obtained from the appropriate entity entitled to give

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<sup>1</sup> [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

<sup>2</sup> [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

<sup>3</sup> [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

<sup>4</sup> [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

<sup>5</sup> Unauthorized uses comprise inter alia misappropriation, misuse and unlawful uses of traditional cultural expressions.

<sup>6</sup> Uncompensated uses include the failure to provide monetary or non-monetary benefits.

authorization. The footnote for “uncompensated” clarified that it included failure to provide not only monetary benefits but also nonmonetary benefits. Alt 2 had been modified to better reflect language from the mandate as well as the approach which was not reflected in Alt 1 or Alt 3. Alt 2 read: “The objective of this instrument is to support the appropriate use and effective, balanced and adequate protection of traditional knowledge within the intellectual property system, in accordance with national law, recognizing the rights of indigenous [peoples], local communities and beneficiaries.” Alt 3 replaced prior Alt 3 but was very similar in content. It read: “The objective of this instrument is to support the appropriate use of traditional knowledge within the patent system, in accordance with national law, respecting the values of traditional knowledge holders, by: (a) contributing toward the protection of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of protected traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations; (b) recognizing the value of a vibrant public domain, the body of knowledge that is available for all to use and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain; and (c) preventing the erroneous grant of patent rights over non-secret traditional knowledge.” Regarding the TCEs text, Alt 1 and Alt 2 were virtually identical to Alt 1 and Alt 2 of the TK text, with TCEs replacing TK. Alt 3 was a new alternative inserted by the same delegation that had proposed Alt 3 of the TK text.

162. [Note from the Secretariat: This part of the session took place after a short break when delegations reviewed Rev. 2s.] The Chair opened the floor for comments on Rev. 2s. Member States could make comments for the record. Any errors or omissions identified would be corrected.

163. [Note from the Secretariat: All speakers thanked the Facilitators for their work.] The Delegation of Guatemala, speaking on behalf of GRULAC, said that Rev. 2s were a basis for future work. However, it called upon delegations to make greater efforts to continue to work constructively in order to converge positions and make significant progress, as indicated in the mandate. After almost 20 years of negotiations, it was high time to reach tangible outcomes. It reiterated its commitment to participating constructively in that work because it wanted to achieve tangible outcomes.

164. The Delegation of Indonesia, speaking on behalf of the APG, thanked all Member States and regional groups for the very fruitful discussion. Rev. 2s could serve as a basis for future work.

165. The Delegation of Canada, speaking on behalf of Group B, supported to forward the texts to IGC 40 for further work. Individual members of Group B might wish to make their own comments.

166. The Delegation of the EU, speaking on behalf of the EU and its Member States, accepted to transmit the texts to IGC 40 to serve as the basis for further discussions. It considered those texts as work-in-progress and looked forward to making further comments at the next session. When looking at the Rev. 2s, it very much appreciated that Alt 2 of Article 2 retained, which was its preference, as strongly expressed during the informals. There was an editorial point which it had already discussed with the Facilitators. It was a minor misunderstanding and it considered that an editorial remark. Its preference was definitely to have brackets around, on the one hand “indigenous peoples, local communities” and on the other hand, “beneficiaries”, and making it clear that those were alternatives, both square bracketed. Concerning Article 3, during the informals, it had made an intervention concerning both Alts 1 and 2. In Article 3.1(a), it had requested that some additional words be inserted, and that was an editorial omission. One of its Member States had discussed that the intention was to insert the words “by them” which were not reflected, after “and develop, use and maintain collectively”. In Article 1, it would



welcome some continued discussions on one element, which appeared in the TCEs text, where the text read: “Traditional cultural expressions are any forms in which traditional culture and knowledge are expressed”. “Culture and knowledge” was a part where it wanted to continue discussions and where it might have further comments.

167. The Delegation of Croatia, speaking on behalf of the CEBS Group, said that Rev. 2s were a work-in-progress but it could accept them for future work. It looked forward to constructive work at IGC 40, where a decision would be taken on recommendations to the GA.

168. The Delegation of Uganda, speaking on behalf of the African Group, said that Rev. 2s represented some progress and could be used as a basis for further discussions. The objective of protection was very clear and was uncut in the IGC’s mandate. The texts were streamlined in terms of definitions, eligibility criteria, and most of the alternatives accommodated all the views of Member States and other stakeholders. For example, the insertion of the term “qualifier” in Alt 1 of Article 3 had been incorporated. The Delegation of South Africa had interceded to the proposal made by the Indigenous Caucus. Both texts were getting aligned and the articles were well drafted.

169. The Delegation of Indonesia, speaking on behalf of the LMCs, said it was not 100 percent happy with Rev. 2s, but they could serve as a basis of the work at IGC 40.

170. The representative of International Indian Treaty Council, speaking on behalf of the Indigenous Caucus, was grateful that most of their proposals were reflected. She was willing to use Rev. 2s as a basis for further negotiations. She preferred less alternatives for the next meeting, but was pleased and looked forward to continued work on refining those instruments.

171. The Delegation of China thanked the Chair and the Vice-Chairs for their outstanding leadership, the Secretariat and RCs for the hard working, and all delegations for their efforts in the contact groups and informals. Rev. 2s could be used as a basis for further discussion at IGC 40. Progress had been achieved, though it still was different from what it had expected. It fully understood the different views and concerns of the delegations. Regarding objectives, the focus should be TK and TCEs themselves, and there was no need to repeat the concepts in the existing IP systems, such as patents and public domain. The objective of the establishment of the IGC was to consider the gaps of using the existing IP systems for the protection of GRs, TK and TCEs. The TK and TCEs texts should effectively reflect the protection of TK and TCEs, not repeat the existing mechanism. That would make the IGC’s work more effective so as to achieve tangible outcomes.

172. The Delegation of South Africa noted an omission in Article 3, Alt 1(e), on TK, of social identity. It should read as follows: “linked with and was an integral part of the cultural and social identity”.

173. The Delegation of the Plurinational State of Bolivia was grateful for the efforts of a number of countries to try to reach an agreement. On the basis of the progress made, the methodology could always be improved, and it was important that all Member States acted in good faith and respected the rules. The Chair’s role was very substantive in that process. The process needed to move forward. It was grateful for the reference to intangibility, which should be retained, as it was important to protect TK and TCEs. Setting eligibility criteria went against many of the preferences of indigenous peoples because of the nature of TK and TCEs. That should not be defined. For example, time frames should not be set. It noted that a number of major efforts had been made to try to respect the mandate and reach a consensus on the effective and balanced protection of TK and TCEs. However, even though progress had been made, there remained a lot of work to be done in recognizing the rights of indigenous peoples. It urged further commitment from all countries in order to make substantive progress.

174. The Delegation of the Russian Federation said that with regard to TK, the characteristic of transmission from generation to generation was not mentioned in Article 1. In Article 2, the alternatives contained the fundamental elements and had to provide a balanced IP protection. Perhaps a more general version would be adopted by the IGC, reflecting what was contained in national legislation. Regarding Article 3, it preferred Alt 2. More discussion was needed on the subject matter of the instrument.

175. The Delegation of Nigeria said that, in relation to Article 1 of the TCEs text, it was not clear whether it was a clerical omission or an informed decision to keep the text as it was, but where the text read “Traditional cultural expressions are any forms in which traditional culture...”, it preferred “traditional cultural practices” instead of “traditional culture”.

176. The Delegation of Canada said that Rev. 2s were a good basis for further constructive discussion at IGC 40. However, in the definition of TCEs, the concept of “knowledge” had been introduced for the first time. Culture was a broad concept that encompassed many elements including knowledge. It was not necessary to expressly include it in the definition of TCEs. In fact, it was redundant. For example, UNESCO referred to a commonly used definition of culture, namely: “[Culture] is that complex whole which includes knowledge, beliefs, arts, morals, laws, customs, and any other capabilities and habits acquired by [a human] as a member of society.” While it appreciated that there was a link, the word knowledge in the TCEs definition would only lead to unwarranted confusion between the subject matter of the TCEs and TK texts. It suggested removing that word since, in essence, its removal would not deprive the definition of an essential element. On the contrary, removing it would ensure greater clarity. Furthermore, in the informals, it had suggested a modified version of the definition of TCEs that aligned more closely with the structure of the definition of TK, bearing in mind the intrinsic distinctions between TK and TCEs. As that was not reflected in Rev. 2 and taking into account new elements, it suggested the following definition, which brought clarity: “Traditional cultural expressions refer to any forms of verbal, musical, tangible or intangible forms of expressions, expressions by movement or combinations thereof, by IPLCs in or from a traditional context and that may be dynamic and evolving.” In the text of Article 2, paragraph (b) referred to the “grant of erroneous intellectual property rights”. That formulation had been previously raised and retained in the previous version. It recommended for consistency that it be changed back to “the erroneous grant of intellectual property”. That was consistent with the formulations in all texts, including the GRs text. “Erroneous” should qualify the grant.

177. The Delegation of Japan said that balanced discussions were conducted with respecting different opinions in the contact groups, informals and plenary. Rev. 2s included the results of discussions during the week. Regarding objectives, it supported the statement made by the Delegation of the EU, on behalf of the EU and its Member States. Although the phrase in Alt 2 “indigenous [peoples] and local communities/beneficiaries” for both TK and TCEs text had been changed, Member States could not reach consensus on that point, and therefore, it should be back as written in Rev. 1s. It looked forward to contributing to effective and constructive discussions at IGC 40.

178. The Delegation of the Philippines could work with Rev. 2s. It reminded delegations of the need to ensure that the discussions were evidence-based and fact-based. It reiterated the importance of continuing consultations with indigenous peoples, especially because the IGC was talking about an instrument that would have a direct impact on them. Regarding Article 3 and the temporal limitation, it reiterated its concern over arbitrary time frames.

179. The Delegation of the Republic of Korea said that Rev. 2s would be a good basis for further discussions at IGC 40. Going into the substance, the proposed structure of the document which clarified the relationship between Article 1 and Article 3 and would further

promote clarity and soundness of the instrument. In regard of Article 3, it welcomed that the proposal concerning the removal of the second paragraph of Alt 2 of Article 3 was reflected in that version. It reaffirmed its commitment to the work of the IGC. It would further engage in constructive and meaningful discussions.

180. The Delegation of Colombia entirely supported the statements made by the Delegation of Guatemala, on behalf of GRULAC. Rev. 2s incorporated changes that it could support and those could be the basis for greater progress in the future. However, there were still issues and the texts could be improved. There was a need for further discussion to reduce the gaps. It thanked the Facilitators for having reflected the issue of intangibility in the definition of TCEs, as a key aspect of that definition. It underscored the importance of following the methodology proposed for future sessions in order to make progress.

181. The Delegation of Indonesia, speaking on behalf of the LMCs, was not 100 percent happy but agreed to send the texts to IGC 40. The exercise of coming up with draft language on objectives and to discuss it in the informals proved very useful. It suggested the Chair considering facilitating the deliberations at IGC 40 on TK and TCEs through the same exercise, with reconciling efforts with breakthrough ideas, especially on scope of protection, exceptions and limitations and/or sanctions.

182. The Chair said that, concerning IGC 40, he intended on focusing on the areas that the IGC had not had a chance to move into, i.e., scope of protection and limitations and exceptions. It would also probably return to some of the issues discussed at IGC 39, particularly objectives and subject matter, because subject matter was linked to scope of protection. He noted the request from the Delegation of Indonesia, on behalf of the LMCs and would consider it. The IGC had made very good progress in some key areas and was starting to narrow gaps. There was more work to do though. It was very important that the IPLCs' views be reflected. In relation to objectives, he asked to reflect on the nature of what an objective was. The language of any objective had to be anchored in the mandate, because the mandate was the direction given to the IGC by the GA. Hopefully, the IGC could make even more progress at IGC 40.

*Decisions on Agenda Item 7:*

*183. The Committee developed, on the basis of document WIPO/GRTKF/IC/39/4, a further text, "The Protection of Traditional Knowledge: Draft Articles Rev. 2", and on the basis of document WIPO/GRTKF/IC/39/5, a further text, "The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2". The Committee decided that these texts, as at the close of this agenda item on March 22, 2019, be transmitted to the Fortieth Session of the Committee, in accordance with the Committee's mandate for 2018-2019 and the work program for 2019, as contained in document WO/GA/49/21.*

*184. The Committee took note of and held discussions on documents WIPO/GRTKF/IC/39/6,*

WIPO/GRTKF/IC/39/7,  
WIPO/GRTKF/IC/39/8,  
WIPO/GRTKF/IC/39/9,  
WIPO/GRTKF/IC/39/10,  
WIPO/GRTKF/IC/39/11,  
WIPO/GRTKF/IC/39/12,  
WIPO/GRTKF/IC/39/13,  
WIPO/GRTKF/IC/39/14,  
WIPO/GRTKF/IC/39/15,  
WIPO/GRTKF/IC/39/16,  
WIPO/GRTKF/IC/39/17 and  
WIPO/GRTKF/IC/39/INF/7.

## **AGENDA ITEM 8: ANY OTHER BUSINESS**

*Decision on Agenda Item 8:*

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

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

186. The Chair thanked the Vice-Chairs, with whom he worked as a team, and with whom he was in regular contact between meetings. He thanked the Facilitators for their tireless work and valuable contribution to the progress. He thanked the Secretariat, working very much behind the scenes. Without their efforts and preparations, the meeting would actually not occur. He thanked the RCs, who played a critical role in ensuring that the meetings were managed in a respectful and friendly manner and that progress was made. The IGC could continue with that, reflecting IGC 40 was going to be a demanding meeting for everybody, in particular the RCs. He indicated his strong support for the Indigenous Caucus and the work they did. It was critical in contributing to the discussions, including in the contact groups and informals. He acknowledged the Government of Canada for the contribution to the Voluntary Fund. More funds would be needed going forward. In relation to indigenous representatives, he acknowledged the presence of the President of the Sámi Parliament in part of the meeting. He thanked civil society and industry. They were all key representatives and their interests had to be included in the discussions. He thanked Member States, because in the end, they were the ones that made the meeting successful. He was impressed by the productive and respectful ways and the good atmosphere. The meetings were held in a firm, fair and friendly manner. He thanked the interpreters, without whom the IGC participants could not do their job. IGC 40 was going to be a critical meeting. He asked Member States to prepare thoroughly in relation to TK and TCEs, but also regarding the mandate and recommendations to the GA.

187. The Delegation of Indonesia, speaking on behalf of both the APG and the LMCs, thanked the Secretariat for all the support for the meeting, including the conference services and the interpreters. It thanked the Chair, the Vice-Chairs and the Facilitators. It thanked the regional groups, the RCs, Member States, observers and the indigenous representatives. It commended the contribution of the Government of Canada to the Voluntary Fund, noting the importance of the participation of IPLCs in the work of the IGC. It urged other Member States to follow the exemplary contribution of the Government of Canada in supporting the participation of IPLCs in the IGC's work. It looked forward to IGC 40.

188. The Delegation of Guatemala, speaking on behalf of GRULAC, thanked the Chair and the Vice-Chairs for their professionalism, energy and work in leading the IGC. It thanked the Facilitators, the members of the contact groups and the *Ad Hoc* Expert Group for the dedication

shown in moving the work forward. With regard to the methodology, the IGC had worked in various configurations: plenary, informals, *Ad Hoc* Expert Groups and contact groups, which had dynamized the discussions. It called on the IGC to stick to what had been adopted to enable substantive progress in following sessions. It thanked the Secretariat for preparing the meeting, for its support, and for drafting and providing all the materials. It thanked the conference services and the interpreters.

189. The Delegation of Croatia, speaking on behalf of the CEBS Group, said that an intensive week was behind, a week which under the Chair's able guidance had enabled comprehensive discussions among different Member States' positions. It thanked the Chair, the Vice-Chairs, the Facilitators, the contact group, as well as the *Ad Hoc* Expert Group for their valuable contributions. It thanked all governmental delegations, as well as the representatives of the IPLCs and other observers. It thanked the Secretariat, the interpreters as well as the conference services for their tireless support. It expressed its satisfaction with the fact that a solution for the replenishment of the Voluntary Fund had been found, and that participation of indigenous communities would be ensured. Its special thanks went to the generosity of the Government of Canada. It welcomed that after hard work, the new Rev. 2s had been accepted as the basis for future discussions. It assured the Chair that it was committed to constructive dialogue, having in mind that IGC 40 had to decide on what to recommend to the next GA concerning its own future.

190. The Delegation of Canada, speaking on behalf of Group B, thanked the Chair for his continued dedication to the IGC and for his guidance that week. It thanked the Vice-Chairs and the Facilitators as well as the Secretariat for their hard work prior to the session and during the week. It also thanked the interpreters and the conference section for their professionalism and availability. It acknowledged and thanked the Government of Canada for its contribution to the Voluntary Fund. The Voluntary Fund was important to the IGC and Group B was pleased to see it being able to once again fund indigenous representatives. The Chair could count on its full support and constructive spirit as work continued in the IGC.

191. The Delegation of Uganda, speaking on behalf of the African Group, thanked the Chair and Vice-Chairs for their skillful leadership of the IGC's work during the session. It appreciated the Facilitators for their enduring efforts. It appreciated all Member States and stakeholders engaging in those discussions with a constructive mind, pragmatism and with dedication to each outstanding issue. The IGC's primary focus had been to narrow existing gaps by reducing the number of alternatives within the international legal instruments, which would provide balanced and effective protection of GRs, TK and TCEs. Each day that went without reaching agreement was an indictment on the IGC, as had been the case before. It approached negotiations with great hope, good will, pragmatism, and was ready to reach out to all Member States and stakeholders to find consensus. Whereas significant progress had been made on the articles, different alternatives remained. If Member States continued with the positive spirit exhibited in IGC 39, the IGC would reach the finish line in the next few sessions. It looked forward with great optimism to the Chair's text on GRs and a very successful outcome at IGC 40. No doubt the momentum generated would catapult the IGC to an agreement on all outstanding issues and possibly recommend to the GA to convene a diplomatic conference to negotiate a treaty for the protection of TK, GRs and TCEs in 2020. It extended its appreciation to the Secretariat, interpreters and conference services for their excellent logistical support and to all the delegates attending IGC 39.

192. The Delegation of China thanked the Chair, Vice-Chairs and Facilitators. It thanked all the Member States, the participants, the Secretariat and the interpreters. It thanked them for their great deal of work during that week. It thanked all those who had participated in the informals, contact groups, and *Ad Hoc* Expert Group. Within the current mandate, there was only one

session left, so the time was short. The IGC had to speed up to work further. It stood ready to work together with everybody to reach consensus on international binding instruments.

193. The Delegation of South Africa supported the statement made by the Delegation of Uganda, on behalf of the African Group. The IGC was doing important work, which should be concluded. In order to do so, some actions had to be taken. The Chair had committed to produce Chair's text. It encouraged the Chair to facilitate the delivery of his paper, which it hoped could be a consensus paper that could capture the important agreements reached, which one could not afford to lose going into the future.

194. The Delegation of the Russian Federation thanked all participants, particularly those who had provided new proposals. It thanked the Secretariat for providing working documents. It thanked the Facilitators who had spent an entire week working without break. It thanked the interpreters. It thanked the Chair for his patience and for leading the meeting. The new documents contained new proposals and useful information. The analysis of those proposals would help move forward and make progress. It hoped that the knowledge accumulated over studying those draft documents on TK and TCEs would help in the IGC's future work. The IGC had already started the transmission of such knowledge from one generation to another.

195. The representative of the Assembly of First Nations, speaking on behalf of the Indigenous Caucus, thanked the Secretariat for supporting their participation at IGC 39, and those parties that had included them in the discussions. She thanked the states that had demonstrated flexibility and made compromises that indicated their willingness to move the negotiations forward. She thanked those states that had supported their proposals. There were a number of issues in need of progress. A number of states continued to insist on temporal requirements within the design of the instruments. Those requirements reflected a misunderstanding of the nature of indigenous knowledge, which was of itself an ongoing, dynamic process within an indigenous context, which could include knowledge acquired from the spirit world. Temporal requirements were unjustified and unworkable. Progress had been made reflecting the worldview of indigenous peoples in the definitions of TK and TCEs. The TK definition currently reflected their understanding of knowledge as acquired through spiritual means and their connection with Mother Earth. Those dimensions were deeply linked to the everyday lives of indigenous peoples. She would continue to seek states' support for incorporating those concepts throughout the documents. She remained concerned with proposals that promoted the public domain. All references to the public domain should be eliminated from the text. The IGC's mandate was to protect the TK and TCEs of indigenous peoples. The existing IP regime did not adequately protect the TK and TCEs of indigenous peoples. Thus, a new set of standards that reflected indigenous peoples' collective cultural and social rights was required. The new regime had to support indigenous peoples' authority over culture as well as over their spiritual, moral and economic rights. The concept of balance introduced in the revised mandate of the IGC had to conform to indigenous peoples' rights of self-determination, FPIC, and other rights contained in UNDRIP. Participation of indigenous peoples in the negotiations was critical. She thanked the Government of Canada for the contribution to the Voluntary Fund. Further resources were needed. She called upon Member States to support the Voluntary Fund and to directly fund indigenous peoples from their countries to participate in the IGC. Many Member States had requested further examples of TK and TCEs to enrich negotiations. That was only possible with more indigenous peoples' participation. She looked forward to future negotiations at the IGC. Those discussions did not end that day, but had to continue in each country with indigenous peoples at the table. Instruments could be designed and completed that worked for all parties. She called upon each Member State to take a progressive step forward in designing an IP regime that included indigenous peoples' worldviews and created strong protection of TK and TCEs.

196. The Delegation of the USA thank the Chair, the Vice-Chairs and the Facilitators for their dedication and persistent efforts during the week. It thanked the Secretariat for preparing the documents, and thanked other delegations and regional groups for their contributions to the process. It remained committed to the work of the IGC, under the current mandate, which included using all WIPO working documents and other contributions of Member States. Pursuant to that mandate, it had introduced or co-sponsored several proposals that week. One of those proposals was for a study by the WIPO Secretariat on existing *sui generis* systems for the protection of TK in WIPO Member States. The study would provide valuable evidence to support the IGC's future work. The mandate also required the IGC to consider examples of protectable subject matter, and subject matter that was not intended to be protected. It had introduced a paper that provided examples of well-known products based on TK. It hoped that paper would contribute to productive discussions under the mandate. It remained flexible about the format of text-based discussions, including *Ad Hoc* Expert Groups, contact groups, informals, and discussions in plenary. It remained open to considering new textual proposals by the Facilitators and the Chair. However, it underscored the importance of each Member State having direct input into all provisions in the text. Direct Member States' input helped to close conceptual gaps, while maintaining the inclusivity of the process. It valued the active participation of IPLCs and other stakeholders in the IGC's work. In particular, IPLCs were critical participants in the process. It recognized with great appreciation the announcement of the Government of Canada of its contribution to the Voluntary Fund. It thanked everyone for their collegiality and participation in that week's discussions.

197. The Delegation of Nigeria identified with the observations made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of South Africa. IGC 40 presented a very crowded agenda. There was no luxury of methodological flexibility. It urged the Chair to leverage on the resources, with the Secretariat, to help with itemizing the issues left to talk about at IGC 40, such as the scope of protection, to take into consideration the progress made on the tiered or differentiated approach, and exceptions and limitations. Those issues were really important to reach a degree of consolidation around TK and TCEs. It was important to have a way to facilitate expedited conversations that would be very efficient at IGC 40, in which case it would be nice to consider a situation where the Chair would put something on the table as the menu before starting the deliberations, taking advantage of every of those resources and understanding on outstanding issues. The IGC would resume the deliberations and have something to start from. That simplified things and enabled moving toward expedited deliberations at IGC 40. It was thankful for a very productive session.

198. [Note from the Secretariat: the following closing statement was submitted to the Secretariat in writing only.] The Delegation of the Cook Islands thanked WIPO for making its attendance to the IGC possible, all the way from the vast ocean states of the Pacific. It thanked the Chair for his leadership in ensuring all voices were heard. That week's deliberations had provided a greater understanding of the diversity of views on TK and TCEs. There were those whose intents were purely to protect them, and those whose intents were not so pure. With that statement, it represented the Cook Islands and member countries of the Pacific. Pacific peoples were committed to protecting their TK and TCEs. It was their intent that their knowledge remained with them and that knowledge became the foundation upon which new knowledge would be built upon and developed now and into the future – for the sake of future generations, by future generations. Pacific peoples acknowledged they had limitations by way of current's technological advancements but they were rich in the use of their own resources using traditional technologies. TK was the connection between land and the environment. It was so valuable that to hold such knowledge was to have power within one's community. For Pacific communities and families, it was the heirloom or family treasure that was instilled in them and their children to empower and sustain their livelihoods. To take that away was to rob them of their knowledge bank, their economic and social stability platform. TK and TCEs having a time limit with its original creators, association with other forms of IP like patents, and reverting

to the public domain should be abolished from that instrument. The public domain was counter-productive to the protection of TK and its expressions. In fact, it worked against the grain of their concept and understanding of protection and works in favor of those waiting for the opportunity to exploit them. Pacific peoples were not closing their doors to development and growth of TK; however, they encouraged development partners to respect their rights to those forms of knowledge and exercise the principles of access and benefit sharing as stipulated under the Nagoya Protocol. That way, the creators and holders of knowledge were not isolated or alienated from their use and development; instead, they became part of that development and exploitation under agreed shared terms and conditions. If one wanted their TK, one should ask them and together they could develop a shared agreement. It pled not to put it in the public domain where one would then exploit it without the knowledge holders' contribution and benefit. Those who advocated exploiting TK and its expressions that did not belong to them should do so in the most respectable way possible, knowing that it was someone else's inheritance. They should treat it as they would like others to treat them in accessing their inheritance.

199. The Chair closed the session.

*Decision on Agenda Item 10:*

*200. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6 and 7 on March 22, 2019. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated by May 17, 2019. 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 Fortieth Session of the Committee.*

[Annex follows]



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