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

Thirty-Eighth Session
Geneva, December 10 to 14, 2018

REPORT

Adopted by the Committee

1. Convened by the Director General of the World Intellectual Property Organization ("WIPO"), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee" or "the IGC") held its Thirty-Eighth Session ("IGC 38") in Geneva, from December 10 to 14, 2018.

2. The following States were represented: Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Belarus, Bolivia (Plurinational State of), Brazil, Burkina Faso, Burundi, Cameroon, Canada, Chile, China, Colombia, Côte D'Ivoire, Czech Republic, Democratic People's Republic of Korea, Denmark, Egypt, El Salvador, Ecuador, Finland, Former Yugoslav Republic of Macedonia, France, Germany, Ghana, Guatemala, Honduras, Holy See, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Jamaica, Japan, Kazakhstan, Kenya, Lebanon, Lithuania, Malaysia, Malawi, Mexico, Morocco, Myanmar, Nepal, Netherlands, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Peru, Philippines, Portugal, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Seychelles, Slovakia, South Africa, Spain, Sudan, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Venezuela (Bolivarian Republic of) and Zimbabwe (84). The European Union ("the EU") and its Member States were also represented as a member of the Committee.

3. The Permanent Observer Mission of Palestine participated in the meeting in an observer capacity.

4. The following intergovernmental organizations ("IGOs") took part as observers: Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC Patent Office); and South Centre (SC) (2).

5. Representatives of the following non-governmental organizations ("NGOs") took part as observers: Asia Indigenous Peoples Pact (AIPP); Centre for International Governance Innovation (CIGI); Centro de Estudios Multidisplinarios – Aymara (CEM-Aymara); Civil Society Coalition (CSC); Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ); CropLife International (CROPLIFE); France Freedoms - Danielle Mitterrand Foundation; Health and Environment Program (HEP); Indian Movement - Tupaj Amaru; Indigenous Peoples' Center for Documentation, Research and Information (DoCip); Indigenous World Association (IWA); International Committee for the Indians of the Americas (Incomindios); International Indian Treaty Council; International Trademark Association (INTA); Korea Invention Promotion Association (KIPA); MALOCA Internationale; Métis National Council (MNC); Motion Picture Association (MPA); Native American Rights Fund (NARF); Tebtebba Foundation - Indigenous Peoples' International Centre for Policy Research and Education; Tulalip Tribes of Washington Governmental Affairs Department; and World Trade Institute (WTI) (22).

6. The list of participants is annexed to this report.

7. Document WIPO/GRTKF/IC/38/INF/2 Rev. provided an overview of the documents distributed for IGC 38.

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 38.

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 advice and their assistance. They were a team and discussed regularly. He thanked the Secretariat who worked tirelessly behind the scenes to ensure the meetings operated efficiently and effectively. He had consulted with Regional Coordinators ("RCs") in advance of the session, and he thanked them for their continuing support and constructive guidance. Over the past 18 months, he had been very appreciative of their efforts to avoid process debates. He hoped that the IGC could continue in that constructive atmosphere throughout IGC 38. IGC 38, as previous sessions, was on live webcast on the WIPO website, which further improved openness and inclusiveness. All participants were required to comply with the WIPO General Rules of Procedure. The meeting was to be conducted in a spirit of constructive debate, in which all participants were to take part with due respect for the order, fairness and decorum that governed the meeting. As the Chair, he had the right to call any person 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 statements could be handed to the Secretariat in writing or sent by email to grtkf@wipo.int. Those would be reflected in the report as in past sessions. Observer statements and proposals would be interspersed with Member States' statements as in the past. Member States and observers were strongly encouraged to interact with each other informally, as that increased the chances 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 gaveled at the end of each agenda item. On Friday, December 14, the decisions as already agreed would be circulated or read out again for formal confirmation by the IGC. The report of IGC 38 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 39 in March 2019.

AGENDA ITEM 2: ADOPTION OF THE AGENDA

Decision on Agenda Item 2:

11. The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/38/1 Prov. 3 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 and of the documents.]

13. The Delegation of Indonesia, speaking on behalf of the Asia and the Pacific Group ("APG"), supported the working methodology and the work program proposed by the Chair. It conveyed its appreciation for the Information Note prepared by the Chair. It had studied the Chair's Information Note, which summarized the work undertaken by the IGC on traditional knowledge ("TK") and traditional cultural expressions ("TCEs") since the text-based negotiations had begun in 2010. With regards to the draft articles on TK and TCEs, it favored the discussion on the core issues in order to arrive at common landing zones, namely on the issues of objectives, beneficiaries, subject matter, scope of protection, and exceptions and limitations.

How to define TK and TCEs would lay down the foundation of the IGC's work. Most of the members of the APG believed that the definition of TK and TCEs should be inclusive and capture the unique characteristics of TK and TCEs. Furthermore, there should be a comprehensive definition that did not require separate eligibility criteria. Most of the group's members were also in favor of a differential level of protection for TK and TCEs, and 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 the balance in 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 the TK or TCEs could be a way forward towards narrowing existing gaps, with the ultimate objective of reaching an agreement on international instruments which would ensure the balanced and effective protection of TK and TCEs, in addition to the protection of genetic resources ("GRs") and associated TK. On the issue of beneficiaries, it agreed that the main beneficiaries of the instrument were 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 the scope of the protection, most of the members of the APG were in favor of providing maximal possible protection for TK and TCEs, depending on the nature of the characteristics of the TK and TCEs. However, some members had a different position. On exceptions and limitations, it was of fundamental importance to ensure that the provisions be considered in a balanced way between the specific situations of each Member State and the substantive interests of TK and TCE holders. Given differing national circumstances, there should be flexibility for Member States to decide on appropriate limitations and exceptions. Some members had a different position, however most of the members of the APG believed that there was a need for a legally binding instrument(s) providing effective protection to GRs, 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 the IGC's objective as laid out in the mandate. It looked forward to a fruitful session towards a positive direction for all. It assured of its full support and cooperation in rendering IGC 38 a success. It remained committed to engaging constructively in negotiating a mutually acceptable outcome. It was hopeful that the discussions at IGC 38 would lead to visible progress in the work of the IGC.

14. The Delegation of El Salvador, speaking on behalf of the Group of Latin American and Caribbean Countries ("GRULAC"), reiterated its interest in advancing the work of the IGC, with a view to obtaining effective and balanced protection of GRs, TK and TCEs, as reflected in the IGC's mandate. It thanked the experts of the *Ad Hoc* Expert Group and trusted that the results of their work would be an important input for the discussions at IGC 38. It looked forward to the report of the *Ad Hoc* Expert Group, as well as the results of the contact groups that the Chair might wish to establish. It expressed its confidence in the facilitators, as well as its gratitude for their effort and dedication to capture the essence of the debates and translate it into written form, which had been a task, as in the previous sessions, representing an important challenge, given the complexity of addressing two subject matters in the same session. It called on all delegations to dedicate themselves to working with an attitude of openness and flexibility, to achieve rapprochement on cross-cutting issues in both topics and thus leave solid foundations for discussions of the particularities of each of the themes, in order to achieve a text that represented a balance between the interests of TK and TCE users and holders. It thanked IPLCs for their participation in the IGC, who contributed in an important way with information about their experiences and their points of view, despite the difficulties and the pace at which the work evolved. It called upon Member States to make contributions to the Voluntary Fund. It hoped that IGC 38 would be productive and assured of its best disposition to achieve that.

15. The Delegation of Morocco, speaking on behalf of the African Group, said that TK and TCEs had, for a long time, enriched and assisted communities and nations throughout the world

and contributed to their autonomy. It recalled the importance of those efforts, as seen through its proactive and constructive commitment to the debates throughout the sessions. The IP regime did not provide sufficient protection to those assets. The absence of legally binding instruments allowed continued misappropriation, and contributed to an imbalance in the global IP system. It wished to improve, enrich and strengthen the transparency of the current IP system and make it more inclusive, to ensure protection for GRs, TCEs and TK. It was happy to see the recommendations taken by the 2018 GA, taking into account the progress achieved and reaffirming the commitment of all IGC members to accelerating the IGC's work to reach an agreement on one or several legal instruments. Therefore, by the end of the biennium, the IGC would have to conclude its long-standing work and convene a diplomatic conference. The draft articles on TK and TCEs had cross-cutting issues and the Chair's Information Note was a useful contribution. It hoped that the discussion on cross-cutting issues would help achieve coherence in dealing with similar concepts. The African Group was open to a process that would guarantee that the text on both issues could progress and reach significant and sufficient maturity, with a view to concluding the work and convening a diplomatic conference. It awaited with interest the report on the *Ad Hoc* Expert Group and hoped that the results would contribute to the discussion underway. The *Ad Hoc* Expert Group and the contact groups should accelerate the IGC's work on the basis of the mandate. Any proposal for a study or recommendation which was not in line with the IGC's mandate took the IGC further from its objective and minimized the work already accomplished. Therefore, it invited all Member States to use the precious time to conclude the Draft Articles under negotiation. The principles of pragmatism, constructive commitment and flexibility should prevail during the three remaining sessions of the biennium. It hoped that Member States could ensure their commitment, guaranteeing that the IGC would not go backwards, and that the work to be accomplished in the remaining sessions would allow to finally reach an agreement. It was necessary to ensure that the IGC was openly committed to complying with its mandate and ensuring the convening of a diplomatic conference. The IGC had to find an appropriate mechanism to allow the participation of IPLCs because they were very important in legitimizing the IGC's work. It hoped that IGC 38 would be successful and productive.

16. The Delegation of Lithuania, speaking on behalf of the Central European and Baltic States Group ("CEBS Group"), looked forward to hearing the report of the *Ad Hoc* Expert Group. It appreciated the hard work of the Facilitators who had prepared the Rev. 2 documents based on the discussions at IGC 37 (documents WIPO/GRTKF/IC/38/4 and WIPO/GRTKF/IC/38/5). Those documents formed the basis of the debates at IGC 38. It attached great importance to well-balanced IP regimes, which stimulated innovation and creativity and therefore supported economic and social development as well as the welfare of all groups of population. It favored an evidence-based approach, as it was important to draw lessons from the most recent experiences in various Member States while elaborating their existing national legislation and measures for protecting TK and TCEs. Such crucial aspects as legal certainty and economic, social and cultural impacts should be carefully considered before reaching an agreement on any particular outcome. It thanked the Delegation of the EU, on behalf of the EU and its Member States, for its proposals for studies relating to TK and TCEs (documents WIPO/GRTKF/IC/37/10 and WIPO/GRTKF/IC/37/11). It supported those proposals. It welcomed continuous engagement of IPLCs as well as of other stakeholders in the work of the IGC and would pay the greatest attention to their contributions to the discussion. It deeply regretted that the WIPO Voluntary Fund had only been able to finance partially one applicant for IGC 38 and hoped that the Voluntary Fund would be replenished soon. It would engage in a positive, constructive and realistic manner in the work ahead. However, it reiterated the crucial importance of transparent and inclusive working methods with a view to achieving an outcome acceptable to all delegations.

17. The Delegation of Canada, speaking on behalf of Group B, said it was confident that the IGC would continue to make progress under the Chair's leadership at IGC 38. It acknowledged

the progress made by the IGC during the mandate on GRs, TK and TCEs. It also noted that more work needed to be done to narrow existing gaps, with a view to reaching a common understanding on core issues. 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. It was critical that the IGC continue its work consistent with its mandate and make meaningful advancements, being guided by 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 looked forward to the report of the co-chairs under Agenda Item 7. 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 IGC's work. It was deeply concerned that the WIPO Voluntary Fund had only been able to finance partially one applicant for IGC 38. It remained 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 China was pleased to participate in IGC 38. Under the Chair's leadership and with the efforts of all parties, IGC 38 would achieve positive results. It had always supported the IGC's work. It hoped that substantive results would be achieved as soon as possible to create a binding international instrument. It supported the methodology and program proposed by the Chair. It was ready to further discuss the pending cross-cutting issues. It would be active and pragmatic in the discussions and appealed to all parties to make common efforts, stay focused on the concerns and reduce the differences to arrive at relevant international instruments as soon as possible for the protection of GRs, TK and TCEs.

19. The Delegation of Indonesia, speaking on behalf of the LMCs, assured of its full support and cooperation in rendering IGC 38 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, the vast wealth of TK and TCEs had sometimes been used without authorization or without any benefit-sharing. Therefore, it was time for the IGC to make progress and finalize the two texts at IGC 38. Regarding the draft articles on TK and TCEs, the discussion should focus on the most important aspects. The IGC needed to minimize distractions and use its valuable time efficiently by not prolonging discussions on issues where positions were already well laid out and understood by all IGC members. On the issue of beneficiaries, there was no dispute that the main beneficiaries were IPLCs. However, there were certain circumstances in which TK and TCEs could not be specifically attributable to a particular IPLC. That usually occurred when TK and TCEs were not specifically attributable or confined to an IPLC or it was not possible to identify the community that had generated them. Under those circumstances, it hoped to forge a solution. Furthermore, the discussion on beneficiaries was closely related to the administration of rights. To reach a common understanding regarding beneficiaries, the discussion on administration of rights was of paramount importance. With regard to the scope of protection, there seemed to be converging views that emphasized the need for the economic and moral interests of the beneficiaries. For that purpose, determining a standard on certain levels of protection that accommodated the rights granted for each TK and TCEs would ensure achieving protection and promotion. Protection should consider the nature of the rights and the level of diffusion of the TK or TCE. It invited the IGC to consider the practical value of establishing the level of rights as determined by the character of the TK or TCE in question and the character of their use. Establishing the level of rights provided an opportunity to find convergence on core elements, namely subject

matter, beneficiaries, scope of protection and exceptions and limitations. In that regard, it recommended continuing the discussion on that particular cross-cutting issue. The issue facing the IGC was an important issue, not only for all Member States, but more importantly for IPLCs who had developed and generated tradition-based knowledge and innovation long before the modern IP system had first been established. They had the rights to maintain, control, protect and develop IP over their cultural heritage. The IGC had to push for a greater recognition for both economic and moral rights of traditional and cultural heritage, including GRs, TK and TCEs. Substantial progress had been made within the IGC, noting the significant progress regarding GRs and TK associated with GRs at IGCs 35 and 36 and regarding TK and TCEs at IGC 37. It welcomed the 2018 GA decision that called upon members to reaffirm their commitment to the IGC's mandate and to expedite its work in the achievement of the IGC's objective as laid out in the mandate. It was confident that IGC 38 and future sessions would yield progress towards the achievement of the IGC's objectives. It highlighted the importance of the participation of IPLCs in the IGC's work, noting that the WIPO Voluntary Fund was depleted. It hoped that Member States would consider contributing to the Voluntary Fund, and hoped that the IGC would consider alternative funding arrangements. Noting the importance of effective protection for GRs, TK and TCEs, the IGC should move towards taking the next step of convening a diplomatic conference with a view to adopting a legally binding instrument(s) providing effective protection of GRs, TK and TCEs. At the conclusion of IGC 38, the IGC would have completed two-thirds of its work program approved under the mandate for 2018/2019 biennium. With a spirit of constructive commitment to progress, the IGC could soon reach the finish line. It expressed its confidence in the Chair and Vice-Chairs in guiding the discussion to enable progress at IGC 38.

20. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that in accordance with the decisions adopted at IGC 37, the EU 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 from the co-chairs. IGC 37 had been the first of four consecutive IGC sessions to discuss TK and TCEs under the mandate. It had focused on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s). It believed that the IGC had made some progress as reflected in the Rev. 2 documents prepared by the Facilitators (documents WIPO/GRTKF/IC/38/4 and WIPO/GRTKF/IC/38/5). It thanked the Chair for his helpful Information Note for IGC 38. Regarding the methodology, transparency and inclusiveness remained a necessity. It welcomed that the 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 (documents WIPO/GRTKF/IC/37/10 and WIPO/GRTKF/IC/37/11) for the IGC to consider. It was crucial to have mutual understanding about how the IP system could, or could not, assist in serving the interests of the holders of TK and TCEs. It looked forward to participating constructively in discussions on TK and TCEs at IGC 38.

21. The representative of NARF, speaking on behalf of the Indigenous Caucus, stated that Member States had to recognize the rights in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), the International Labour Organization Convention No. 169 ("ILO 169 Convention"), and other instruments of international, domestic, and indigenous law, as well as indigenous customary law. Under those, indigenous peoples enjoyed legal peoplehood, self-determination, and the right to maintain indigenous cosmologies, spirituality and lifeways. He called upon Member States to honor their obligations to recognize and respect indigenous peoples' rights. The respect of UNDRIP and the Charter of the United Nations in upcoming negotiations was fundamental for the process to continue. Concerning the TK and TCE draft texts, he welcomed the discussion on the relationship between the substantive articles and the work being done on definitions. He noted that definitions of some terms might not be necessary or appropriate. He questioned whether eligibility criteria needed

to be set out in definitions or separately, as they might be defined by the scope of protection. Establishing a particular number of years since origin as an eligibility criterion was a negotiating dead end. Requiring 50 years before TK and TCEs could be protected would result in the lack of protection of TK and TCEs 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. While possibly there might be forms of TK and TCEs that might be amenable to treatment through a tiered approach, for indigenous peoples the current criteria as set out did not adequately address their rights. Much TK and many TCEs had been taken from them historically and economically without their FPIC. What mattered was not how widely available TK and TCEs were, but their sacred nature, violations of their spiritual and cultural beliefs, and the harms that they suffered from, as they defined and experienced them. Any tiered approach had to respect indigenous peoples' laws, traditions and customs, as set out in Article 31 of UNDRIP. They had the right to petition for the return of their secret, sacred, spiritual and other culturally sensitive TK and TCEs. TK and TCEs did not exist primarily as a means to serve the IP system – their purpose was to holistically serve political, economic, cultural, ritual, ceremonial, spiritual, sacred and other purposes of indigenous peoples. The legitimacy and lawfulness of the IGC process depended on the FPIC of indigenous peoples. He continued to call upon Member States and WIPO to support the Voluntary Fund, which was depleted, in order to ensure continued participation of indigenous peoples. He thanked those that had contributed in the past. The days in which indigenous peoples' fundamental rights were negotiated without their full consent had to be a thing of the past. He looked forward to a productive set of negotiations.

22. [Note from the Secretariat: the following opening statements were submitted to the Secretariat in writing only.] The Delegation of India said that India was a country rich in TK, a large part of which was widely spread throughout the country and which might or might not be confined to a particular community and might subsist in codified, oral or others forms. India had a heritage of traditional medicinal knowledge, which not only had a commercial and economic value but also had an immense social and cultural value. There was an urgent need to protect such types of knowledge from misappropriation and to provide space and an environment for the dynamic development of TK for the benefit of custodians of such types of knowledge and other members of the society. India was among the hundreds of countries affected by misappropriation and biopiracy. The Delegation supported an early finalization of international legal instruments on GRs, TK and TCEs. The absence of such a legally binding instrument(s) had allowed the continued misappropriation of GRs and TK and biopiracy thereby resulting in an imbalance of the global IP system. India had developed a Traditional Knowledge Digital Library (TKDL) which had been a pioneering initiative in providing defensive protection to India's TK specifically related to traditional medicinal knowledge. In all those cases, IPLCs could not be distinctly identified as the holders of TK. There was a need to recognize the important role played by national authorities as the trustee of TK where IPLCs could not be identified and therefore it was essential to recognize nations/sates as one of the beneficiaries. Appropriate moral and economic rights must be ensured for freely available TK, which had immense commercial value and was vulnerable for misappropriation. It supported the positions of the APG and of the LMCs and favored discussions based on the core issues in order to achieve a common approach on the issues of objectives, disclosure requirements, access and benefit-sharing ("ABS") and defensive measures. It was hopeful that the discussions at IGC 38 would lead to visible progress. It hoped that IGC 38 would be successful in achieving key deliverables to open the possibility for convening a diplomatic conference. Flexibility and political will were critically important for engagement to make the IGC a success. It would actively and constructively participate in the deliberations of the IGC and make constructive interventions as warranted. It looked forward to a fruitful meeting.

23. The Delegation of Nigeria aligned itself with the statement delivered by the Delegation of Morocco, on behalf of the African Group. It was committed to working together with all stakeholders to ensure that the IGC would build upon the progress made in the textual work of the past session. As IGC 38 was the second deliberation 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 approach (differentiated option), was considered in an open-minded manner, with a view to filling any gaps that may be identified. It also recognized the importance of reaching a better understanding of the subject matters – TK and TCEs. It would be helpful to appreciate the unique nature of those subject matters, as well as the beneficiaries. Furthermore, it was 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. Recognizing the importance of seeking an international legal instrument that would protect TK and TCEs, it emphasized the need to focus on closing existing gaps. It encouraged the flexibility and good faith of all participants to enable the IGC to reach agreement on such an instrument(s) that would enhance the contributions of the holders of such knowledge, protect and preserve their knowledge systems, as well as advance the course of innovation and the fair and equitable sharing of associated benefits. It supported the value of *Ad Hoc* Expert Groups to the progress of negotiations in the IGC as a methodological strategy. It appreciated the work done by the *Ad Hoc* Expert Group for IGC 38, and looked forward to the report to assist in reaching understanding and achieving progress in the negotiations that would follow. Finally, it emphasized the importance of IGC 38 and the opportunity it presented for the delegations to demonstrate concrete and meaningful outcomes from the collective deliberations under the 2018/2019 biennium, which only had two sessions left. It hoped that at the end of IGC 38, 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 prepare the ground for making meaningful recommendation(s) to the 2019 GA on an international instrument(s) for the effective protection of GRs, TK and TCEs.

24. The Delegation of Japan stated that the IGC had made good progress thus far under the work program. Nevertheless, even after many years of discussion, the IGC had not been able to find a common understanding on the fundamental issues, namely, objectives, beneficiaries, subject matter, and definition of misappropriation. In addition, many gaps still remained in terms of the Member States' understanding of those issues. Sharing domestic experiences and practices was useful for everyone to gain a better understanding of those issues. In fact, the IGC had held valuable discussions in the past sessions based on interventions by some Member States. It was critical for the IGC to hold discussions using sound working methods, supported by an evidence-based and inclusive approach that took into account the contributions of all Member States. Regarding TK, IGC 38 should focus on finding the importance of preventing the erroneous granting of patents. That could be done by establishing and utilizing databases stored with non-secret TK. In that context, the Delegation of Japan, together with the Delegations of Canada, the Republic of Korea and the United States of America ("USA"), had re-submitted 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 texts. To reach that goal, it was crucial to gather concrete examples of relevant national laws and to know the ways and effect of implementing them and the actual impact that they would have on each TK. It had co-sponsored document WIPO/GRTKF/IC/38/13, and also supported the spirit shown by the Delegation of the USA in document WIPO/GRTKF/IC/38/14. It was ready to engage in work at IGC 38 with a constructive spirit.

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

25. The Chair referred to the draft report of IGC 36 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 36.

Decision on Agenda Item 3:

26. The Chair submitted the draft report of the Thirty-Sixth Session of the Committee (WIPO/GRTKF/IC/36/11 Prov. 2) for adoption and it was adopted.

AGENDA ITEM 4: ADOPTION OF THE REPORT OF THE THIRTY-SEVENTH SESSION

27. The Chair referred to the draft report of IGC 37 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 37.

Decision on Agenda Item 4:

28. The Chair submitted the draft report of the Thirty-Seventh Session of the Committee (WIPO/GRTKF/IC/37/17 Prov. 2) for adoption and it was adopted.

AGENDA ITEM 5: ACCREDITATION OF CERTAIN ORGANIZATIONS

Decision on Agenda Item 5:

29. The Committee unanimously approved the accreditation of the following three organizations as ad hoc observers: Association pour la défense des droits des malades mentaux *(A.D.D.M.M);* Association pour la promotion des droits humains et le développement *(APDHD); and Wakatū Incorporation.*

AGENDA ITEM 6: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES

30. 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. In the past, a small number of countries had contributed regularly. It was time for other Member States to contribute. He drew attention to document WIPO/GRTKF/IC/38/INF/4, which provided information on the current state of contributions and applications for support, and document WIPO/GRTKF/IC/38/3 Rev., 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/38/INF/6.

31. The representative of Tupaj Amaru stated that there was no UN regulation or procedure to exclude certain participants from a meeting. For many years, he had been defending the rights of indigenous peoples in WIPO, but had never received any funding from the Voluntary Fund.

32. [Note from the Secretariat]: The Indigenous Panel at IGC 38 addressed the following topic: "Indigenous Peoples' and Local Communities' Perspectives on Gaps in the Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions: Examples and Proposed Solutions". The three panelists were: Mr. Elifuraha Laltaika, Executive Director, Law and Advocacy for Pastoralists, Tanzania; Ms. June L. Lorenzo, Member, International Indian Treaty Council, USA; and Mr. Q"apaj Conde Choque, Aymar lawyer, *Centro de Estudios Multidisplinarios – Aymara*, Plurinational State of Bolivia. The Chair of the Panel was Mr. Frank Ettawageshik, Executive Director, NARF, USA. The presentations were made according to the program (WIPO/GRTKF/IC/38/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:

> "The first panelist, Mr. Elifuraha Laltaika, is an expert member of the United Nations Permanent Forum on the Rights of Indigenous Peoples. He is the Executive Director for Law and Advocacy for Pastoralists and is a law lecturer at the Tumaini University Makurmia, Tanzania.
>
> Mr. Laltaika stressed that TK and TCEs could not be separated from the rights of Indigenous Peoples. These rights are expressed within the UNDRIP. FPIC and benefit-sharing must be a part of all discussions on TK and TCEs. He concluded by noting the necessity of full and effective participation in decision-making related to TK and TCEs.
>
> Ms. June Lorenzo, the second panelist, is a lawyer, living and working in her home community of Laguna Pueblo. She advocates in tribal and domestic courts, as well as before legislative and international human rights bodies.
>
> Ms. Lorenzo presented on the Zia Pueblo sun symbol and how it was inappropriately taken from the pueblo and subsequently became the symbol on the flag of the State of New Mexico.
>
> She explained how the concept of 'public domain' was often in direct conflict with indigenous world views in regards to a sharing of knowledge. She noted seven distinct legal traditions in the world: Chthonic, Talmudic, Civil, Islamic, Asian, Hindu and Common Law. This was to demonstrate that indigenous law should be considered among these others when working with indigenous rights.
>
> The Zia sun symbol was taken illegally under Zia Pueblo Indigenous Law and had now been registered by the State of New Mexico whose rights were considered superior to Zia Pueblo law under the USA legal system. This was a prime example of the issues that the WIPO IGC process was trying to resolve.

The final panelist, Mr. Q'apaj Conde Choque, is an Aymar lawyer from the Plurinational State of Bolivia and is currently a part of *Centro de Estudios Multidispinarios – Aymara*, an indigenous institution which supports indigenous authorities, conducts training programs and provides legal support regarding indigenous peoples' rights.

Mr. Choque spoke of how the UNDRIP emphasized no new rights but rather put human rights in context for Indigenous Peoples. He also emphasized the role of Article 31 of the UNDRIP for understanding the meaning of protection of TK and TCEs, which was not reflected in existing protection of the IP systems. He believed that protection in this context had three dimensions: positive, preventive and reparative. Any discussion on the issue, including the tiered approach or eventual eligibility criteria, should take these characteristics of protection into consideration.

A brief question and answer period followed the panelists' presentations."

33. [Note from the Secretariat]: The Advisory Board of the WIPO Voluntary Fund met on December 12, 2018 to select and nominate a number of participants representing IPLCs to receive funding for their participation at the next session of the IGC. The Board's recommendations were reported in document WIPO/GRTKF/IC/38/INF/6 which was issued before the end of the session.

34. The representative of the International Indian Treaty Council, speaking on behalf of the Indigenous Caucus, underscored the need for funding. She said that at IGC 38, there were no indigenous representatives from Africa, which was a huge continent with millions of indigenous peoples, from the Pacific or from the Arctic. At a minimum, it was extremely important that all the indigenous regions be represented. She asked states who had the resources to consider contributing to the Voluntary Fund. As the process was further along, it was critical to have indigenous representation. She hoped that states saw the value of indigenous peoples presenting cases of what was happening on the ground. It would help the process if there was more indigenous representation.

35. The Chair said it would be very important to have a good representation of indigenous observers at IGC 40, when the IGC would make critical decisions and recommendations.

Decisions on Agenda Item 6:

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

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

38. 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.

39. The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Kamal Bin Kormin, Assistant Director General, Technical, Science and Technology Department, Intellectual Property Corporation of Malaysia (MyIPO), Ministry of Domestic Trade and Consumer Affairs, Malaysia; Mr. Q"apaj Conde Choque, Representative, Centro de Estudios Multidisciplinarios – Aymara (CEM-Aymara), Plurinational State of Bolivia; Ms. June Lorenzo, Representative, International Indian Treaty Council, United States of America; Ms. Paola Moreno Latorre, Advisor, Economic, Social and Environmental Affairs Directorate, Ministry of Foreign Affairs, Colombia; Ms. Susan Noe, Representative, Native American Rights Fund, United States of America; Ms. Shumikazi Pango, Expert, Ministry of Science and Technology, South Africa; Ms. Renata Rinkauskiene, Counsellor, Permanent Mission of Lithuania, Geneva; and Ms. Aurelia Schultz, Counsel, Office of Policy and International Affairs, Copyright Office, United States of America.

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

AGENDA ITEM 7: REPORTING ON THE AD HOC *EXPERT GROUP ON TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS*

41. The Chair said that, as agreed at IGC 37, an *Ad Hoc* Expert Group had met on December 9, 2018. He thanked Ms. Marisella Ouma and Mr. Michael Shapiro 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 38. 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. Ouma and Mr. Shapiro to take the floor.

42. Ms. Ouma and Mr. Shapiro reported as below:

"**Introduction** [by Ms. Ouma]

The *ad hoc* expert group convened in Geneva on December 9, 2018. This was pursuant to the recommendations of the IGC 37, approved by the General Assemblies in 2018. There were two main issues that were identified by the IGC Chair and Vice-Chairs, following consultations with member countries, for possible discussion by the *ad hoc* expert group:

1. Subject Matter of Protection
    - Traditional Knowledge
    - Traditional Cultural Expressions
2. Cross Cutting Issues related to traditional knowledge and traditional cultural expressions
    - Interface between subject matter, criteria for eligibility and scope of protection
    - Scope of protection (including possible "tiered approach"/ "differentiated protection")

The *ad hoc* expert group, taking into account the time constraints, narrowed down the discussions based on four hypothetical cases which covered the subject matter of protection, beneficiaries, the tiered approach/differentiated protection, public domain and false and misleading use of traditional knowledge (TK) and traditional cultural expressions (TCEs).

Subject Matter of Protection [by Mr. Shapiro]

The *ad hoc* expert group first turned to a discussion of subject matter. The overall goal was to develop a deeper understanding of the subject matter of TK and TCEs. To facilitate the discussion, two hypothetical case studies were made available to the experts. The first case study used the example of "tea", including tea ceremonies, while the second case study used the example of the "longhorn" instrument, including performances using the instrument. In both hypothetical cases, however, the Co-Chairs observed that the goal was to stimulate a discussion of the boundaries of TK and TCEs to determine specific aspects that might be eligible for protection. A number of experts pointed out that tea could also be protected as a Genetic Resource (GR), while other experts noted the broader relationship between GR, TK, and TCEs and the possible overlaps in any protection. As illustrated by both examples, some experts called attention to the existing intellectual property tools available to protect the TK and the TCE in the tea case study (trademarks and geographical indications) and in the longhorn case study (copyrights, trademarks, geographical indications, patents, designs). The Co-Chairs pointed out that the purpose of the hypotheticals was to focus on TK and TCEs.

The case studies prompted a discussion of the definitions of TK and TCEs, including the meaning of "traditional" and the possible "criteria of eligibility" for protection. As a threshold for providing protection, some experts emphasized the need to establish a clear link between the TK and the TCEs and the indigenous peoples and local communities associated with a particular TK and/or TCEs. Noting the wide variety of teas and uses (including recreational, medicinal and ceremonial) that are produced and enjoyed around the world, many experts stressed the importance of establishing clear definitions and eligibility criteria for the protection of TK and TCEs. However, experts exchanged

divergent views on the question of whether eligibility criteria should include “temporal” criteria (whether stated as a number of years or as a number of generations). Some experts said that protection of TK and TCEs cannot have a time limit because they are held in custody for future generations. Further discussion in the IGC is recommended to clarify how such temporal criteria relate to the period of use of the specific TK or TCEs and to the traditional community associated with the TK and TCEs. Such a discussion could also help to distinguish the temporal dimension of eligibility criteria from the term of protection for the TCEs or TK.

With respect to the beneficiaries of the subject matter, the experts explored the meanings of the phrases “indigenous peoples” and “local communities.” For some experts the phrase “local communities” was sufficiently clear. One expert, for example, said the phrase could be used to refer to communities who settle in another place taking their traditional culture with them. For other experts, however, the phrase lacked the clarity needed in an international instrument, suggesting that additional criteria should be developed to better understand the specific characteristics of local communities. Further discussion in the IGC is recommended to clarify this issue. The experts also exchanged views on larger public policy issues that could be implicated by the protection of TK and TCEs. Offering views from the perspective of independent film producers, one expert noted the need for legal certainty (for example, to facilitate the rights clearance process). Concerns also were expressed that the protection of TK and TCEs could be misused to diminish the freedom of expression of film producers, other creative industries, and individual artists. One expert responded that, to the extent that such problems arise, consultations between industry representatives and indigenous peoples and local communities could be helpful to identify and resolve possible problems in advance of production. Finally, a number of experts observed that certain UNESCO Conventions complement the IGG’s work on the protection of TK and TCEs and encouraged continued cooperation between WIPO and UNESCO on areas of common interest.

Scope of Protection

Introduction [by Ms. Ouma]

The *ad hoc* expert group delved into the issue of the scope of protection and, in particular, the ‘tiered approach’ (or ‘differentiated protection’). The main purpose was to understand the principles behind the proposed approach as well as to ensure that there was clarity as to what was meant by the tiered approach or differentiated protection for TK and TCEs.

The issue of the tiered approach was previously raised at the IGC and embodied in the initial versions of the TCE texts (WIPO/GRTKF/IC/9/4) which differentiated TCEs of particular spiritual or cultural significance from other TCEs. Over time the discussion has progressed and seeks to create a balance in relation to the protection of TK and TCEs and the notion of public domain. It was notable that the discussion on the tiered approach/differentiated protection has to take into account the issues of the public domain as well as of the beneficiaries.

Public Domain [by Ms. Ouma]

The *ad hoc* expert group discussed the issue of the public domain in the context of the tiered approach. Some experts expressed the view that the public domain is a construct from the intellectual property system and, as pointed out during the discussions, may not have a corollary in the fields of TK and TCEs as it does not take into account the private domain created for TK and TCEs through customary law and practices. TK or TCEs may

be widely diffused but this does not necessarily mean that they are 'public domain' from an IP perspective.

Another point of concern was that if the rights are held in perpetuity, this may present a problem within certain industries where the chain of title is important, noting that other IP rights are held for a specified period of time.

Tiered Approach [by Ms. Ouma]

The experts were invited to discuss the concept of the tiered approach/ differentiated protection to provide clarity and eventually a better understanding of the same. It was clear from the discussions that there were several issues that needed more discussions and elaboration, such as criteria used to determine what falls into the different levels of protection and which rights shall be granted at each level.

By way of reminder, the tiered approach/differentiated protection anticipates different levels of protection based on the following factors:

1. Nature of protection,
2. Level of control that was already being exercised by the community, and/or
3. The degree of diffusion of the TK and TCEs.

Nature of Protection: The approach proposes several tiers namely 'Sacred', 'Secret', 'Widely diffused' and 'Narrowly diffused'. Sacred/secret TK and TCEs would attract the highest form of protection. In the case of sacred TK of TCEs, the level of protection would further be determined based on whether or not the TK or TCEs have been widely or narrowly diffused.

The determination of what would qualify to be categorized as sacred was discussed at length. Some experts stated that this would ideally be left to the indigenous/local communities to determine based on their customs and practices. However, other experts were of the opinion that this might be subject to abuse if specific parameters are not set out. A few experts were of the contrary view and noted that having this defined at the international level would be problematic taking into account the different customs and practices around the world. These experts expressed the view that clear principles should be laid out at the international level, leaving the elaboration of those principles to the national level after consultation with the relevant indigenous and local communities.

Level of protection already exercised by the indigenous/local community: Within the tiered approach, experts discussed the issue of granting economic rights for secret and/or sacred TK and TCEs. Some experts questioned whether granting such rights was consistent with the nature of sacred and/or secret TK and TCEs, while other experts offered the reasons for doing so. It was noted that this question should be considered from a broader perspective, taking into account the subject matter and the nature of the rights and the rationale for the protection of TK and TCEs. Some experts also noted the importance of examining existing customs and practices and what kind of protection the relevant communities accord to the TK or TCEs. A number of experts stressed the importance of consultations with the indigenous and local communities at the national level to determine the scope of protection to be granted through the different tiers.

The Degree of Diffusion: The question is linked to the issue of public domain. A number of questions were discussed. Does the fact that the work is publicly available within or outside the indigenous or local community affect the level of protection? How would one determine whether or not TK or a TCE is narrowly or widely diffused? And does the level of diffusion affect the level of protection granted for the TK or TCEs? The experts noted

that there could be instances where the TK or TCEs could be diffused in such a manner that it would no longer attract the level of protection initially granted.

One of the main challenges identified in relation to the tiered approach/differentiated protection is defining the number of tiers at the international level. This is an issue that requires further discussion as well as consultation with the relevant indigenous or local communities at the national level to provide the necessary guidelines at the IGC.

False and Misleading Uses of TK and TCEs [by Mr. Shapiro]

Using another hypothetical case study, experts discussed the problem of products that are offered for sale or sold that falsely suggest that they are produced by particular indigenous peoples and local communities. The hypothetical presented two questions for discussion. First, are there national laws that protect against such unfair acts? Second, would it possible to develop principles or best practices at the international level? With respect to the first question, there appeared to be broad agreement that such laws existed at the national level, including general laws relating to unfair competition and trade practices as well as laws and programs specifically aimed at safeguarding the authentic handicrafts of indigenous peoples and local communities. With respect to the second question, a number of experts expressed an interest in exploring the development of principles and best practices at the international level as well as gaining a deeper understanding of the broader concept of 'authenticity' as it relates to this issue."

43. The Chair thanked the Co-chairs. He said that they had had a fairly short period of time to cover quite complex technical issues, and hoped that their insights and those of the experts could be utilized to further the IGC's work in the contact groups and in plenary. He opened the floor to the experts and IGC members to add any comments.

44. The representative of Tupaj Amaru said he had been a constant participant in the IGC. In 2012, he had submitted two textual proposals, one on the protection of TK and one on the TCEs. Each contained definitions of the subject matter for ease of understanding. It was very difficult to determine how much headway was actually made by the IGC on any of the issues. The report of the *Ad Hoc* Expert Group was fairly confused. It did not shed much light on any of those issues. Instead of specifying where there were points of divergence or possible movement toward a solution, it actually made the whole thing far more complicated. The IGC was stranded between two sets of interests: the collective interests of indigenous peoples, urging explicit recognition of their heritage and accumulated wisdom, and the interests of capitalist markets and the eternal drive for profit. The IGC needed to indulge in a little bit of self-criticism so as to really understand why, after 18 years, it had not been able to make any substantive progress.

45. The Chair said that any submissions by observers had to be supported by a Member State, according to the rules of procedure. To date none of the textual proposals by the representative of Tupaj Amaru had been supported by a Member State.

Decision on Agenda Item 7:

46. The Committee took note of the oral reports from the Co-Chairs of the ad hoc expert group on traditional knowledge and traditional cultural expressions*, Ms. Marisella Ouma (Intellectual Property Consultant, Kenya) and Mr. Michael Shapiro*

(Senior Counsel, Office of Policy and International Affairs, United States Patent and Trademark Office).

AGENDA ITEM 8: TRADITIONAL KNOWLEDGE/TRADITIONIAL CULTURAL EXPRESSIONS

47. The Chair presented the methodology and program, recalling the decision of the 2018 GA. The methodology and program would be flexible and dynamic, based on the progress made. He had presented the methodology to the RCs and interested Member States. A substantive change regarding the final revision had been suggested: rather than to note and transmit the final revision to the next session as a working document, the IGC could simply forward it to the next session. A number of Member States were concerned with that change. Therefore, the methodology would revert back to past normal practice. He proposed Mr. Paul Kuruk from Ghana and Ms. Lilyclaire Bellamy from Jamaica as the Facilitators. Their role was to listen to all the interventions within plenary, contact groups and informals, to follow those discussions closely, and to develop revised documents. They might also take the floor and make proposals themselves; however, if they wanted to make proposals and incorporate them in working documents, they needed to be identified as such, and no Facilitators' proposal would go forward unless it had agreement from at least one Member State. Any observer's intervention which involved a textual change within a working document had to be supported by a Member State. Regarding the work of the IGC so far, the Chair said that the IGC was halfway through its mandate, with its work concluding by IGC 40 in 2019. At IGC 40, the IGC would need to take stock and consider recommendations to the 2019 GA. The IGC had more work to do during the three meetings, yet it behooved Member States to start thinking about expectations and outcomes. In relation to stocktaking at IGC 40, the IGC had to be thinking in terms of deliverables, the future form of the Committee and the future mandate. He hoped that Member States would come forward with recommendations at IGC 40 for consideration by the GA. To aid in the consideration over the following few months, it was important for him to provide his perspective on the work thus far, including status, challenges and opportunities. His comments were his alone and without prejudice to any Member States' position. It was worth highlighting that the IGC had commenced its discussions in 2001 and that, in 2010, it had commenced negotiations on an instrument(s) relating to IP and the protection of GRs, TK and TCEs. Over that time, the international landscape had changed significantly within and outside the IP system. At a multilateral level, there was, for example, UNDRIP, Article 31 of which was directly relevant to the IGC's work, reflecting the aspirations of indigenous peoples in relation to IP. Almost all UN Member States had signed the instrument, which was declaratory in nature, including the four countries that had initially voted against it. Two of those countries, Australia and New Zealand, were currently actively engaged in domestic policy work related to IP and the protection of GRs, TK and TCEs, with consultations underway with indigenous peoples. The third country was Canada, which was progressing Bill C-262 to ensure that the Canadian laws were in harmony with UNDRIP. The Bill had passed the lower chamber and was currently being considered by the Senate. There were also the Convention on Biological Diversity ("CBD"), the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity ("the Nagoya Protocol"), the International Treaty on Plant Genetic Resources for Food and Agriculture, and two UNESCO Conventions, namely, the 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions and the 2003 Convention for the Safeguarding of Intangible Cultural Heritage. There had been a significant growth of national and regional laws relating to the protection of GRs, TK and TCEs within and beyond the IP system, such as the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore and the Melanesian Spearhead Group Framework Treaty on the Protection of Traditional Knowledge and Traditional Cultural Expressions. In addition, over 25 domestic patent disclosure regimes relating to GRs had been established and the number continued to grow. In

the absence of agreement at the international level, these domestic regimes varied, in some cases considerably. On a regular basis, news articles were being published relating to instances of potential misuse and misappropriation of cultural heritage, including TK and TCEs. There were also reports on the sale of fake indigenous products and the growing repatriation of cultural objects. That reflected an ongoing discussion and debate on how best to preserve and protect fragile indigenous cultures and support the aspirations of indigenous peoples. It also reflected a growing public interest in WIPO's work. This rapidly changing environment sent a clear message or was perhaps a challenge to the IGC. After nearly 20 years of work, the IGC needed to expedite its work or it risked being overtaken by domestic and regional efforts, with the potential for a fragmented international policy and regulatory environment. That implied transactional and regulatory costs and burdens, legal uncertainty and barriers to accessibility to GRs, TK and TCEs with potential negative impacts on innovation and creativity. This fragmentation was also likely to prejudice efforts by the holders of GRs, TK and TCEs to protect, within the IP system, their legitimate moral and economic interests. In terms of the status of the IGC's work, there were three working documents specific to each subject matter. A number of Member States had put forward recommendations and working documents for consideration by the IGC. There was also a wealth of material produced by the Secretariat over the past 18 years, much of it under the auspices of the IGC, such as two recently updated Draft Gap Analyses on TK and TCEs and the WIPO publication "Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge" (2017). For those Member States who continued to ask for material on the national and regional regimes, the Traditional Knowledge Division had established a webpage, including resources available on WIPO's website on regional, national, local and community experiences regarding IP and GRs, TK and TCEs (https://www.wipo.int/tk/en/resources/tk_experiences.html). The Chair then specifically reviewed the status of each subject matter, and the challenges and opportunities to move forward those negotiations. On GRs, the text incorporated two broad approaches, which were yet to be agreed: (1) the introduction of a mandatory disclosure regime; and (2) the introduction of defensive measures relating to preventing the granting of erroneous patents. In relation to those approaches, there was broad support for some form of a mandatory disclosure regime in the patent system. However, there remained differences between Member States who supported such a regime in relation to the scope of disclosure, nature of the sanctions, and relationship with international regimes relating to access and benefit-sharing. At the same time, some Member States had publicly stated that they did not support a mandatory disclosure regime based on concerns which had been raised by industry observers at the IGC. Those concerns were potential impediments to accessing GRs and associated TK, increasing regulatory burden and high transactional costs involved in such a regime, legal uncertainty which it created, and subsequent negative impacts on innovation. To address those issues, those Member States had put forward an approach based on a range of defensive measures, such as use of databases to support prior art search, voluntary codes of conduct, etc. The aim during the recent negotiations had been to provide clarity around each approach so Member States could make informed decisions on which approach, or combination of approaches, met their interests. In terms of clarity in relation to a disclosure regime, he believed that the IGC had reached a point, where it should be able, subject to a willingness to compromise on some issues amongst the disclosure regime proponents, to produce a proposal which had sufficient clarity to enable policymakers and those Member States who had raised concerns regarding such a regime to make informed decision regards the merits and validity of a disclosure regime based on a clear model. The model attempted to balance the legitimate concerns of the users and the holders, regarding misappropriation of the GRs and associated TK, and a lack of transparency within the IP system relating to the utilization of GRs and associated TK. He suspected, for example, that the concerns of industry and some Member States were being assessed against a disclosure regime which had not been on the table for some time. Significant changes had been made to that regime in the working documents, as the IGC had progressed. The New Zealand government, as part of the Waitangi review and consultation process, had produced an analysis that incorporated three models, which better reflected the

current negotiations. He did not suggest that the concerns of industry were not legitimate, but rather that the disclosure requirement proponents had recognized those concerns and in good faith, had significantly modified the proposed model, as reflected in the analysis conducted by the Government of New Zealand. With regard to the second approach based on defensive measures, that approach was also incorporated within two joint recommendations, proposed by a number of Member States. Most of those proposals had not changed significantly since they had first been introduced in 2012. To date, those proposals had not received broad support within the IGC. However, it was recognized by the majority of Member States that a number of the proposals had merit, including as complementary measures to a disclosure regime. Regarding how to move those negotiations forward, noting that two broad approaches were on the table, he noted that at IGC 36, the IGC had been unable to agree to transmit the latest revision of the GR draft text to IGC 40 for consideration during the stocktaking session, though it was referred to in the report of IGC 36. In an attempt to overcome the current divide, he had committed at IGC 36 to produce a Chair's text on GRs prior to IGC 40. The text would attempt to produce a proposal for consideration by Member States, which took account of the interests of all Member States and attempted to balance the interests of all stakeholders. In essence, he believed that the IGC was at the point where it needed to make a decision on GRs and associated TK. Otherwise, it would be overtaken by initiatives at national and regional levels with all the potential risks and implications thereof. Member States should see that as an opportunity for WIPO to take the lead and shape policy in that area, learning from the experiences at the national level, rather than leaving resolution of these IP issues to other forums. He recalled the strong position taken in the TRIPS Council and during the Nagoya Protocol negotiations that WIPO was the appropriate forum for discussion of IP issues relating to GRs, including disclosure regimes. A number of proposals had been put forward on databases. There was significant merit in progressing those initiatives at a working level, where the technical issues, including standards and safeguards, could be considered. That could be considered in the recommendations, whether it was possible to start progressing that work, as everyone generally believed that those databases had strong utility. Regarding TK and TCEs, the Chair noted in the first instance that the negotiations were highly complex and they involved consideration of moral and economic rights with potential impacts across the full spectrum of IP rights. In addition, environments within which indigenous peoples and local communities operated across the world were widely divergent, including differing legal frameworks. There was also the challenge of how to address TK and TCEs which were publicly available, particularly those made available without the prior informed consent ("PIC") of the holders. The IGC also importantly needed to recognize that there was a fundamental conceptual and legal divide in relation to how indigenous peoples' belief systems, customary laws and practices interacted with IP policies, laws and practices. From their perspective, the very conception of "ownership" in the conventional IP system was incompatible with notions of responsibility and custodianship under customary laws and practices. That divide was also captured in the updated draft gap analyses on TK and TCEs. They highlighted a number of key concerns of IPLCs on the protection of their interests and rights within the IP system, such as ownership of derivative works; the originality requirement; ownership within a collective context; terms of protection; and limitations and exceptions which allowed access and in some cases rights to be conferred to third parties without the FPIC of IPLCs. However, while recognizing those issues, the IGC also needed to protect the fundamental role 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. That perhaps was the greatest challenge, balancing those interests. Many indigenous peoples understood that, as they often reflected, they lived in two worlds. This was not necessarily their choice, but their reality. In relation to TK and TCEs negotiations, there were two working documents on each subject matter and they had both incorporated a number of alternate positions reflecting the various views on the objectives of the instruments and approaches to implementing the objectives, such as a rights or measures-based approach.

Notwithstanding those divergent positions, significant shifts had occurred. Expectations in relation to the scope of protection had been narrowed, aided by the introduction of a possible tiered approach as an analytical tool to attempt through practical example to explore the central issues. There had been a shift towards framework documents which established a set of standards (minimum and maximum) and mechanisms which provided flexibility for implementation at the domestic level. There also were eight additional documents which had been presented by some Member States for consideration by the IGC, which included joint recommendations, requests for studies and information papers. As he had alluded to earlier, the recommendations and requests for studies had not received support within the IGC. However, they remained on the table for consideration. Regarding the next steps, noting there were three further IGC sessions devoted to TK and TCEs under the current mandate, the IGC first needed to accept a compromise position on policy objectives, reflecting the need to balance all the interests. This should be achievable with good faith. The IGC should then continue its focus on establishing a principles-based framework instrument(s). That framework instrument should reflect agreement on issues where agreement was possible, and leave more complex issues for further discussion and resolution over time, perhaps in the form of protocols to the initial framework instrument which would provide the foundation for the future work. That recognized the complex issues and the reality regarding the policy challenges, particularly in balancing all interests. Clearly the IGC had much work to do over the next three sessions, but he saw that as an opportunity rather than a challenge, as reflected in the reaffirmation of the commitment to expedite the IGC's work at IGC 37 and endorsed by the 2018 GA.

48. The Chair proposed to establish contact groups and presented the methodology for the contact groups. Their mandate was to reduce the number of options and alternatives, and to narrow gaps. They were requested to focus on the specific questions. There would be two contact groups: (1) subject matter, chaired by a Vice-Chair, Mr. Jukka Liedes, and (2) scope of protection, chaired by the Facilitator, Mr. Paul Kuruk. Each regional group might nominate no more than two delegates per contact group. The EU, LMCs and Indigenous Caucus might nominate one delegate per contact group. The Chair of each group should check composition at the beginning of each meeting. The members of the contact groups should ideally be the experts, where possible, who had attended the *Ad Hoc* Expert Group on TK and TCEs. Each contact group would nominate one rapporteur, who would report back the day after in plenary. The Facilitators would take note of the reports for the purposes of preparing Rev. 1s. The plenary would then have an open discussion about those reports. The contact groups would work in English only. The background and questions for the contact groups were as follows:

"**SUBJECT MATTER**

QUESTION/BACKGROUND

In a legal instrument, provisions on subject matter generally aim at delineating the scope of protectable subject matter. International IP standards often defer to the national level for determining the precise scope of protectable subject matter.

International instruments can range from providing a general and broad description of subject matter, to a set of eligibility criteria (i.e. the qualities the subject matter should exhibit to be eligible for protection), to no definition at all.

Within the two working documents two options are presented in relation to subject matter:

- **Alternative 1**. The subject matter is defined in the list of terms, which incorporates eligibility criteria e.g. *created, maintained or developed within a collective context, linked/distinctly associated with or an integral part of a social identity and/or cultural heritage, transmitted from generation to generation*.

- **Alternative 2**. The subject matter is defined in the list of terms with eligibility criteria further defined within the subject matter article e.g. *distinctly associated with the cultural heritage of the beneficiaries; that has been used for a term as has been determined by each member state, but not less than 50 years*. It is noted that this option also includes criteria within the definitions in the list of terms which could be considered eligibility criteria.

The contact group is requested to attempt to agree a single approach and agree a set of criteria and/or eligibility requirements, at the international level, for TK and TCEs, respectively.

The contact group is also invited to discuss and agree on:

- the necessity and relevance of including a temporal component (for example, 'not less than 50 years'); and
- the necessity of including examples of different forms of TCEs in the definition of TCEs (in the body of the definition or as footnotes).

SCOPE OF PROTECTION

QUESTION/BACKGROUND

The IGC has discussed for several years a so-called 'tiered approach' (also referred to as 'differentiated protection'), whereby different kinds or levels of rights or measures would be available to rights holders depending on the nature and characteristics of the subject matter, the level of control retained by the beneficiaries and its degree of diffusion.

The tiered approach proposes differentiated protection along a spectrum from TK/TCEs that are available to the general public to TK/TCEs that are secret, sacred or not known outside the community and controlled by the beneficiaries.

The contact group is invited to consider the tiered approach, for an instrument(s) on TK and TCEs, respectively, at the international level, with the aim of validating/refining:

- The number of tiers;
- The criteria for each tier; and
- The level of protection for each tier."

49. Concerning the objectives of the instruments, the Chair stated that the ones that were in the TK and TCEs texts should be finalized in good faith. The purpose of the objectives was to give a clear intent or purpose to the IGC's work. There were two objectives that were very clear and related to IP and the protection of TK and TCEs but others were broader. Within those objectives, some preamble language was duplicated. IGC 37 had modified the Preamble section significantly, and it was now a clearer, succinct, one-page Preamble. The Delegation of Switzerland had recalled in the past that the IGC should be looking for a positive statement of its purpose, and maybe Member States could look at that as well. In the TK text, there were three alternatives and in the TCE text there were four. He suggested narrowing those down into a clear and concise couple of sentences.

50. [Note from the Secretariat: Two contact groups were established as the Chair announced above, and they met from 10 a.m. to 1 p.m. and from 3 p.m. to 4 p.m. on December 11, 2018. This part of the session took place on December 11, 2018 after the meeting of the contact groups.] The Chair recalled that he had established two contact groups, one focused on subject

matter and the other focused on the scope of protection with a specific focus on the tiered approach. He invited the rapporteurs from each contact group to present their report.

51. Ms. Jennifer Tauli Corpuz from the Tebtebba Foundation, speaking as the Rapporteur of the contact group on the subject matter, said that the group had started with discussing the necessity of having a definition within the text. While there was broad agreement that there needed to be clarity and legal certainty in identifying the subject matter of the instrument, there was no agreement on whether that should be contained in a definition, in eligibility criteria, or in scope. Some felt that there was no need for a definition, but there needed to be clear criteria and conditions under which subject matter would qualify for protection. Others felt that a definition was necessary. The group had also looked at the individual elements of the definitions in the text, and tested each of the elements for their appropriateness and usefulness in a definition. In testing each of the elements, the group had tried to identify which were absolutely necessary, in the words of the Vice-Chair, "for identifying the subject matter with a certain degree of clarity". There was a broad agreement to align the elements of the definition of TK and TCEs. The group had worked on the elements without prejudging whether that would be contained in a definition or in the text as eligibility criteria. Most of the elements passed the test of being necessary to be reflected. The group also had an extensive discussion on the temporal scope, and unfortunately it did not come to an agreement on that matter. The group did not touch some brackets, such as the brackets around "peoples" and "beneficiaries" because they were subject to different a set of discussions.

52. Mr. Jukka Liedes, one Vice-Chair and the Chair of the contact group on subject matter, said that the group had the opportunity to have three and a half hours or so to discuss subject matter. The group picked from the two working documents the most relevant elements as the main focus of the discussions. For the purposes of discussion, the definitions taken from both texts were cut into substantive sub-elements. In the discussions, it became clear that more clarity could be achieved if the definitions would follow a parallel order in both documents: the elements found in the TCEs definitions would be in the same order as in the TK definition. The group saw a need to have some of the elements indicated as candidates to be either retained or deleted; those elements were in square brackets. They were the elements which referred to the form in which the TK or TCEs might be found or existed (codified or other forms). That had no definitional value because all forms were acceptable. It was probably a good candidate to be considered to be deleted later. Similarly, "which are dynamic and evolving" could be deleted, but then there was the observation that all forms would be covered by the instrument, irrespective of being either static or dynamic and evolving. That clause in a definition or in a series of eligibility clauses would have a very important explanatory role. Regarding the examples of the form that TK might take (the last element in the definition), as well as some parts of the TCEs examples, the question was whether all of those elements in the examples should be retained. If the bodies, the upper parts of the sets of elements would be kept as a definition, it would be possible to do without a separate Article 1 on subject matter or criteria of eligibility. The other possibility was that, for instance, the time aspect and the element referring to "distinctly associated" could form the article on subject matter or criteria of eligibility. If the series of elements from the definition would become clauses on eligibility, then a definition would no longer be necessary for TK and TCEs. The group had had a long introductory discussion on the phenomenon to be covered by the instruments, a long discussion on the time aspect, and a walk-through and testing of all of the elements. It seemed that irrespective of where those clauses would be placed in the instrument, the elements mostly passed the test of meaningfulness and, once properly drafted, also the test of clarity.

53. The Chair invited members of the contact group to make interventions to ensure the views were adequately represented.

54. The Delegation of India said the group had had a very constructive discussion. As regards the issue where the TK or TCEs could not be linked with existing or identified IPLCs, India had developed the TKDL and it was not always possible to correlate the TK/TCEs therein with any specific IPLCs. Hence "other beneficiaries", i.e. the state, should also be included in both definitions of TK and TCEs.

55. The Delegation of South Africa had concerns over the rationale for splitting two very important articles (subject matter and scope of protection), which should be revisited. The subject matter and the scope of protection were linked and interdependent. To that extent, the split limited the type of discussion that one could have. Hence, it had come up with a methodology to move into a non-definition in terms of not having definitions or eligibility criteria or subject matter. In the South African Bill on TK, the text was a mirror image of the discussions in the IGC. When looking at the criteria for protection, the Bill's drafting team had opted for minimum criteria. Having a long shopping list of criteria would make it burdensome and legally uncertain. Thus, the Bill contained three very crisp criteria: transmission from generation to generation, link to a social and cultural identity, and "used, maintained and developed".

56. Ms. Jennifer Tauli Corpuz from the Tebtebba Foundation, speaking as the Rapporteur, said that concerning the "collective context", there was a slight difference between the TK and TCE texts. The TK text originally did not have "collective context" so it was to mirror the definition in the TCEs text. Some observed though that not all knowledge was created collectively, neither was it always maintained or developed collectively. It was put into brackets to reflect that there was no agreement on whether "collective context" applied to creation, development or maintenance. Concerning the temporal element, she said there had been a long discussion, and the group had initially asked the proponents to explain why they wanted it reflected in the text. They explained that it was necessary for legal certainty to have a temporal aspect. The others, however, also explained that specifying a temporal aspect might not be applicable in all contexts, and might be contrary to the conception of TK or TCEs being dynamic and evolving. Some also pointed out the possible injustice of requiring communities to stay frozen in time, and some also pointed out possible inconsistency of having knowledge that was not protected for the first 50 years and then suddenly when it reached 50 years it became protected. There was no agreement on that point.

57. The Chair opened the floor to Member States to question or seek clarification on the material presented by the contact group.

58. The Delegation of Nigeria recalled previous negotiations on the temporal aspect, and said that the proponents had yet to defend the reasons for benchmarking TK to 50 years, taking into account the conversations in relation to the public domain and the eligibility criteria. It was a critical constraint to the nature of TK, and it went to the point of whether the IGC wanted a *sui generis* document or a strictly IP document. That question was fundamental and any proponent should explain the reasons behind such a proposal.

59. The representative of Tupaj Amaru said that through eight years of discussions, the IGC had clearly failed. In 2012, the IGC had discussed the draft of an instrument on TK and TCEs and that draft contained the definition of subject matter. All UNESCO and UN treaties had definitions. That was absolutely fundamental to any kind of treaty. He wondered why the definition in both instruments had been diminished since 2012 and why the IGC was wasting time not being clear about the definition. Since 2000, indigenous peoples had been insisting on their rights to their TCEs and TK, and he wondered what the 50 year criterion had to do with anything. He asked whether it was because states assumed that in another 50 years, there would be no trace of indigenous people left, and they would have disappeared. He proposed a definition as follow: "TCEs are all their tangible and intangible forms. This includes all forms of expressions and different places where they themselves express appear and/or are evident in

the cultural heritage. They are transmitted from generation to generation in time and space. The Legal protection of TCEs from (against) any illicit use, as stipulated in the present article, shall be applied in particular to: (a) Phonetic or verbal expressions, such as stories, popular stories, epics, popular legends, poetry, riddles and other narratives; as well as the words, signs, oral expression, names and sacred symbols; (b) The musical or (aural) sound expressions, such as songs, the rhythms, and indigenous instrumental music; (c) The corporal expressions by actions, such as dances, scenic representations, the ritual ceremonies in sacred places, the traditional games, and other interpretations or executions , theatre and dramatic works based on popular traditions; (d) The tangible expressions, such as works of art, in particular drawings, designs, paintings, sculptures, pottery, terracotta, mosaics, woodwork and jewellery, architectural and funerary spiritual works. Protection and safeguarding will be applied to all TCEs which are the fruit of a collective and intellectual activity and constitute the living memory of indigenous peoples and local community and belong to this people or community as an intrinsic part of their cultural, social and historic identity or heritage."

60. The Chair noted that there was no support from the Member States for the proposal made by the representative of Tupaj Amaru.

61. The Delegation of Ghana asked for clarification as to why "generated" had been deleted.

62. Ms. Jennifer Tauli Corpuz from the Tebtebba Foundation, speaking as the Rapporteur, said that was one of the rare points of agreement, because it seemed that "created" and "generated" were synonyms, so there was an agreement to delete "generated".

63. The Delegation of Ghana explained that the difficulty with "generated" was that sometimes something might not be necessarily created by someone, but the person could generate it in the sense that where there were adaptations of certain TK or TCEs, there might be the possibility that the community had generated it based on a different source of TK. For example, in Ghana there was a folk character called Anansi. Anansi was indigenously Ghanaian; however, the Caribbean had also developed upon that character in their stories. There were certain aspects of folklore that were not created, but developed upon. Hence it suggested that "generated" be maintained so as to capture such aspects.

64. The Chair invited the Rapporteur of the second contact group on the scope of protection to present the report.

65. Mr. Preston Hardison from Tulalip Tribes, speaking as the Rapporteur, said that the contact group had considered the tiered approach to the protection of TK and TCEs. Because of the complexity and number of issues in the tiered approach, the contact group had focused its discussion on ALT 2 of the TK text, without prejudice to any of the other alternatives. The group had focused on the issues, not on drafting alternatives. Despite the differences around the need for a tiered approach, all participants had engaged in a collegial and collaborative manner. The group had worked on refining the number of tiers. The tiered approach engaged the tier one, which gave maximum protection, tier two which gave a moderate amount of protection, and tier three which gave a minimum amount of protection. The group had looked at the terms involved and the ideas behind the protection. One of the first issues raised was defining the criteria for protection. It was observed by several members that IPLCs themselves needed to be the ones to define criteria for protection and some of the other terms in the draft. The group had also looked at the issue of intent, a term that was not in the current draft. When knowledge was diffused or transmitted, it was important to understand what the intent was. The example given was from the presentation at the Indigenous Panel of the Zia sun symbol and how it had become widely diffused, even though it was not the intent of the Zia to make it available, because it had been originally only available to a particular society within their peoples. Some had observed that intent might be vague or subjective and should be tied to the

actual use. There was a distinction between the intended use and the actual use of the TK. There had to be information about how it was practiced and maintained. On the other hand, other members had said one could independently discover intent and that would be sufficient. Some of the members were concerned that a state might be made subject to the subjective intent of peoples from across the world. The issue was to try to understand how to objectify the idea of intent so that it could be used in a legal context, and not be an imposition of foreign subjective ideas on their nation. The issue of diffusion was also difficult. It was pointed out that one needed information in relation to the tiers on how diffusion occurred. It was not sufficient just to refer to diffusion, but one needed to know if it was diffused because that was intended or if it was misappropriated. Members had pointed out the difference between diffusion within communities and diffusion between communities. The purpose of the instrument was to focus on the diffusion between communities, but there were also issues involved with the diffusion within communities. He referred to the Zia sun symbol, because originally that was not diffused within the Zia community. The diffusion might have other elements that needed to be considered. Regarding the tiers, there were different opinions in the group, but it was explained that from an indigenous people's point of view, there were often burdens that went with the knowledge whenever it was transmitted. Thus, there was nothing exactly equivalent to the public domain. There was often an intention to diffuse, but even when knowledge was meant to be diffused widely, there were some entailments, burdens or requirements that it be used in an appropriate way. The issue of definitions could not be completely and adequately addressed. A full discussion of definitions might take a long time. The meaning of "narrowly diffused" and "widely diffused" was discussed. Some found a lack of clarity in regards to the definitions of "secret" or "sacred" knowledge. Others brought up the issue of moral rights, the content and definition of moral rights. The moral rights most commonly mentioned were the moral rights of attribution and integrity, but there might be other moral rights involved. There was a discussion on the issue of authorized and unauthorized diffusion. Some believed that it really needed clearer definitions. Some states had common law regimes, other states had constitutional law or statutory law, and depending on the legal regime, it might be difficult to get those definitions accepted in their jurisdictions. The group had discussed the differences in the level of control. The group had looked at the highest level in the TK text under ALT 2, the right to maintain, control, use, develop, authorize or prevent access and utilization of their TK and receive a fair and equitable share of benefits from its use. The group had discussed those terms. It was pointed out that one of the biggest transitions between level A and level B was the apparent loss of the collective right to control. That might be an important right or interest for IPLCs. The group had discussed fair and equitable sharing of benefits and its meaning. That might mean remuneration or other kinds of benefits, such as technology transfer. The group had addressed the nature of the tiers: either guidance or inflexible categories that really determined the kinds of protections for each tier. Some argued for treating them as guidance and allowing for flexibility. Some pointed out that there might be gaps in the tiered approach. The main one was that for indigenous peoples, if something was widespread, that did not mean that it was any less sacred or deserving of protection. One of the ways of filling that gap was to state that the tiers provided guidance for general ways in which states might provide protection for TK, but that IPLCs should be able to petition or request that measures from governments or national competent authorities in order to get a higher level of protection than the protection provided in the level one protection. The things that they could take into account to protect narrowly diffused or widely diffused TK would be considering moral rights, historical facts, intentions, indigenous and customary laws, national laws, international laws, evidence of cultural harms that might come from the application of the tiered approach. There was no consensus on that, but there was consensus that it was an issue that should be considered and brought forward into the text. Some members were not supportive of the tiered approach, but they did say, should the IGC go for the tiered approach, it was something that they would consider. The group had looked at the TCEs text very briefly. Some were in favor of developing the kind of tiered approach in the TK text and applying it to the TCEs text, but others pointed out that in

their national context, they appreciated the TCEs approach because it was a lot more substantive. It gave more details of which national officers liked to see in implementing.

66. Mr. Paul Kuruk, the Facilitator and the Chair of the contact group on the scope of protection, said that the contact group had been tasked with considering the tiered approach with the aim of validating or refining the number of tiers, the criteria for each tier, and the level of protection for each tier. The group had engaged in a frank exchange of ideas with a view to understanding the subject matter and developing workable solutions. The group had focused on the provisions in the instruments that reflected the tiered approach. For that purpose, it had examined the provisions of the TK text. Although the TCEs text also provided for the tiered approach, the provisions in the TCEs text were not as clearly stated and structured as those in the TK text. The group, therefore, had used the TK text as its starting point for discussions with the understanding that it could refer to the TCEs text to the next discussions or separately after having developed, for further consideration, the working text on the tiered approach. The group had identified three tiers to be determined under national regulations based on the nature of the diffusion with reference to the beneficiaries, namely, (1) TK that was restricted and was not diffused or intended to be diffused, such as secret or sacred TK; (2) TK that was narrowly diffused; and (3) TK that was widely diffused. Thus, the group had referred to the terms “secret” or “sacred” only as examples of TK that was not diffused or intended to be diffused under a new classification scheme rather than as an independent classification scheme, as had been found in the text. For each tier, the group had identified appropriate methods of protection ranging from the maximum in tier one to the barest minimum in tier three. The maximum methods included, broadly, (1) to provide for exclusive rights to control, prevent access and use of TK and the right to receive fair and equitable sharing of benefits; and (2) the moral right of attribution and integrity of the TK, as it concerned the mid-range measures reserved for those types of TK that would be narrowly diffused. There were proposals to provide matters of protection including the right to fair and equitable sharing of benefits and also the moral rights of attribution for TK, but without rights to control and so on. The minimum measures of protection reserved for TK that was widely diffused was to call on Member States to use best endeavors to protect the integrity of the TK in consultation with beneficiaries. The group recognized that the provisions on the tiered approach raised important definitional issues, and there were proposals that such terms should be defined at the national level by Member States. That included terms such as “narrowly diffused”, “widely diffused”, “secret”, “sacred”, etc. There were so many different approaches to those questions that it was difficult to define them at the international level. A few members of the group had expressed concern about the inability to address the definitional issues at the international level. On a different note, the group had also recognized that a rigid classification scheme would lead to situations where the manner of classification would call for measures of protection that might be considered inadequate and would warrant higher degrees of protection. To address that concern, there was a developing consensus to insert a new paragraph (d) in the provision along the following lines: for TK that might be classified in tiers two or three, beneficiaries would be afforded the right to petition the relevant national authority to exercise rights of protection provided for in tier one, as appropriate, taking into account all moral rights, historical facts, intentions, indigenous customs and laws, cultural laws, national laws, international laws and evidence of cultural harms that would come from the application of the tiers. The recommended method would be to use moral rights to respond to widely diffused TK. Based on the presentation made in the Indigenous Panel and discussions within the group, it was recognized that there could be some types of TK that would originally be viewed as sacred, secret or restricted, but would have been taken through unauthorized means and would be subject to wide diffusion. In such cases, one would be classifying that as “widely diffused” and applying recommended measures, i.e. moral rights. However, that would not be an adequate solution. To come up with a flexible arrangement to accommodate all of those variances, the group had drafted paragraph (d). If TK that was widely diffused but was originally sacred, one could request that the TK be protected under the maximum protection in tier one.

Due to time constraints, the group had not been able to examine the provisions in the TCEs text that reflected the tiered approach, so that would have to be taken up at a later stage.

67. The Chair opened the floor to any member of the contact group who wished to make further comments.

68. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that it was not clear whether the intent was to keep the definitions of “sacred”, “secret”, “narrowly diffused” and “widely diffused” in the improved text on a tiered approach or to let go of them on the basis that many in the group had felt that that should be left to the national legislation and that it was not the intent of the instrument to cover those definitions.

69. Mr. Paul Kuruk, the Facilitator and the Chair of the contact group, said that the group had not discussed in detail how to approach those definitional questions, except to note that it should be referred to national legislation. In developing the text of international instruments, to the extent that a particular term was used in a provision, it often warranted a definition. The consensus emerging from the discussions was that one moved away from identifying sacred/ secret as an independent classification method and to refer to them as examples. It was to be explored further whether to delete the definitions in Article 1 pertaining to sacred, secret and widely diffused, and to leave that to national legislation. That would be part of a consensus, but there were members of the group that were not quite comfortable with the exercise.

70. The Chair said that the Facilitators could look at removing the definitions. Yet if one Member State required those definitions to be retained, they would be retained. The Chair opened the floor for comments.

71. The Delegation of Colombia reinforced one of the arguments raised in the contact group on the scope of protection. One of the reasons for determining that the scope of protection and the definitions should be a part of national legislation was that they were subjective considerations which had stopped the group from finding common elements among those definitions. Consequently, one could identify some common elements for the majority of Member States that there was limited access to certain forms of TK and more open access to other forms of TK. The definition of sacred/secret was dependent upon the communities and national legislation, and without going into the details of the definition, one could continue to work in the tiered approach. As to the proposed language, which was linking to the beneficiaries, the communities could demand moral rights in TK independently of the level of the tier. Some TK might be outside the maximum protection level, but communities might wish to recover and to retain the option of moral rights.

72. The Chair agreed that flexibility was quite common in IP instruments, with minimum/ maximum standards that enabled Member States flexibility and policy space at a national level. The biggest challenge was the significant divergence in relation to legislation, legal frameworks, and how indigenous peoples were dealt with in different nations. Policy space and flexibility were needed. The Chair ended the plenary discussion.

73. [Note from the Secretariat: This part of the session took place on the following day, December 12, 2018.] The 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 EU, on behalf of the EU and its Member States, to introduce its proposals from IGC 37 (documents WIPO/GRTKF/IC/37/10 and WIPO/GRTKF/IC/37/11).

74. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that it had re-submitted two proposals at IGC 37that had previously been circulated. It had not re-submitted those proposals for IGC 38 because it was sufficient that they had been issued for

IGC 37. Its proposal for a study relating to TK and a study relating to TCEs were aimed at the Secretariat to undertake studies of national experiences and domestic legislation in relation to the protection of TK and TCEs, respectively. To inform the discussions at the IGC, the studies should analyze domestic legislation and concrete examples of protectable subject matter and subject matter not intended to be protected and taking into account a variety of measures taken, some of which could be measure-based whereas others could be right-based. The two points that were highlighted were quite closely related to the discussions held in the *Ad Hoc* Expert Group and the contact group, i.e. subject matter and the tiered approach.

75. The Chair opened the floor for any comments on those proposals. There were none. He invited the proponents of documents WIPO/GRTKF/IC/38/10, WIPO/GRTKF/IC/38/11 and WIPO/GRTKF/IC/38/12 to introduce their proposals.

76. The Delegation of the USA introduced document WIPO/GRTKF/IC/38/10, entitled “Joint Recommendation on Genetic Resources and Associated Traditional Knowledge”, which was co-sponsored by the Delegations of Canada, Japan, Norway, the Republic of Korea and the USA. It emphasized that the document could be used as a confidence-building measure to help the IGC move forward on key issues concerning GRs and associated TK. The co-sponsors had re-tabled that document based on discussions in the past IGC sessions, when some delegations had expressed interests in that document and its objective, which included preventing the erroneous grant of patents. The recommendation could be negotiated, finalized and adopted without slowing down the work of the IGC. The proposal would promote the use of opposition systems to allow third parties to dispute the validity of a patent, the development and use of voluntary codes of conduct and the exchange of access to databases, among other things, in order to prevent the erroneous granting of patents for inventions based on GRs and associated TK. It wished to continue the discussion on that proposed joint recommendation because it captured key objectives and facilitated the establishment of effective mechanism for the protection of TK associated with GRs. It invited other delegations to express their support for that proposal and looked forward to continued discussions.

77. The Chair recalled that the submission had initially been put forward at IGC 20 in 2012.

78. The Delegation of Japan thanked the Delegation of the USA for the explanation. As a co-sponsor, it supported that proposal. The recommendation was a good basis for the discussion on the issues regarding IP and GRs, especially on preventing the erroneous granting of patents. It looked forward to the continued discussions on that recommendation.

79. The Delegation of the Republic of Korea, as a co-sponsor, supported the joint recommendation as introduced by the Delegation of the USA. The establishment and the use of the database to prevent the erroneous granting of patents and the use of opposition measures were an effective and efficient form of promoting protection of GRs and associated TK. It emphasized the importance of protecting TK and associated GRs with the prevention of the erroneous granting of patent. The most effective form of protection was the establishment and use of databases. The Korean Intellectual Property Office (KIPO) had established a TK and associated GR database. The database was presented online and was publicly accessible to patent examiners searching for prior art. The method was used effectively in the protection of TK and associated GRs. It was a very practical, feasible method for reducing the number of erroneously granted patents in each Member State.

80. The Delegation of the Russian Federation supported the joint recommendation, which was an excellent basis for the work of the IGC on that particular question. It could be adopted by the IGC as a set of guiding principles for the protection of TK.

81. The Delegation of Morocco, speaking on behalf of the African Group, thanked the co-sponsors for the proposal. It had always urged Member States to concentrate on substantive work and it reiterated that. At that stage, recommendations could only slow down the IGC's work and make it difficult to make further progress.

82. The Delegation of Japan, on behalf of the Delegations of Canada, Japan, the Republic of Korea and the USA, reintroduced the "Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources" (document WIPO/GRTKF/IC/38/11). Paragraph 18 laid out several key issues, including the contents to be stored in databases and the allowable format for the content. Those were important aspects in terms of understanding the function and benefit of the databases. Paragraph 19 referred to the necessity of the WIPO Secretariat conducting feasibility studies. Particularly, a prototype of the proposed WIPO portal site would greatly help see all aspects of that database and define future steps. Most 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, the Delegation 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.

83. The Delegation of Egypt said that after 19 years, the IGC did not need any new documents. Time was running out, so efforts should concentrate on approving the draft articles on TK and TCEs. The IGC was facing a deadline: there was only IGC 39 and 40 left to achieve any progress on the instruments.

84. The Delegation of the USA supported the comments made by the Delegation of Japan regarding document WIPO/GRTKF/IC/38/11. As a co-sponsor, it saw that proposal as a valuable contribution to the work of the IGC that aimed to provide an international legal instrument(s) for the effective protection of TK. In particular, the proposal helped to address 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. Through the IGC's work, one had learned that there were a variety of approaches to databases at the national level. Having a centralized database could simplify search procedures to make it easier to conduct more systematic searches to cover the content of several databases. If a database was made available to patent examiners and the public, it should only contain information that was eligible to prior art. The examiners searched a wide variety of databases from around the world, including the following: the Korean TK portal, the Indian TKDL and other databases, the South African traditional medicines database, the University of Melbourne multi-lingual multiscript plant names database and the US Department of Agriculture plants database. It looked forward to discussing the WIPO portal proposal. It invited other delegations to express their support for the proposal and welcomed any suggestions for improvement that other Member States might have.

85. The Delegation of the Republic of Korea, as a co-sponsor, supported the document introduced by the Delegation of Japan. Databases were a very practical and feasible method for reducing the number of erroneously granted patents in each Member State. The development of the integrated one-click database system effectively and efficiently enhanced the protection of GRs and associated TK.

86. The Delegation of the Russian Federation said that it was not a co-sponsor but it offered its support to the use of databases for the defensive protection of GRs and associated TK. The proposal was appropriate because it advocated the setting up of a comprehensive system of databases through the WIPO portal. That would make it possible for experts to do more effective prior art searches and to seek material relating to GRs and associated TK, which was not protected by secrecy, and it would make it possible to avoid the problem of erroneously granted patents. That would help the IGC achieve its goals.

87. The Delegation of India recalled that the TKDL was a very comprehensive database that had been very successfully used to prevent the erroneous grant of patents. It welcomed that proposal. However, those databases should be available only to patent examiners in IP offices. It supported database, with the condition that efforts should go in parallel and not affect the negotiation of an instrument(s) on TK and TCEs.

88. The representative of the Tulalip Tribes concurred with the Delegation of Egypt that a study was not necessary, certainly not in its current form. He said that any study should look into all forms of protection, including positive protection, not just defensive protection. Databases could be evidence of a positive property right as opposed to defensive protection only, and it should be balanced. All the aspects of databases should be discussed: costs and benefits, risks and opportunities. There was no such thing in that proposal. He said that IPLCs, as TK holders, should be involved in the study to take account of their opinions, views and rights. Those kinds of defensive databases could only protect against one kind of harm and, if one made databases publicly available, they would likely lead to other harms that were not IP harm, such as over-exploitation. The cure could not be worse than the disease.

89. The Delegation of Nigeria aligned itself with the statements made by the representative of the Tulalip Tribes and the Delegation of Egypt. It agreed in principle that databases were important, but it was not inclined to elevate them to the real subject of negotiations. Databases were good as complementary, supplementary but could not substitute the core issues such as the question of mandatory disclosure. They were part of a measures-based approach while the negotiations were rights-based. The IGC had gone back in time with regard to those subject matters. Bringing them back on the table, enabling them to occupy the IGC's precious space in the limited time available, did not point to the expedited negotiations that the IGC was called to do.

90. 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" (document WIPO/GRTKF/IC/38/12). It co-sponsored that proposal with the Delegations of Japan, Norway, the Republic of Korea, the Russian Federation and the USA. Up-to-date information on the issues outlined in the proposal would help inform and advance the work of the IGC in respect of both GR and TK instruments. The proposed study would provide up-to-date information on existing national laws, as well as concrete information on practices and experiences. That would be consistent with and support the IGC's mandate, which called for an evidence-based approach and reaching a common understanding on core issues. That study would provide highly valuable information, of benefit not only to the IGC, but also more generally, for example by providing a useful reference for Member States considering the introduction of a disclosure system. It welcomed the Secretariat's continued work in compiling and making available information on existing disclosure laws and measures, such as the 2004 "Technical Study on Disclosure Requirements in Patent Systems 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 administrative and judicial bodies, what the impacts were, and how those laws and measures were perceived by IPLCs, by the user community (including academia and industry), and by the public in general. Overall, the IGC would benefit from detailed information on concrete Member States' practice in that regard on GRs and TK as well as TCEs, and could draw on those studies to identify the most appropriate way forward. It welcomed a further discussion of that proposal, whether formally in plenary or informally. That proposal was complemented by other proposals for studies on TK and TCEs. Such studies, which could be undertaken in parallel to the IGC meetings, informed and enriched the text-based work and enhanced efforts to reach a common understanding on core issues, which were the foundation to and a prerequisite to reaching a consensus on any instrument regarding GRs, TK and TCEs. It invited other Member States to seriously consider the merits and value of the proposed studies and to be open to contributing to and supporting such proposals.

91. The Delegation of Japan thanked the Delegation of Canada for the explanation. As a co-sponsor, it supported the proposal. The importance of an evidence-based approach had been recognized by many Member States. The proposed study was an effective and productive way to foster a common understanding on core issues on GRs and/or TK without delaying the text-based negotiations.

92. The Delegation of the USA supported the proposal made by the Delegation of Canada and the comments made by the Delegation of Japan. It recalled the 2018/2019 mandate of the IGC and its reference to studies. In past sessions, the IGC had had constructive discussions about national laws and how disclosure requirements and ABS systems functioned. Those discussions had helped to inform the text-based negotiations. Questions in that study explored issues such as the impact that national disclosure requirements had had in securing compliance with ABS systems and the penalties associated with non-compliance. The study was intended to generate important information to support the IGC's work. It was not intended to slow down its work. It invited other delegations to express their support for the proposal and welcomed any improvements for that proposed study that other Member States might have.

93. The Delegation of the Republic of Korea thanked the Delegation of Canada for introducing the proposal. As a co-sponsor, it supported the proposed study, which would provide fact and evidence-based information on current national experiences. Through the study, Member States could hear diverse opinions or experiences, not only from GR providers, but also from patent examiners and patent users that would be directly influenced by the introduction of a disclosure requirement. That study would help reflect abuses from various stakeholders in a balanced manner, contribute to assessing the possible impact of a disclosure requirement in the patent system and better understand core issues in the IGC.

94. The Delegation of the Russian Federation, as a co-sponsor, supported the proposal. It supported what had been expressed earlier, namely that there was indeed a danger of losing sight of the source with regard to patents and one had to look at that issue in greater depth. In particular, in terms of defining mechanisms for disclosure, a study of that type could be conducted in parallel with the work of the IGC and would not take time away from the discussion of the IGC documents. The questions, as formulated and set forth in that document, would be addressed to patent offices involved in carrying out disclosure procedures and the answers to those questions would be very useful to other departments and patent offices.

95. The Delegation of Morocco, speaking on behalf of the African Group, thanked the co-sponsors for that proposal. It recalled that any proposal at that stage could only take the IGC away from its objective and only add to the amount of work to be done. The IGC had to make best use of the time that remained and focus on the texts under discussion.

96. The Delegation of Egypt thanked all of the delegations involved in presenting the recommendations and proposals. It had every respect for them. However, the IGC did not have enough time to study and discuss all of those proposals, which might contained interesting ideas. However, the most important thing was to focus on the two basic documents that contained the draft articles. That was the way the IGC needed to work in order to reach its objective.

97. The Delegation of the Czech Republic supported the proposal. It was very important to answer the questions listed therein. It was convinced that the Secretariat had the capacity to do so. Member States did not have the capacity to answer all those questions. The IGC was not working in a vacuum but within a robust existing IP protection system, including the patent system, and the Nagoya Protocol, and Member States should reflect all those existing systems in the IGC's work. The IGC needed to answer those questions. It did not understand the rigidity of some Member States to block that work. The Nagoya Protocol should be reflected in the IGC's work because it had been ratified by many WIPO Member States.

98. The Delegation of India said that the WIPO Secretariat had done extremely well-informed work and had come up with several studies on GRs, TK and TCEs. Taking on an additional study, linked to the IGC, was not welcomed. However, it supported that the WIPO Secretariat take up that study separately, not linked to the IGC.

99. The Delegation of South Africa aligned itself with the statements made by the Delegation of Egypt and the Delegation of Morocco, on behalf of the African Group. It reminded the co-sponsors that the rationale for the formation of the IGC was meant to be a non-patent exercise. The co-sponsors should table those documents at the Standing Committee on the Law of Patents.

100. The Delegation of the USA introduced a "Proposal for a Study by the WIPO Secretariat on Existing *Sui Generis* Systems for the Protection of Traditional Knowledge in WIPO Member States" (document WIPO/GRTKF/IC/38/13). After it had introduced that document at IGC 37, a number of Member States had expressed their interest in the study. In order to improve that proposal and to be responsive to suggestions made at IGC 37, it had revised the title to better reflect the objectives of the proposed study. The document was intended to provide a valuable contribution to the IGC's work. The IGC's mandated work included conducting and updating studies that included domestic legislation. The tasks facing the IGC involved balancing a complex set of issues that included responding to the concerns of IPLCs over the unauthorized use of TK, especially in the commercial context, allowing active use of the TK by the originating community itself and safeguarding the interests of other stakeholders such as the private sector, museum, archives and libraries. Over the past 20 years, a number of WIPO Member States had introduced in their national laws provisions to protect TK. The IGC would benefit from a better understanding of the scope, the nature and effectiveness of the implementation of the laws and 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 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, examples of how such laws and regulations had been applied, whether the law would apply to subject matter used by the public and any exceptions and limitations that might apply. The study was different from other studies and indeed was a next step to build on existing studies. That new study proposal was to look beyond the language of the laws and agreements covered in existing studies and other reference materials and to look at how the laws and agreements worked in practice, how they were implemented and how they affected those involved. The proposed study would not delay progress in the negotiations, rather the proposal reflected a good faith effort to gather more specific, relevant information than envisioned under previous studies and to capture updates from those Member States that had

recently passed new TK laws. The IGC was not there to write an aspirational statement, but to develop an instrument that worked in practice with clear parameters that could be implemented domestically and used by IPLCs, governments and the public. The study was intended to generate important information to inform the IGC and support its mandated work. It invited the IGC's support for that proposal. The Delegation further clarified that it was a set of questions for Member States. The resulting document would be a compilation of answers.

101. The Delegation of Japan thanked the Delegation of the USA for explaining the new proposal. The IGC had to follow the evidence-based approach, as stipulated in paragraph (c) of the 2018/2019 mandate, in particular, paragraph (d) of that 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 states' domestic laws. Taking that into account, the Delegation of Japan, as a co-sponsor of that proposal, 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 that document. Compiling the responses obtained by conducting that study would undoubtedly lead to effective discussions in the IGC.

102. The Delegation of South Africa found the underpinning of the proposal very confusing. In the past two years, it had participated in a similar exercise in terms of studies or questionnaires. The Delegations of the USA and Japan could make those findings available.

103. The Delegation of the Russian Federation supported the proposal. Questions would be sent out to members regarding their national experiences and that the received responses would be compiled and made available in a document or on a website. New and developing legislation in different areas would show how the situation was evolving. It was willing to participate.

104. The Delegation of Nigeria agreed with previous interventions by the Delegation of Morocco, on behalf of the African Group, and the Delegations of South Africa and Egypt. It called attention to all the submissions, particularly the last one, which made reference to the studies on national laws. There had been a lot of studies and national laws since the IGC had started its text-based negotiations in 2009. States had moved forward and therefore the IGC could not be trailing behind. With regard to the intervention by the Delegation of the Czech Republic, it needed to be clear as to who was seeking to derail or delay the expedited negotiations, as called for in the mandate. It was a mirage of moving forward two steps and then moving backward ten steps, with all the studies coming over and over. The IGC could not over-study that situation, even if agreed on one day, more would still be happening as the treaties would be signed. Even in the documents presented, several states had moved forward and there was no lack of studies on national laws. The IGC was supposed to lead and not to trail behind.

105. The Delegation of the Czech Republic supported the proposal made by the Delegations of the USA and Japan. It recommended including a study of the regional system of the Swakopmund Protocol, which had entered into force three years before. The experience with that protocol could be included in the study as well as other regional *sui generis* systems.

106. The Delegation of Egypt endorsed the statement made by the Delegation of Nigeria and reiterated its position expressed in its previous statements. It did not think that any new studies were required, mainly because they would not help the IGC make headway. They might rather cause a delay in the work program given by the GA.

107. The Delegation of the Republic of Korea supported the proposal made by the Delegations of the USA and Japan. The proposal would provide useful, updated information on the current

status of national laws and help Member States have a discussion on TK in a fact and evidence-based approach.

108. The Delegation of India said that any study was always good. However, it objected to linking studies with the functioning of the IGC. If the WIPO Secretariat wanted to take up the studies separately and distribute the findings to Member States, that would a different kind of technical assistance. If the studies were linked to the IGC functioning, it supported the observations by the Delegations of South Africa and Nigeria.

109. The Delegation of the USA introduced document WIPO/GRTKF/IC/38/14 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 based on discussions in past IGC sessions when some delegations had expressed interest in that document and its objective, which included informing the IGC on what TK should be protected and what was not intended to be protected. It had first introduced that document at IGC 32. Prior to IGC 38, it had revised the document and added another example of TK: a popular traditional sweet snack made from grapefruits and walnuts originating in Georgia hundreds of years before. The document could help Member States reach a common understanding of 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. It looked forward to continued discussions on that paper.

110. The Delegation of Japan expressed its appreciation to the Delegation of the USA for providing document WIPO/GRTKF/IC/38/14. There were lots of things to be considered before initiating the discussions of the 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 of the discussions. It picked up one example from the document: 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 State responded "yes", it would ask additional questions, such as "why?"; "what were the criteria for protecting tea as TK?"; "who should own the rights to tea?"; "who were the beneficiaries?"; and "what was the exact scope of protection for tea?" Before any of those questions were answered, specific criteria needed to be determined and a universal understanding about the subject matter "tea" needed to be reached.

111. The Delegation of the USA introduced document WIPO/GRTKF/IC/38/15 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 consideration of national experiences with IP and GRs. That document had first been introduced at IGC 36, following the release of the Report on the Economic Impact of Disclosure Requirements and Patent Applications for GRs-Based Innovation, commissioned by IFPMA and CropLife International at a side-event during IGC 36. The Delegation had updated the document to incorporate findings of the report. The document analyzed the impact that disclosure requirements would have on research and development (R&D) in the field of biotechnology and pharmaceuticals due to the uncertainties they would introduce into the patent system. It was based on recent peer-reviewed economic studies. The document considered the effect of patent review delays on business growth, including employment and sales growth for startups. Among its findings were that each year of patent review delay would reduce employment growth for a startup by an average of 19.3% and sales growth by an average of 38.4% over five years, following the first action decision on the patent application. The legal uncertainty arising from disclosure requirements might encourage companies to forego patent protection in favor of weaker, non-disclosed forms of protection such as trade secrets. 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 the firms' overall market competitiveness, including negative effects on licensing, R&D, investment and litigation. The Delegation had significant economic-based concerns about proposals for new disclosure requirements under consideration by the IGC. It urged Member States to exercise caution when exploring those proposals. It invited the IGC to give careful consideration to the revised table.

112. The Delegation of Nigeria asked the Secretariat to consider whether it was not necessary to buy into the documents that were taking the IGC away from the mandate, but to look at cultural aspects or implications for IPLCs of non-disclosure and lack of FPIC over the uses of GRs. It was time to begin to think about a study in that direction as well.

113. The Delegation of Japan expressed its appreciation to the Delegation of the USA for providing document WIPO/GRTKF/IC/38/15. As indicated in the document, including the mandatory disclosure requirement would result in delaying the patent-granting process and create uncertainty for patent applicants. In addition, the mandatory disclosure requirement might hinder the healthy growth of industries utilizing GRs in emerging and developing countries, both at present and in the future. It shared a common, grave concern about the mandatory disclosure requirement, as stated at IGC 37. The analysis based on the objective data shown in that document was highly useful to advance the work of the IGC, using an evidence-based approach. For example, taking into account the fact that the terms of patent rights were limited (20 years from the filing date), both panel A and B shown in Figure 4 in the document were very persuasive. In addition, the document shed light on the effect of the disclosure requirement for start-up companies. Since supporting start-up companies was critical for emerging, developing and developed countries, it also offered all Member States valuable insight for those highly important aspects. It remained committed to contributing to constructive discussions in the IGC, in an evidence-based manner, based upon the valuable lessons obtained from the detailed analysis shown in the document.

114. The Delegation of the Republic of Korea supported document WIPO/GRTKF/IC/38/15 as introduced by the Delegation of the USA. It shared the concern that the new mandatory disclosure requirement could cause delays in the patent examination process and put a burden on inventors or applicants, eventually hindering the development of GRs-related inventions. In 2017, it had held a meeting with GRs users and other stakeholders and had heard their opinions on the possible impacts of introducing mandatory disclosure requirements in the patent system. The participants had expressed their concerns that the patent filing date could be significantly delayed when they attempted to meet the disclosure requirements for each GR used in an invention. From that study, if a disclosure requirement was introduced, additional search and review time could be required to examine patents and could lead to delays. It stood ready to constructively discuss that document in the following sessions.

115. The Delegation of Egypt said that the contents of that document were not new. They reflected the official position of one side. It believed that disclosure requirement had to be mandatory, otherwise it would be useless.

116. The Delegation of India said that the IGC was debating mandatory disclosure for GRs and TK. It was one of the basic principles that there should be mandatory disclosure, if states wanted to support IPLCs. Even from the R&D perspective, it was a highly misplaced notion that mandatory disclosure delayed the process. People knew that they had to disclose. It wondered why one should wait until filing a patent, knowing fully that disclosure was one of the requirements.

117. The representative of Tupaj Amaru supported the statement by the Delegation of Egypt, as echoed by other African countries. The proposals were not new, and they were a way to

distort the discussion and of moving it towards a discussion of far more abstract and irrelevant issues, a discussion which the IGC would be able to conclude not that day or the following year. The mandate of the IGC was to discuss the three drafts, which had been watered down and undermined by a lack of political will.

118. The Chair closed the discussion on those working documents. He left it for Member States to consider whether or not they wished to support any of the proposals.

119. [Note from the Secretariat: This part of the session took place after the distribution of Rev. 1s dated December 12, 2018 prepared by the Facilitators.] 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. The Facilitators had put some ideas forward, which needed a Member State's support to stay in the text. If Member States had questions, it was best to talk to the Facilitators directly.

120. Mr. Paul Kuruk, speaking on behalf of the Facilitators, said that the Facilitators had been called upon to review the provisions regarding subject matter and scope of protection in the draft texts on TK and TCEs and to propose texts for the IGC's consideration that were concise, narrowed gaps, eliminated repetition and redundancies, and preserved the integrity of the proposals of Member States. In line with that mandate, the Facilitators had proposed a set of several provisions in Articles 1, 3 and 5 in the TK text. With regards to the TCEs text, the proposals concerned Articles 1 and 3, but not Article 5. The revisions took into account the reports of the two contact groups as well as interventions made in plenary the day before. The Facilitators had cleaned up the definitions of TK/TCEs and "secret" TK. They had added provisions on the subject matter of TK and TCEs, which identified various criteria in a list form that was easier to read. Finally, they had revised provisions on the tiered approach in the TK text on TK but not in the TCEs text to provide greater clarity regarding the types of tiers and to incorporate a flexible approach to implementation of protective measures within that classification system. The Facilitators had captured the three tiers to be determined under national regulation based on the nature of diffusion with reference to the beneficiaries, namely TK that was restricted and was not diffused or intended to be diffused, such as secret or sacred TK for the first tier; TK that was narrowly diffused for the second tier; and TK that was widely diffused for the third tier. In that context, they had referred to the terms "secret" and "sacred" as examples of TK that was not diffused or intended to be diffused under the new classification scheme of the tiered approach, rather than as a distinct category or tier as in the previous text. For each tier, they had described appropriate methods of protection, ranging from the maximum in tier one to the barest minimum in tier three. The maximum included the exclusive right to control and use and to prevent access and use of TK, the right to receive a fair, equitable sharing of benefits and the moral rights of attribution and respect for integrity of TK. The mid-range measures for TK that would be narrowly diffused included the right to receive a fair, equitable sharing of benefits as well as the moral rights of attribution and respect for integrity of TK. As to minimum measures of protection reserved for widely diffused TK, those called for Member States to use best endeavors to protect the integrity of TK in consultation with beneficiaries. The flexible mechanism recommended by the contact group was reflected in a new paragraph (d) in ALT 2 of Article 5. In Article 5, they had inserted the word "protect" after "safeguard" in the first sentence of ALT 2 to conform with a comparable provision in the draft text on TCEs and to better align with the title of Article 5 which referenced protection. They had described the three tiers in the differentiated approach and corresponding methods of protection as follows: "Member States [should/shall] safeguard/protect the economic and moral interests of the beneficiaries concerning traditional knowledge as defined in this instrument, as appropriate and in accordance with national law, in a reasonable and balanced manner, and in a manner consistent with Article 14, in particular." He noted that the reference to national law was crucial and would inform the decision to allow Member States to define some of the issues, and to provide the criteria in terms of the tiered approach. Paragraph (a) stated: "(a) Where

access to traditional knowledge is restricted, including where the traditional knowledge is secret or sacred, Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring that: (i) Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional knowledge; and receive a fair and equitable share of benefits arising from its use; (ii) Beneficiaries have the moral right of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge." Paragraph (b) read: "(b) Where the traditional knowledge is narrowly diffused, Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring that: (i) Beneficiaries receive a fair and equitable share of benefits arising from its use; and (ii) Beneficiaries have the moral right of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge." Paragraph (c) read: "(c) Where the traditional knowledge is widely diffused, Member States [should/shall] use best endeavors to protect the integrity of traditional knowledge, in consultation with beneficiaries where applicable.]" Paragraph (d) was new and read: "(d) For traditional knowledge that may be classified as narrowly diffused or widely diffused, indigenous [peoples] and local communities may request the relevant authorities for protection as reflected in paragraph (a), as appropriate, taking into account all moral rights, historical facts, intentions, indigenous and customary laws, national and international laws, and evidence of cultural harms that would come from the application of the classification schemes in paragraphs (b) and (c)." In light of the fact that classification under the tiered approach would be made with reference to the manner of diffusion or intended diffusion of TK rather than the nature of the TK, the terms "secret" and "sacred" would no longer be used to describe the category of TK in the first tier, but would rather be referred to as examples of TK, the access to which could be restricted. To that extent, those terms no longer formed part of the substantive provision in the TK text. As a result, the Facilitators had given careful consideration to deleting the terms altogether from Article 1. Out of an abundance of caution, they had resolved to retain the definitions for further consideration. However, they had cleaned up the definition of secret TK spread out in several provisions, which contained duplicates and redundancies. Their objective was to arrive at a definition of secret TK that complemented the classification scheme underlying the tiered approach. Accordingly, they had deleted the previous definitions of secret TK in ALTs 1, 2 and 4, and previous ALT 3 had been retained as the sole definition of secret TK. No changes had been made to related term "sacred" TK.

121. Ms. Lilyclaire Bellamy, speaking on behalf of the Facilitators, referred to the report of the contact group regarding Article 3. The contact group had looked at the necessity of having a definition within the text. There was no agreement thereon. The individual elements of the definitions in the text were tested for usefulness in a definition. The contact group looking at the subject matter had sought to identify what was absolutely necessary or what gave a certain degree of clarity. The agreement reached was to align the definitions of TK and TCEs, which were quite similar in Rev. 1. In the discussion in the contact group, there was no agreement on whether it should be a definition of subject matter or if it should be included in the text of eligibility criteria. They had reflected what the contact group had discussed, but on the matter of "collectively", the contact group had looked at "collectively" and the term was reinserted to mirror the definitions in the TCEs text. However, some members of the contact group had observed that not all knowledge was created collectively, neither was it always maintained or developed collectively, so it was retained but in square brackets. The issue was whether the collective context applied to the creation, development and maintenance. Moreover, the term needed to be explained and the aspects should have been maintained even though some in the contact group felt that it was at any time applicable in all contexts and that it might be contrary to the concepts of TK and TCEs as "dynamic and evolving". The Facilitators had made a few changes to the work done by the contact group. The word "collectively" was no longer in paragraph (a) The TK text read: "This instrument applies to traditional knowledge that: (a) is created, maintained, and developed by the beneficiaries as defined in Article 4, and[/or] is linked with, or

is an integral part of, the national or social identity and/or cultural heritage of indigenous [peoples] and local communities." They had removed the word "collectively" from paragraph (a) and put it in paragraph (b). They had retained the collective transmission, but had not kept it in the development part because while they recognized that transmission might be collective, the creation, maintenance, and development of TK could be done on an individual basis. For example, transmission might occur through the medium of a dream or a vision, and that might come to an individual, and that individual could then transmit it or share the information with a number of persons. They recognized collective transmission. Yet in terms of receiving the knowledge and information, sometimes that was done on an individual, and not a collective basis, even though there were instances where one person had a dream or a vision and another had that same dream or vision, there was confirmation of the vision or the dream. Paragraph (c) was in square brackets. Paragraph (c) and a portion of paragraph (d) could be deleted because the concepts that were reflected therein were captured in the first two points. They suggested deleting paragraph (c) "subsists in codified, oral, or other forms". In paragraph (d), they would retain "may be dynamic and evolving", but they were recommending deleting "[, and may take the form of know-how, skills, innovations, practices, teachings or learnings]". Paragraph (e) read: "(e) has been used for a [reasonable] term as has been determined by each Member State, but not less than 50 years.]]". There was some discussion reflecting on the fact that TK and TCEs were dynamic and evolving so to put a time limit negated that. She gave the example of someone getting a dream, a vision, which would then become part of the collective knowledge of the group, but as it was something recent, it would not fall within the temporal criterion if it was less than 50 years. A reasonable time could be determined at the national level. In the TCEs text, the discussion as presented under TK would also be applicable. In Article 3 in the TCEs text, the same recommendation went for the deletion of the language in square brackets. There were no major substantive changes.

122. The Chair said it was a challenging task for the Facilitators to take onboard all of the different views and try to represent each Member State's view. The Facilitators had a license to, in the first instance, put forward some recommendation and ideas, and maybe not all of the verbatim comments from Member States were included. He emphasized that Rev. 1s were revisions and had no status. The plenary was the decision-making body. He opened the floor for comments.

123. The Delegation of Trinidad and Tobago requested clarification from the Facilitators of a proposed amendment regarding Article 1 in the TCEs text. In ALT 1, the footnotes had been deleted, however, in ALT 2, the footnotes had been kept. It requested an explanation or rationale regarding that.

124. Ms. Lilyclaire Bellamy, speaking on behalf of the Facilitators, said that in the TCEs text, Articles 1 and 2 were trying to capture the essence of what a TCE was and rather than a full definition of every single form of TCE at the risk of leaving out something, it was a wholesome way of looking at it. The notes of the instrument would articulate the content of the footnotes.

125. [Note from the Secretariat: All speakers thanked the Facilitators and the members of the contact group for their work.] The Delegation of Switzerland asked for clarification. In Article 5(d) of the TK text, there was a reference to the "relevant authorities for protection as reflected in paragraph (a)." It was not clear to which authorities in paragraph (a) that referred to.

126. Mr. Paul Kuruk, speaking on behalf of the Facilitators, said that the reference to authorities should be read in conjunction with the method of protection available under the first tier as provided in paragraph (a)(i). Paragraph (c) noted that the relevant method of protection would be the use of best endeavors. The understanding was that a very rigid application of that scheme would lead to unintended results and place undue burden on stakeholders including IPLCs. It was therefore necessary to provide for a flexible mechanism that would require first a

request to be made by the relevant stakeholders to the relevant national authorities. In resolving that question, they had taken into account different terms, including governments and national competent authorities. They had had extensive debates. Given the wide variety in practice by different governments, it did not make sense to be focused on national competent authorities, agencies, etc. They had settled for the relevant national authorities. If that particular provision was subsequently adopted as a text of an instrument, it would require the relevant applicants to work with the available national institutions, however they were referred to. The relevant authorities were the forums to which one addressed a petition for the stronger protection available under paragraph (a). It was up to Member States to identify and provide a name for relevant national authorities.

127. The Chair said that the question might relate to Article 8 and the reference to competent authorities.

128. The Delegation of Ghana said “ethnic” had been proposed to be added to the TCEs text, yet it was not reflected in the document. It wanted to know why. Also, there was a disparity in the definitions of TK and TCEs, one used “and” to connect “created, maintained, developed etc.”, while the other used “or”. The use of “and” or “or” had different connotations and different effects and it sought clarification on the difference.

129. The Chair suggested Member States should speak directly to the Facilitators on specific interventions.

130. [Note from the Secretariat: This part of the session took place after a short break when delegations reviewed Rev. 1s.] The Chair announced that the he would take general comments from regional groups and others, followed by Member States providing specific comments on the material presented, starting with subject matter and then scope of protection. He said those who had concerns around omissions or errors had engaged with the Facilitators during the break. That was the most efficient way. He opened the floor.

131. [Note from the Secretariat: All speakers thanked the Facilitators and the members of the contact group for their work.] The Delegation of Indonesia, speaking on behalf of the APG, considered the Rev. 1 documents, both the TK and the TCEs texts, as a work in progress. It reaffirmed its commitment to continue its discussion, either in the informals or plenary. With regard to the scope of protection in the TK text, it appreciated the idea behind the introduction of new paragraph (d), and, without prejudging its position, it agreed with the comments made during plenary along the lines that there should be language clarification to avoid confusion.

132. The representative of the Tulalip Tribes, speaking on behalf of the Indigenous Caucus, said that the text on the scope of protection was something he would continue working with, although there were a few changes he wanted to see. In general, it was a way forward if one was to adopt the tiered approach. The concepts embodied in paragraph (d) were necessary in order to make the tiered approach go forward. He hoped to find a large degree of support in at least looking at ideas and using it as a working basis.

133. The Delegation of Lithuania appreciated that Article 3 contained some more explicit language on eligibility, but it still duplicated the definition. It asked to refine the definition of TK to make it more general and without a reference to beneficiaries, because there was no agreement on beneficiaries, so it was difficult to chart the content of the definition and subject matter. As regards Article 5, it did not agree with the language of new paragraph (d) in ATL 2, so it had a strong preference for ALT 1 as the most relevant basis for further work.

134. The Delegation of Morocco, speaking on behalf of the African Group, said that Rev. 1s could be a basis for future discussions, as the IGC was an evolving process. It had a number of concerns and would make comments in the plenary and informals.

135. The Delegation of El Salvador, speaking on behalf of GRULAC, said that with regard to the TCEs text, the footnotes in ALT 1 of Article 1 needed to be kept in.

136. The Delegation of Indonesia, speaking on behalf of the LMCs, said that it took Rev. 1s as a work in progress and reaffirmed its commitment to continue the work. The changes reflected in Rev. 1 documents indicated progress in positive directions. Even though it had concerns that needed further clarification and discussion, it looked forward to the discussions in both the plenary and informals. With regard to the definitions of TK and TCEs, in general it welcomed the idea of making the language parallel between TK and TCEs, even though it had some concerns with regard to the details, but it looked forward to discussing that later on. In the TCEs text, it preferred ALT 1. With regard to Article 3, since essentially the new alternative was just copy-paste the definition, it preferred ALT 1, but it was open to further discussion. On Article 5 of the TK text, it welcomed the idea that had been introduced. It saw a lot of opportunities to go deeper in informals or in plenary to find a common landing zone that would be acceptable to all.

137. The Delegation of the EU, speaking on behalf of the EU and its Member States, said there had been some progress in terms of aligning the two texts. In both work strands, the methodology was to focus first on the TK text and then try to transfer improvements to align the two texts. It found that positive. On Article 3, it expressed its appreciation for retaining that article and retaining the eligibility criteria set out in a separate article, which was very important. Concerning the list, it was very appreciative of paragraph (b) which was an important element: “transmitted in a collective context”. It understood the distinction between paragraphs (a) and (b), and it appreciated that element. It was also grateful that previous paragraph (b) had been retained as paragraph (e), i.e. the temporary element. Its understanding was that it would be further developed to provide additional clarity to what was considered “traditional” in a particular moment, and to clarify the relationship with the current IP framework. Regarding the new formulation of “as defined in Article 4”, the issue was that Article 4 contained several alternatives. As to paragraph (a) in the definition, it had a preference for the previous language which made more concrete reference to beneficiaries, as it was supportive of specifying them. It understood that the IGC could continue the work on clarifying the subject matter. It could see the possibility of removing elements in brackets in paragraph (c) and descriptive elements in the second half of paragraph (d) as proposed by the Facilitators. It was open to further exploring those possible modifications.

138. The Chair opened the floor to all Member States on the subject matter.

139. The Delegation of the USA said that, regarding the TK text, in Article 3 of Rev. 1, the old ALT 2 had been deleted and replaced with the new ALT 2, and it asked to restore the old ALT 2. It made suggestions to improve the text of paragraph (b) of the previous ALT 2, and proposed to replace paragraph (b) with the following text: “created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation for a term as has been determined by each Member State, but not less than for 50 years or a period of five generations.” With respect to the new alternative proposed by the Facilitators, it appreciated the work done, and in paragraph (e), it wanted to add “or a period of five generations” after “50 years” to improve the text of that alternative. The main body of that alternative text was taken verbatim from the TK definition. It was not clear what would happen with that alternative versus the definition of TK, so in the meantime it wanted to keep the previous alternative with the improvement suggested and make that possibly ALT 3 and see how the text would evolve. On Article 1, it related to the definition of TK. The phrase “for the purposes of that instrument” had been deleted from the definition of TK. It asked to restore that text. It was important to make

that consistent with other definitions such as “public domain” that was only for the purposes of the instrument. It wished to keep the deleted text “indigenous peoples, local communities”, and to bracket “the beneficiaries as defined in Article 4.” One should avoid referring to other articles in the definition of terms that made the definition itself circular. It would make additional comments on Article 5 later. Regarding the TCE text, the Delegation wished to insert the phrase “for the purposes of this instrument” in Article 1, ALT 1. With respect to beneficiaries as defined in Article 4, in order to avoid circularity, it said the operative provision usually referred to the definitions and not vice versa. ALT 2 was its preferred language and it would address its rationale more elaborately in informals. With respect to Article 3, to align the options for substantive discussion, it had a preference for restoring ALT 2 as modified with the additional language just mentioned with reference to TK. It appreciated the newly reflected provision and looked forward to the discussion. With respect to subparagraph (e), it wanted to add the phrase “or for a period of five generations” after “50 years”. It looked forward to a substantive discussion on all of those elements in informals.

140. The Delegation of Japan, concerning the process of the IGC meeting, acknowledged that the contact groups were one way to share opinions among a small group of Member States. It emphasized the importance of inclusiveness of all Member States in the discussion. Regarding Article 1 of the draft TK text, the alternative of “secret TK” had been reduced only to former ALT 3 in Rev. 1. The former ALT 3 defined “secret TK” as one which was regarded as sacred by applicable IPLCs in accordance with their customary laws, protocols, practices, under the understanding that the use or application of the TK was constrained within a framework of secrecy. Such a definition was very subjective, and it was difficult for third parties to objectively grasp the scope of secret TK. Therefore, it proposed keeping the former ALT 2 or ALT 4 of secret TK.

141. The Delegation of India said the discussions were moving towards a certain degree of convergence. For example, the definition of TK had been very meticulously worded: TK was knowledge that was created, maintained, and developed by beneficiaries as defined in Article 4. The text included states or nations as beneficiaries, which was essential and very pertinent in the Indian context. There should not be reference to other articles. It proposed that the text should read: IPLCs and/or nations or states. There was a need to reduce redundancies, as had been done under the scope of protection. Its preference was to have a very nice definition of TK in Article 1, which described all of the criteria in combination with ALT 1 of Article 3, which was simple and straightforward.

142. The Delegation of the Islamic Republic of Iran said, regarding the TK text and the definition of TK, that the proposed new language to use the word “beneficiaries” instead of IPLCs was more appropriate because the beneficiaries were not necessarily restricted to IPLCs. It welcomed the proposed language. With regard to the subject matter of the instrument, as mentioned by the Delegation of India, ALT 1 was the most appropriate. It had some concerns with the language of new ALT 2 which raised so many questions, in particular with regard to the temporal framework in paragraph (e). One had to avoid redundancies between the definition of TK and the article on subject matter. It was not difficult to merge those issues. With regard to the TCEs text and the proposed definition for TCEs, it supported ALT 1. It had the same concerns with regard to the newly developed language in ALT 2. It could address those questions in informals.

143. The Delegation of Nigeria supported the remarks made by the Delegation of Morocco, on behalf of the African Group. With regard to TK, it noted the progress made, especially with regard to the elimination of ALT 2 of Article 3 and it called attention to paragraph (e). It considered highly problematic the attempt to make a 50 year or five generation reference to TK. That was a subject that it wanted to engage in reasonably during the negotiations. It noted the progress made in trying to keep to the mandate, specifically by closing the gaps, and wondered

why one should be retaining ALT 2 in each of those two documents while the IGC had made an attempt, however insufficient, to begin to reconcile the definition with the criteria for eligibility. At some point, the IGC would have to make a judgment call as a collective not to duplicate definitions with criteria for eligibility.

144. The Delegation of the Republic of Korea said that the definition should be clear and precise and should speak for itself. In the definition of TK, "beneficiaries as defined in Article 4" should be removed, and the previous definition should be recovered. The inclusion of "collective context" in the definitions of TK and TCEs was appropriate for better clarification. In addition, it wished to include possible forms and actual examples of TCEs in the definition like in ALT 2 in order to enhance clarity. With regard to Article 3, some elements of subject matter in ALT 2 were redundant, as the definition of elements in the definition. Therefore, it was necessary to remove those redundant elements and the previous ALT 2 should be recovered.

145. The representative of the Tulalip Tribes raised the question of the required term for protection. It seemed like the new proposal was five generations, i.e., around 125 years. If there was a term of either 50 years or 125 years, it did not seem to matter. Indigenous peoples often got TK through dreams, through spiritual and other means. What made TK traditional was not the manner of acquisition or the length of time for which IPLCs had been practicing it, but that it was inserted into a traditional system, a traditional way of being. The problem with any kind of term was that during that term there would be no protection. In the proposals like the tiered approach, he wondered what would happen during the 125 or 50 years when TK was not protected. If it was not protected, it was likely to become diffused, and if it became diffused, it would receive less protection under the tiered approach. That was linked with other forms of protection, and it did not belong in that instrument.

146. The Delegation of Egypt supported the statement by the Delegation of Morocco, on behalf of the African Group. In Article 3, it supported ALT 1, but wanted to proposed a modification: "the beneficiaries are the IPLCs and other beneficiaries as indicated in national legislation." ALT 2 was extremely dangerous given that it mentioned the 50-year time period.

147. The Delegation of Canada raised an inconsistency between the two texts with regard to the subject matter that could benefit from clarification and alignment. Specifically, it was concerned with the nature of the link between the TK or TCEs and the IPLC. In the TK text, with respect to both Article 1 and Article 3, the TK was described as "linked with, or is an integral part of, the national or social identity and/or cultural heritage of indigenous [peoples] and local communities". In the TCEs text, within both Article 1 and Article 3, the TCE was described as "the [unique] product of and/or [directly] linked with the cultural and/or social identity and cultural heritage of indigenous [peoples] and local communities". It was valuable to specify the nature of the relationship that linked the TK or TCE and the identity or heritage of the IPLC. The Delegation recommended further refinement of the specific nature of the relationship, to be followed by alignment of the two texts.

148. The Delegation of South Africa aligned itself with the position of the African Group and of the LMCs. It found it ironic that the delegations were reintroducing text in plenary. Certain interventions were not part of the text and it would engage with the Facilitators. In Article 3, it preferred ALT 1. During the informals, it would engage with the proponents of the temporal elements, both in the definitions and in the eligibility criteria. It supported the argument made by the representative of the Tulalip Tribes on the mathematical issue of either 50 or 125 years. The African Group had a similar position regarding the temporal element.

149. The Delegation of Senegal supported the statements made by the Delegation of Morocco, on behalf of the African Group, and the Delegations of Nigeria, Egypt and South Africa. The

50-year period was prejudicial and problematic for communities. The point was to ensure a legally strong relationship between rightholders and the objects of their creativity.

150. The Delegation of Niger supported the statement made by the Delegation of Morocco, on behalf of the African Group. It preferred ALT 1, both under the TK and TCEs texts. None of the arguments put forward to justify the 50-year period was convincing, and therefore it should not be included. In certain countries in Africa, life expectancy had not even reached 50 years until quite recently. A step had been taken when removing the reference to five generations, but there was a divergence between the periods of five generations and of 50 years.

151. The Delegation of China said that Rev. 1s were clearer than the previous versions. The core elements comprehensively covered its concerns. It said that there was duplication between Articles 1 and 3. It had a different view regarding the term. It would continue to exchange with other Member States in the informals.

152. The Delegation of Uganda concurred with the positions of the African Group and of the LMCs. The current texts were a good start for further discussion, as they were closing the gaps. On Article 3, it supported ALT 1. It asked for a justification for the inclusion of the time element.

153. The Chair said that the temporal issue linked to the idea of telling “traditional” from “contemporary.” In the informals, Member States should have a frank discussion on the policy rationale.

154. The Delegation of Colombia was very much in favor of the changes made in Rev. 1s. The IGC could continue to make progress on that matter. On TK, it pointed out the progress made in the definition of TK, considering the possibility that it could be transferred collectively at any time. In Article 3, it preferred ALT 1. It was concerned with regard to the idea of a time frame being put on TK because it was a limitation on the nature of the traditional issue itself. With regard to TCEs, it agreed with the statement made by the Delegation of El Salvador, on behalf of GRULAC, that under Article 1, ALT 1, to maintain the consistency, the footnote should be kept. It highlighted the progress and hoped to be able to continue working in the same way.

155. The Delegation of Italy supported the statement made by the Delegation of the EU, on behalf of the EU and its Member States. The problems came from the fact that they did not take account of existing IP treaties. The new legal instrument was not coming out of a void. It was entering into an existing IP system that existed since almost a century and a half. One needed to take account of an overlap of rules. For instance, the definition of TCEs repeated a list of the possible TCEs and those were already contained in Article 2 of the Berne Convention on the Protection of Literary and Artistic Works (“the Berne Convention”). Those overlaps created problems in terms of interpretation of the instrument. With regard to TK, there was some repetition in the definition and scope of protection. A solution had to be found because that was not acceptable. Regarding the time frame for protection, it understood both sides. One side was that protection started at a certain time, where something could be considered traditional, but before the 50-year period, TCEs should be protected by copyright laws. After 50 years, the objects could be considered traditional and be protected under TCE laws. However, there was an overlap of terms. Article 7(b) of the Berne Convention mentioned a 50-year period. Some TK might be connected, for instance, with issues of investment and finances. If TK was not yet eligible for protection during the initial 50-year period, there needed to be some recognition of protection for that TK. It wondered how that was to be done, if it was not yet considered traditional, because 50 years had not passed.

156. The Delegation of Ghana identified with the position of the Delegation of Morocco, on behalf of the African Group, and with the Delegations of Egypt, Nigeria, South Africa and Senegal. Existing IP regime did not properly protect TCEs or TK. In Ghana, copyright

protection was for works produced by an identified author. However, that did not apply to TCEs and TK because a community usually produced TK or TCEs. In that sense, copyright could not, in its existing state, protect TK or TCEs. Regarding the temporal aspect, “traditional” did not necessarily mean ancient or old. It just referred to the mode of transfer or the way in which the TK or TCE came about.

157. The Chair opened the discussion on the scope of protection.

158. The Delegation of Switzerland said, with regard to paragraph (d), that it was important for the IGC to explore new and creative approaches in order to find balanced solutions for the appropriate use and protection of TK of IPLCs. It recognized the need for flexibility to attribute the specific type of TK to a specific tier and that the level of protection might not necessarily be static. Yet such an approach had to be carefully analyzed and elaborated. In particular, further discussions were needed on the role and functions of the relevant authorities as well as what a possible change of level of protection meant in a transnational context. It looked forward to further discussing those points in the informals.

159. The Delegation of the USA said that, regarding the term secret TK, it preferred ALT 2, which was the language that it had proposed at IGC 37. It provided more helpful understanding of what was meant by secret TK and was less circular than other definitions. With respect to Article 5, it appreciated the work done on ALT 2 and its new text, but it had significant concerns with respect to that text as it was digesting it. The word “protect” in the first line of ALT 2 should be bracketed. It was not completely clear on the meaning of “access to traditional knowledge that is restricted”. It appreciated clarification on the meaning and whether or not it should be defined. With respect to the new paragraph (d), the chapeau of that article referred to “reasonable and balanced manner” and it was not sure if that balance was reflected in that paragraph. It was not sure that the procedure would lead to legal certainty and predictability. ALT 3 was its preferred alternative. It had been repeatedly suggested incorporating criteria for eligibility into Article 5 and not to keep them in Article 3. That might be a workable approach. It was willing to drop ALT 2 in Article 3 in the TK text if it could introduce the amendment to the revision to ALT 3 of Article 5.1 as a chapeau. It would read: “Where traditional knowledge is distinctively associated with the cultural heritage of the beneficiaries as defined in Article 4, and is created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation for a term as has 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.” Then the text of existing ALT 3 would follow that new proposed text.

160. The Delegation of the EU, speaking on behalf of the EU and its Member States, appreciated that the text of Article 5 retained the alternatives to the tiered approach. It supported the measures-based approach as contained in ALT 1. However, it tried to engage constructively in further improving ALT 2 on the tiered approach. When exploring the tiered approach, its focus was on understanding how the various tiers would work and the types of TK/TCEs that would be captured in the tiers. It still had basic problems in understanding how those tiers worked. The new paragraph (a) introduced the category of “restricted”, which had no definition. There had been an attempt at eliminating some unclarities, and considering “secret” or “sacred” TK as examples was an improvement. It acknowledged that new ALT 2 was more streamlined and improved. However, it still had some basic difficulty in understanding how those categories, such as restricted, secret, sacred, narrowly diffused and widely diffused would be specified. Looking at the relationship between Article 5 and the definitions in Article 1, some definitions were related to the operation of that article. Only one alternative was retained as regards the definition of secret TK (ALT 3), while the others had been deleted. That was problematic because the IGC had not engaged in elaborate discussions on definitional issues. As to the new paragraph (d), while it acknowledged the interest to be protected by that

mechanism, i.e. the possibility to cut through the tiers in certain situations where TK/TCEs was diffused in a manner which was not found legitimate or authorized, there could be some situations where a correction mechanism was necessary. It was difficult to understand how it related to the rest of the article and the whole set of tiers. It shared the concerns expressed by the Delegation of Switzerland as to the reference to the relevant authorities as reflected in paragraph (a). It was not quite clear how protection would work. It was ready to engage further in informals to explore the tiered approach.

161. The Delegation of Nigeria noted a significant attempt to bring clarity to the previous text. The word "restricted" looked like a reference to sacred or secret TK. The categories of the tiers were clearly spelled out through the drafts. It also noted the progress made in relation to paragraph (d) and noted that that was a very new draft. It was studying it carefully, because it was important to learn from the Indigenous Panel in relation to those categories of diffusion through concrete examples. It wished to engage strongly with everyone to flesh that out with the degree of clarity required. The IGC should think about how it would translate into the TCEs text because that would represent a lot of work in the informals.

162. The Delegation of Islamic Republic of Iran welcomed in principle any innovative idea from the Facilitators that could potentially bridge the gaps among Member States. It supported the insertion of the word "protect" in the chapeau of ALT 2. It also welcomed the insertion of the newly drafted paragraph (d), which it was still examining and exploring. As a matter of consistency, paragraphs (a), (b), and (c) mentioned the word "beneficiaries" but paragraph (d) referred to IPLCs only. It would be more appropriate to use the same wording, "beneficiaries", in paragraph (d).

163. The Delegation of Canada was still considering the different options regarding the scope of protection, including the tiered approach as well as the new text added to Article 5. So as to ensure common understanding, it had preliminary comments on the scope of protection. It appreciated the efforts to refine the definitions of "sacred" and "secret", which played an important role in the scope of protection. It was still important to have definitions of those terms, and more work was required to clarify what they covered and what would be the appropriate level of protection. It was concerned that "secret" and "sacred" in the revised scope were examples of the type of TK that might be protected. It was important to understand what other categories of TK might be contemplated there, and for the text to be clear as to what might be included. It understood that the contact group had only been able to focus on the TK text and had recommended that for the TCE text, consideration should be on whether simply adopting the TK text approach or to take into consideration any unique features for TCEs. It sought clarity as to why the reference to Article 9 was in ALT 1 but not in ALT 2. It looked forward to further exploring those issues and discussing paragraph (d) in the informals.

164. The Delegation of Egypt preferred ALT 1, because it was more inclusive and flexible. Reaching a solution had not been easy when dealing with ALT 2 through the contact group. ALT 2 had many positive aspects, but also negative aspects. Most importantly, the definition of "secret" and "sacred" TK was not acceptable. What was sacred in Africa could not be necessarily sacred in the Amazon or by other indigenous peoples. It could not find proponents for that definition. It suggested adding "in accordance with national law", in ALT 2, in the very first line of paragraphs (a) and (b).

165. The Delegation of the Russian Federation preferred ALT 1. It was the more flexible alternative. ALT 2 contained many different concepts that needed a clearer definition. It was willing to participate in discussions to elaborate appropriate wording.

166. The Delegation of Japan supported ALT 1 and ALT 4 for the TK text and ALT 1 or Option 2 of ALT 3 for the TCEs text, although the discussions at the contact group were implemented

focusing on the tiered approach. Regarding Article 5, ALT 2, paragraph (a) of the TK text, the TK which would be given the highest-level protection was required to be of "restricted" access. However, the meaning of "restricted" was highly subjective. In the same sentence, "sacred" TK was included as TK of restricted access, but assessing whether TK was sacred or not was also a subjective question. Therefore, it could not support the new sentence and requested to go back to the original text. As for ALT 2, paragraph (d) of the TK draft text, the rationale and the necessity of that proposed item should be clearly explained by the proponents, and until such time, it was not in a position to support that proposed item.

167. The Delegation of India said that although a lot of efforts had been made to clarify the article, there had to be more deliberations thereon.

168. The Chair closed the discussion of Rev. 1s.

169. [Note from the Secretariat: The informals took place on December 13, 2018. This part of the session took place on December 14, 2018.] The Delegation of Finland reported on the publication of a study on the "Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks" (available at http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161206/OKM_40_18_Needs_of_the_Sami_people-WEB111218.pdf?sequence=1&isAllowed=y).

170. The Chair reported on his meeting with the RCs on the change of date of the *Ad Hoc* Expert Group. He said it was agreed that a meeting of an *Ad Hoc* Expert Group on TK and TCEs would be organized prior to IGC 39 instead of IGC 40. It would follow the same arrangements *mutatis mutandis* as agreed at IGC 37. That meeting would take place on Sunday, March 17, 2019, at WIPO Headquarters in Geneva, in Room NB 0.107, from 09:00 to 16:30.

171. [Note from the Secretariat: This part of the session took place after the distribution of Rev. 2s on December 14, 2018.] The Chair invited the Facilitators to introduce Rev. 2s for consideration by Member States.

172. Mr. Paul Kuruk, speaking on behalf of the Facilitators, said that the Facilitators had reviewed the provisions regarding definitions, subject matter, scope of protection and exceptions and limitations on the basis of Rev. 1s. They proposed texts for consideration that were concise, narrowed gaps, eliminated repetition and redundancies and preserved the integrity of the Member States' proposals. Their revisions took into account interventions made in plenary and informals. They had cleaned up the definition of TK and reinserted some previously deleted alternatives in the definition of "secret" TK in Article 1. They proposed for consideration the definition of a new term, "traditional", in both texts. In addition, they created an alternative in Article 3 that identified certain criteria of protection, but excluded the reference to time limits. In contrast, other alternatives retained similar criteria for protection and included the time limits proposed by Member States. Furthermore, they had revised positions on the tiered approach on Article 5, in the draft text on TK but not TCEs, to provide clarity regarding the types of tiers and methods of protection. Finally, a minor change had been made to Article 7 in the TCEs text to be consistent with the TK text.

173. Mr. Jukka Liedes, the Vice-Chair, speaking in the absence of Ms. Lilyclaire Bellamy, one of the Facilitators, said that in Article 1 of the TK text, the chapeau stated that the terms were defined "for the purposes of this instrument". That was applicable to all the definitions; it seemed redundant and unnecessary to have the same phrase for each definition. The Facilitators had included a definition of the term "traditional" to establish a language on the time aspect that was more flexible than the references to the numbers of generations or years. The draft by the Facilitators tried to provide a basis for further consultation on whether there would

be a possibility to have a clause that would clarify the time aspect and be acceptable for the two main opinion camps. The element read as follows: "Knowledge is traditional when, in the course of time, it has acquired a form and content which is emblematic and characteristic of the cultural or social identity, or the cultural heritage, of an indigenous people and local community/beneficiary." The last element, IPLCs/beneficiaries, was there because there was the supported suggestion to consider the longer version of the reference to beneficiaries. In the definition of TK, there had been the words "created/generated." In the preparatory exercise, the main dictionaries of English had been consulted and it seemed that "to create" and "to generate" meant the same thing. It was submitted for consideration whether to have only the word "creation". In the next line, the reference to IPLCs was suggested and supported. The reference to "collectively, where applicable" was a placeholder, which was important for many. The place would still be considered if it would be kept, or that could become a part of the results of the explanatory notes for the provision. It was quite a convincing argumentation that the creation, transmission, etc. might be sometimes collective and sometimes not. The element "which subsists in other forms…" had been deleted, as per the discussions in the contact group. The deletion had been supported in plenary. It had been suggested that that element, which had no definitional value, be deleted. The next element was ALT 2 of "secret" TK, which was the element deleted in Rev. 1. The Facilitators had restored on the basis of proposals from some delegations. In Article 3, ALT 2 was developed further. The list of eligibility criteria contained in that alternative, the same elements were found in paragraph (a). In paragraph (c), there was a reference to "collectively, where applicable", under the understanding that the right place would be considered. Paragraph (c) was suggested to be deleted, and paragraph (e), which referred to the time dimension, had been deleted. It was, however, retained in the next alternative. ALT 3 was the old ALT 2 from the previous meeting. It had been restored on the basis of a proposal. Paragraph (b) had been complemented, as suggested by one delegation. In the TCEs text, in Article 1, the same element, "for the purposes of this instrument", had been added. IPLCs had been put-back, the reference to "collectively, where applicable" had been maintained as a placeholder, and "written, codified form, etc." had been suggested to deleted. ALT 2 of the definition of TCEs was suggested to be deleted. The most important difference between ALT 1 and ALT 2 was that in ALT 2 the time element was included in the end of the definition, and then the time element was properly recorded in the proposals in the text of the articles so it was not necessary to be maintained there. In Article 3, the same changes had been made as in the TK text, so it was self-explanatory. The old ALT 2 had been taken back and complemented, as suggested by one delegation in paragraph (b). There had been a critical discussion on the scope of application of the draft instruments. There seemed to be no boundaries. The Facilitators had prepared a first draft for such a purpose. The text could be included in the preamble or as a second paragraph in Article 3. The proposed draft followed closely the definition of "publicly available" and read as follows: "This instrument does not apply to traditional knowledge which has, in the course of time, lost its distinctive association with any indigenous peoples and local communities and has become generic or stock knowledge, notwithstanding that its historic origin may be known to the public."

174. Mr. Paul Kuruk, speaking on behalf of the Facilitators, said that in Article 5 of the draft TK text, in line 1 of ALT 2, they had placed new brackets around "safeguard" and "protect". They had inserted the words "rights and" after the word "moral" so that the first clause of the first sentence would read: "Member States [should/shall] [safeguard] [/protect] the economic and moral rights and interests of the beneficiaries…". To clarify the amount of diffusion of TK, which informed the classification of TK in the tiered approach was to be from the perspective of IPLCs, the following language had been inserted to the description of the tiers in paragraphs (a), (b) and (c) in response to the request from a Member State: "Where with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries." Thus, paragraph (a) read as follows: "access to traditional knowledge is restricted, including where the traditional knowledge is secret or sacred, Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring

that…". There was a slight adjustment in paragraph (a), i.e. the addition of the word "moral" to specify that the right to the use of TK in a manner that respected the integrity of the TK was a moral right. As for paragraphs (b) and (c), it was evident from the changes that they had only added the introductory clause identified earlier. Paragraph (d) of ALT 2 was to provide clarity. In response to the request of some Member States, they had added new language to paragraph (d) and deleted some text. The revised provision read as follows: "[For traditional knowledge that is narrowly diffused or widely diffused, and not in accord with customary laws and practices of indigenous [peoples] and local communities or with their prior informed consent, indigenous [peoples] and local communities or other beneficiaries, as applicable, may request from the relevant national authorities protection provided for in paragraph (a), taking into account all relevant circumstances, such as: historical facts, indigenous and customary laws, national and international laws, and evidence of cultural harms that could result from such unauthorized diffusion.]]". A Member State had requested the reinsertion of the words, "whether or not it is sacred", where those words would have been deleted from paragraphs (a) and (b) of ALT 2. However, they had determined that ALT 3, substantially the same as ALT 2, already contained the same words in paragraphs 5.1 and 5.2. Therefore, ALT 3 would respond adequately to the concerns of the Member State that had requested the reinsertion of the text, and not making the change enabled maintaining the integrity of the proposals of other Member States. Furthermore, they had taken into account the fact that the Member State had indicated ALT 1 as its preferred approach. In Article 7 of the TCEs text, in response to a request from a Member State, they had added the word "should" to ALT 1, 2 and 3.

175. [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.

176. [Note from the Secretariat: All speakers thanked the Facilitators and the Vice-Chair for their work.] The Delegation of Lithuania, speaking on behalf of the CEBS Group, said that Rev. 2s were work-in-progress. The document took into account the discussions at the informals, which it reflected in a fair manner. Rev. 2 could be the basis for further work. It still had to consider all the changes made and looked forward to discussing it more thoroughly at IGC 39. It said that there was a discrepancy between the two texts. In the definition of TK, the text still contained the word "national" and it wondered if that was intentional or not because the TCEs text did not contain the word "national". In ALT 2 of Article 3, paragraph (b) also mentioned "national or social identity". It wondered whether it was the intention of the Facilitators to leave it, and if so, it wished to bracket the word "national".

177. Mr. Jukka Liedes, the Vice-Chair, speaking on behalf of the Facilitators, clarified that it had been in the pipeline to be deleted, so the bracketing was the right thing to do.

178. The Delegation of Indonesia, speaking on behalf of the APG, recognized the effort of defining the term "traditional" and looked forward to discussing it at IGC 39. It took note of Rev. 2s and Articles 1, 3, 5 and 7, and looked forward to continuing the discussion at IGC 39 based on Rev. 2s.

179. The Delegation of Canada, speaking on behalf of Group B, noted and recognized that Rev. 2s were work-in-progress. Individual members of the group would make specific comments on Rev. 2s.

180. The Delegation of El Salvador, speaking on behalf of GRULAC, recognized that an attempt had been made in Rev. 2s to include all the interventions made during the informals and the views of the delegations in general. It recognized that the texts would be reviewed at IGC 39, when it would have had time to analyze the documents in detail and would be able to

make more positive contributions. In Article 3 of both documents, it had pointed out already that in ALT 2 in Rev. 1 (new ALT 3) there should be a square bracket before the word “but”. The two issues had been separated so one should open the bracket before the word “but”. It recognized the attempt to introduce a definition of the word “traditional” in order to meet the concerns expressed by a number of members. The Delegation was open to discussing that definition, which could be improved, because it still mentioned a term for protection. It would look at it in depth and would make further observations at IGC 39. As to ALT 2 of the definition of “secret TK”, it preferred not to have the reference to commercial value. On Article 3, it recognized the separation of the two positions by introducing ALT 3, as requested by a number of delegations. It was more comfortable with ALT 2, which had eliminated the time period; however, it could accept ALT 1, on the understanding that the definitions would be associated with the definition from Article 1. It would continue to work with both alternatives in the hopes of finding a solution that would accommodate all members. As to Article 5, in paragraph (d), it appeared that it was a new category of TK. It was a tool that applied to the situations under paragraph (b) and (c). It was more than ready to contribute in a positive manner at IGC 39.

181. The Delegation of the EU, speaking on behalf of the EU and its Member States, could accept Rev. 2s to be transmitted to IGC 39 to serve as the basis of further discussions. It was happy to continue discussions and come back with more substantive comments. In Article 1, it found that the new definition of “traditional” without further explanation required some time for review and it might get back with more comments at IGC 39. As to the definition of TK and of TCEs, it noted the discrepancy and wanted to see the TK text aligned with the TCEs text. Instead of including the word “national and social identity and/or cultural heritage of indigenous peoples”, it wanted to see the same text. That also appeared in Article 3, ALT 2, paragraph (b), with the same unintended consequence. As to the definition of secret TK, it appreciated that one of the previous alternatives had been retained, so ALT 2 reflected a different approach as compared to ALT 1. It still remained more anchored in the approach as reflected in ALT 2, which laid the emphasis on accessibility to the public or users. It was important to have it reflected in Article 1. It appreciated that the Facilitators had taken onboard its comments in the definition regarding the reference to “beneficiaries”. Regarding Article 3, it thanked the Facilitators for taking onboard its comments as regards paragraphs (a) and (b). The wording made it clear that those were cumulative criteria. That was an important issue for the Delegation. Similarly, it thanked the Facilitators for separating the elements in paragraph (b), because it supported that. Concerning the time aspect, although the discussions thereon had not been concluded and the IGC had still not reached consensus, it was a very important issue for the Delegation. Previous ALT 2 (new ALT 3) still contained the wording that it found important to be retained in the text, so it took it that it was work in progress. Whether it was ALT 2 or ALT 3, in the set of criteria, there was a placeholder for the time aspect until the IGC reached a consensus. As regards Article 5, it was supportive of the measures-based approach contained in ALT 1, but it could accept ALT 2 as a basis for further discussions on the tiered approach, which it was ready to explore in more detail. It might come back with further substantive questions or comments on the tiered approach.

182. The Delegation of Morocco, speaking on behalf of the African Group, said that Rev. 2s were work-in-progress and could serve as a basis for debate at IGC 39. It had some concerns which would be raised by members of the Group. The IGC should, at IGC 39, try to avoid the number of alternatives in the text and try to bring views together rather than separating them. It would continue to work in a constructive manner.

183. The Delegation of Indonesia, speaking on behalf of the LMCs, took note of the introduction of the definition of “traditional” in Rev. 2s. It recognized that the attempt had come about at the discretion of the Facilitators. It looked forward to discussing that in greater details at IGC 39. Notwithstanding its positions, it welcomed the changes on the definition of TK and TCEs, which were more consistent, as reflected in Rev. 2s. With regard to Article 3 in both

documents, it saw a potential to bridge further gaps in the continuation of the discussion. It was time for the IGC to decide on the framework to apply with regard to the definition and subject matter of protection to avoid redundancy and to produce a clearer text, while at the same time continuing to maintain the integrity of Member States' positions. With regard to Article 5 in the TK text, it welcomed the changes in ALT 2 and hoped that further discussion on the tiered approach would lead to a better understanding on the necessity to assign different levels of protection in line with the characteristics of TK, to be able to bridge gaps on other core issues within the draft instrument. Exceptions and limitations were closely linked to the scope of protection and should be straightforward so as not to compromise the already differentiated scope of protection. Both Rev. 2 documents, as work-in-progress, could serve as a basis to continue the discussion at IGC 39. It hoped that at IGC 39, the IGC would have the opportunity to discuss, in addition to subject matter and scope of protection, policy objectives and exceptions and limitations in greater detail, along with other cross-cutting issues.

184. The Delegation of China said that the IGC had had very deep discussions on TK and TCEs. The two documents reflected the results of the discussions in a very good way. It was pleased to have the two Rev. 2 documents as the basis of discussion at IGC 39 and looked forward to further discussions.

185. The Delegation of Egypt said that the IGC had done a considerable amount of the work it needed to do and had made a considerable amount of the headway it needed to make. Discussions had been held in transparency under the Chair's and Vice-Chair's skilled leadership as well as with the two Facilitators. Rev. 2s faithfully reflected what had been said and agreed or not agreed during the discussions. The two working documents were valuable and could be used as a foundation for the IGC's work in the future. It would make further comments at IGC 39, where it hoped there would be increased room to make progress and not get into a deadlock. It hoped to be able to concentrate on the articles from day one, so that not too much time would be spent in philosophical discussions, which were not really of a great deal of use or of much active interest. There were three areas which were very important to tackle; the IGC was attempting to create history in terms of IP, creativity and the human aspect, which was the important thing, not just the economic and material aspects.

186. The Delegation of the Plurinational State of Bolivia said that the documents were very helpful, although there was still some difficulty with the language. The IGC would be able to make headway, particularly on the definition of TK. The two documents represented progress. It did not necessarily agree 100 percent to their content, but they would help bridge gaps in the negotiating process. ALT 2 of Articles 3 and 5 could still be improved and needed to be discussed further. Having said that, they could be a foundation for moving closer to the goal of the instrument on scope of protection. The public domain and temporal issues were important, but the main focus was on achieving a clean document.

187. The Delegation of the USA said that it was still studying the definition of "traditional". It was a new definition, and it wanted for the time being to bracket it. It did not see that as a substitute for clear eligibility requirements, including a temporal element, in the text. In addition, the definition contained the phrase "an indigenous people" and it requested to replace it with "indigenous peoples". In Article 3, with respect to the new ALT 2, it had already suggested to insert the phrase in paragraph (e) "or a period of five generations," after the phrase "50 years" (and the same change was requested in the TCE text). In Rev. 2, paragraph (e) had been deleted altogether. It requested that the Facilitators reinsert the text previously found in paragraph (e), with the additions it had suggested in order to preserve that option in ALT. 2. In Article 5 of the TK text, with respect to ALT 2, it had posed a number of questions, both in plenary and informals, that had not been answered completely; however, it was still studying the proposed edits and would have more detailed comments at IGC 39.

188. The Delegation of India welcomed the incremental progress made and looked forward to an early finalization of an international legal instrument(s) for the effective protection of TK, TCEs and GRs. The IGC had been able to discuss parts of Article 1, i.e. the definition of TK and TCEs, as well as Articles 3, 5, and 7. It was pleased to note that there was a recognition of the role played by the state or nations as the trustees of TK and TCEs where IPLCs could not be identified or correlated. It was hopeful that the discussion would lead to substantive progress at IGC 39. It reserved its right to provide comments on the texts.

189. The Delegation of Canada said that Rev. 2s provided a good basis for further discussion. Without prejudice to its position, it continued to work constructively towards a common understanding and with a view to reducing the number of alternatives. There were merits in all proposed approaches regarding the scope of protection, including the tiered approach. Regarding ALT 2 of the scope of protection, some points had been omitted during the drafting of Rev. 2. ALT 2 should incorporate a reference to Article 9 concerning exceptions and limitations with the same language in ALT 1. It asked to retain the previous phrase "traditional knowledge is secret, whether or not it is sacred," which was a workable framework to determine what could benefit from the highest level of protection. Notwithstanding that, it had concerns about what might be captured by the terms "secret" and "sacred". The new language "where access to traditional knowledge is restricted, including whether TK was secret or sacred," made it less clear what TK would be captured. As a result, it asked to retain the two options for further consideration of the tiered approach in ALT 2. It had been suggested that ALT 3 already contained that phrase. The Delegation was open to working on all options, particularly the tiered approach, and it was trying to retain elements that would allow reflecting Canada's reality in that option. ALT 3 was a formulation of the tiered approach and contained the phrase to which it was referring, but it was a different formulation that did not appear to be gaining much interest. With a view to working constructively towards common options and alternatives, it had focused attention on trying to support ALT 2. Additionally, it would review the new proposals, including the one for a definition of "traditional", and would provide more substantive comments at IGC 39.

190. The Delegation of the Republic of Korea said that in general, Rev. 2s could serve as a basis for further discussion at IGC 39. With regard to Article 1, "traditional" was a new concept, and it wished to contribute to the discussion at IGC 39 with comments thereon. Article 3 was one of the critical elements in the TK and TCE texts. It looked forward to discussions on that matter. Regarding the Article 5, it would be better for the scope of protection to be as simple and concise as possible in order to increase clarity and legal certainty. It looked forward to a good discussion on that matter at IGC 39.

191. The Delegation of Japan said it would consider Rev. 2s carefully and would make comments thereon at IGC 39. Regarding the additional word "traditional" in Article 1 of both texts, it was grateful for the constructive efforts of the Vice-Chair and the Facilitators to enhance the clarity of the instruments, and it considered those additions as a good basis for further discussions. However, it needed to carefully consider each word in more detail and would make comments at IGC 39, if needed, because the definition of "traditional" might have a great impact on the entire texts on TK and TCEs. Regarding Article 3 of both texts, it supported the statement made by the Delegation of the EU, on behalf of the EU and its Member States, and the Delegation of the USA. There was no consensus on the deletion of the temporal criterion from ALT 2. Therefore, that criterion should remain in both texts. Regarding Article 5 of the TK text, Member States had not reached any consensus to put paragraph (d) into ALT 2. It proposed to put paragraph (d) in brackets. It looked forward to having discussions with all Member States in a constructive manner at IGC 39.

192. The Chair said that the inclusion of "traditional" was a suggestion by the facilitators, and there were Member States that were interested in that, so it would be retained in the text.

193. The Delegation of Nigeria noted the attempt to define “traditional” and also noted, as stated by the Delegation of Indonesia, on behalf of the LMCs, that they were proposed at the discretion of the Facilitators. That needed to be further interrogated. It agreed with the Delegation of the USA to put it in brackets and noted that it was already in italics. On definitions, if one proceeded on the premise that the determination of the different tiers of TK and TCEs in relation to their diffusion or lack thereof was a matter for IPLCs, there was no need of seeking to define “sacred”, “secret” and other categories. It would return to that matter at IGC 39. It noted the proposed draft suggested by the Facilitators and would appreciate to have the opportunity to engage with that idea in the course of further negotiations at IGC 39. As proposed by the Delegation of Morocco, on behalf of the African Group, based on the progress made, it hoped that it could get on with the task of reducing the alternatives. That was really the test: whether the IGC would make progress or would lack the courage to make progress. That was a matter for IGC 39.

194. The Delegation of Australia said that it looked forward to making further comments at IGC 39. Article 3 read a lot more easily with the three alternatives, notwithstanding its current reservations around the temporal aspect and “other beneficiaries”. The wording put forward by the Facilitators was an interesting concept worth exploring. Under Article 5 in ALT 2, it understood that paragraph (d) was a work-in-progress, and the wording was not perfect. It had some concerns about how it would work in practice, for example, with other beneficiaries and relevant authorities, but appreciated that it was a very new concept and it looked forward to discussing it further. It looked forward to further discussions to bridge gaps and move towards a cleaner text.

195. The Delegation of the Islamic Republic of Iran recognized that the newly defined term “traditional” was an initiative by the Facilitators to bridge the gaps around the temporal aspects. It took note of that definition and would make more detailed comments at IGC 39. On the definition of TCEs, it welcomed the introduction of only one definition, which reduced redundancies. On Article 3, it recognized the efforts to produce a text that reflected the position of all Member States. It supported ALT 1 and reiterated its concern on the temporal element contained in ALT 3. Concerning Article 5 in the TK text, it took note of the proposed change in ALT 2, in particular paragraph (d) as a new conceptual idea. It looked forward to further discussions on ALT 2, which had the potential to constitute the final language of that article.

196. The Delegation of Colombia welcomed the comments made by the Delegation of El Salvador, on behalf of GRULAC. It emphasized that the IGC needed to focus on dealing with issues which had not yet been solved. It had looked positively at the way the discussions had gone in the contact groups because they helped to look in-depth at issues in the text, and that had led to a positive outcome. It invited delegations to work at IGC 39 on the text, which would include a framework for protection, which in itself was a point of reference, because going into details on definitions in each and every one of the terms was likely to lead to subjective interpretations that would prevent the IGC from making headway. On Article 5, it was grateful for the work done in the contact groups and informals, which made it possible to produce paragraph (d). One needed to make sure that the holders of TK could protect their integrity.

197. The representative of CEM-Aymara, speaking on behalf of the Indigenous Caucus, said that Rev. 2s would help the IGC to continue its work in a constructive manner. He would participate in constructive discussions on that document at future sessions. He had listened with concern to the discussions on a temporal criterion in relation to TK and TCEs. That was unacceptable because the imposition of such a temporal criterion would be in contradiction with the IGC’s mandate. As to the tiered approach, it was positive because it acknowledged the diverse nature of TK and TCEs, but it did not accommodate the intention of indigenous peoples vis-a-vis the TK, because it did not recognize their owners’ decision as to whether or not a TK or

TCE should be shared. That was a decision that indigenous peoples made within their own peoples. A tiered approach would be acceptable provided it guaranteed respect for the decision taken by the owners of the TK or TCE. A tiered approach should also provide for the recovery of TK. If a piece of TK was not supposed to have been shared but had been diffused without the consent of the indigenous peoples holding the right to it, the mechanism should include some way of recovering control over that TK and/or TCE. He was happy to continue working on that. He welcomed the inclusion of paragraph (d). It was the beginning of finding a solution to the problem of TK diffused without the agreement of its peoples. The IGC still had to work on the language, but it was a step in the right direction. Exceptions and limitations should be based on determination by indigenous peoples under the principle of FPIC. That work had to be done at a national level because there was no one-fits-all solution. The Indigenous Caucus remained open to continuing the discussions on Rev. 2s.

198. The Delegation of South Africa, while it noted Rev. 2s, expressed its disappointment at the increase in the number of alternatives and options. Rev. 1s contained 497 open brackets and Rev. 2s contained 484. The true progress of any session would be determined by the decrease in the number of alternatives and brackets. It noted the inclusion of the definition of "traditional" in italics. It joined the Delegations of the USA and Nigeria in bracketing it so as to have sufficient time to consider its implication. It was encouraging that many delegations were showing preference for either ALT 1 or ALT 2. By implication, that could be a starting point to deleting ALT 3 and ALT 4. Under Article 1, it noted the introduction of new definitions, which it would take under review. It asked the Facilitators to look at the consistency of the use of "beneficiaries" to include both IPLCs and other beneficiaries. In Article 3, it supported ALT 1. In Article 5, it supported the preference expressed by the Delegation of Morocco, on behalf the African Group. In Article 7, it supported a simplified exceptions and limitations clause.

199. The Delegation of Senegal said that the Rev. 2 documents opened options for discussion. It would be able to pass those documents onto authorities in Senegal for analysis. There was a region in Senegal where traditional peoples hunted and farmed on a traditional basis. It was strongly believed in Senegal that the time had come for the IGC to adopt instruments on TK and TCEs. It was convinced that the IGC would reach the result that the TK and TCEs holders had been waiting for so long.

200. The Delegation of Kenya appreciated the contribution of the Facilitators. It took note that Rev. 2s were fair working documents for IGC 39. It hoped that all the delegations would work towards bridging the gaps in the documents.

201. The Delegation of Ghana identified with the positions of the Delegation of Morocco, on behalf of the African Group, and the Delegation of Indonesia, on behalf of the LMCs. The definition of "traditional" would be subject to further discussion. The temporal scope was unacceptable. The proposal by the Facilitators was laudable and worthy of further discussion at IGC 39. It hoped that continuous sharing of the experiences and legislation on TCEs and TK by Member States would aid moving closer to a cleaner document. It noted that the acknowledgment of the state as a beneficiary was a laudable one, and it drew attention to the fact that the preamble ensured that states would not infringe on the rights of indigenous peoples, where applicable. It suggested, for clarification, to substitute "generate" with "develop" in the TCE text to document the scenario where TCEs or TK did not originate from a state but had been uniquely developed by IPLCs or the state itself in another country. It looked forward to constructive discussion at IGC 39 in order to move closer to the finishing line.

202. The representative of Tupaj Amaru said that he had presented a more coherent definition, which fully represented the vision of indigenous peoples. TK was the cosmic vision of the indigenous peoples. TK was not something tangible. TCEs were heritage. The IGC had failed, after 18 years of work, but the mandate had to be returned to the GA, which would decide how

to pursue it. All Member States had to analyze the problem of the indigenous peoples, not from the point of view of profit or the markets, but with a human value.

203. The Chair closed the agenda item.

Decisions on Agenda Item 8:

204. The Committee developed, on the basis of document WIPO/GRTKF/IC/38/4, a further text, "The Protection of Traditional Knowledge: Draft Articles Rev. 2", and on the basis of document WIPO/GRTKF/IC/38/5, 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 December 14, 2018, be transmitted to the Thirty-Ninth Session of the Committee, in accordance with the Committee's mandate for 2018-2019 and the work program for 2018, as contained in document WO/GA/49/21.

205. The Committee took note of and held discussions on documents WIPO/GRTKF/IC/38/6, WIPO/GRTKF/IC/38/7, WIPO/GRTKF/IC/38/8, WIPO/GRTKF/IC/38/9, WIPO/GRTKF/IC/38/10, WIPO/GRTKF/IC/38/11, WIPO/GRTKF/IC/38/12, WIPO/GRTKF/IC/38/13, WIPO/GRTKF/IC/38/14, WIPO/GRTKF/IC/38/15 and WIPO/GRTKF/IC/38/INF/7.

206. The Committee agreed that a meeting of an ad hoc expert group on traditional knowledge and traditional cultural expressions be organized prior to the Thirty-Ninth Session of the Committee instead of prior to the Fortieth Session of the Committee, following the same arrangements mutatis mutandis as agreed at the Thirty-Seventh Session of the Committee under Agenda Item 6. The Committee agreed that the meeting will therefore take place on Sunday, March 17, 2019 at WIPO Headquarters

in Geneva, in Room NB 0.107, from 09h00 to 16h30.

AGENDA ITEM 9: ANY OTHER BUSINESS

Decision on Agenda Item 9:

207. There was no discussion under this item.

AGENDA ITEM 10: CLOSING OF THE SESSION

208. The Chair said that IGC 38 had clearly made progress, particularly in terms of developing a set of criteria for the subject matter, reflecting that consensus was yet to be reached on what they were and the framework one would utilize. There were two alternative framings within the document. The IGC was also starting to further refine an understanding of the scope of protection, which might be afforded to TK and TCEs, including starting to unpick the central issue of what was traditional vs. contemporary knowledge or expressions. The IGC had also started to conceptualize how to deal with TK or TCEs that might have been diffused outside an IPLC or beneficiary without their FPIC. The IGC still had much more work to do. The IGC needed to establish language that better defined the boundaries around the subject matter. The IGC had had a frank exchange of views on key policy issues, which had enabled a shared understanding. However, there was still a conceptual divide on some of those issues. Member States were required to move outside their comfort zones and attempt to balance the interests of all stakeholders and, in particular, consider the clear aspirations of indigenous peoples reflected in UNDRIP, particularly Article 31. The IGC was a negotiation. Sometimes it seemed like a discussion. Ultimately, the IGC needed to develop outcomes that took account of the policy interests of all Member States and stakeholders. That would require compromise and a shared understanding of Member States' and stakeholders' different legitimate policy perspectives, and importantly, an understanding of the aspirations of IPLCs and how their system interacted with the IP system. The mandate was to narrow gaps. Looking at the growing number of alternatives and brackets, the IGC should be moving in the opposite direction. The IGC had made significant progress but it also needed to further refine the scope of protection. The IGC needed to come back to the policy objectives because they underpinned its work. There were two more meetings on TK and TCEs, so he wanted Member States to go back to capital and consider their expectations in relation to the outcomes of the IGC's work under the current mandate and the recommendations to the2019 GA. He was sensitive to the fact that some Member States had concerns around contact groups not being inclusive, but he had concerns about plenary where Member States were just stating their positions within their comfort zones rather than trying to share experiences. Hopefully, the contact groups were inclusive, with the increased representation and having greater time to discuss the results of the contact groups. He thanked the Vice-Chairs, with whom he worked as a team. They worked very closely together. He thanked the Facilitators, Ms. Lilyclaire Bellamy and Mr. Paul Kuruk, for their tireless work and contribution to the process. He thanked the RCs very sincerely, because they had really made sure that the meetings avoided a significant amount of process discussions. He very much appreciated the RCs for their support. He thanked the Secretariat for working long hours, tirelessly, behind the scenes to make sure that the meetings were efficient and effective. He thanked the interpreters. He thanked the Indigenous Caucus. He recalled the need for indigenous representatives to be present, and the valuable contribution that they made to the discussions. He recalled the critical importance to provide funding for the Voluntary Fund, and called on those Member States who could consider providing funding for the next few meetings. The IGC seriously needed to look at how it could find other mechanisms to fund indigenous participation. He thanked civil society and industry, who were key stakeholders in the discussions, for their views and comments. He thanked Member States,

who were the most important group, for making IGC 38 successful. Despite the progress made, there remained significant work to be done. He looked forward to continuing the discussions at IGC 39 and to pushing the work forward. He opened the floor for final comments.

209. The Delegation of Indonesia, speaking on behalf of the APG and of the LMCs, took note of all the hard work done in the session, and looked forward to continuing to make progress in upcoming IGC sessions. It would contribute actively in IGC 39. It thanked the Chair and the Vice-Chairs for the guidance and leadership shown during the week. It thanked the Secretariat for all the work and support, including the conference services. It thanked the interpreters and all the support section for their excellent work. It conveyed its appreciation for all the contributions in the negotiations during the week, especially by the indigenous representatives.

210. The Delegation of Morocco, speaking on behalf of the African Group, thanked the Chair and Vice-Chair for all their efforts to move the work of the IGC forward. It thanked the conference services, the Secretariat, the Facilitators and members of the contact group for their very important contributions. It thanked the interpreters. It reiterated its commitment to the debate within the IGC with a view to achieving binding legal instruments that would ensure the protection of TK, GRs, and TCEs. It was determined to remain constructive and to continue its effort. It had contributed actively throughout all IGC sessions, and in the spirit of cooperation, it hoped to be able to enjoy what had already been achieved. With debate always complex, particularly in light of the differing views of various parties, it urged Member States to be pragmatic in future sessions in order to reach a consensus which would allow accomplishing the IGC's mandate successfully. It thanked the RCs for their enriching contributions.

211. The Delegation of El Salvador, speaking on behalf of GRULAC, expressed satisfaction with the work done at the session, in which there had been an open and frank debate on fundamental issues. The foundation had been laid for the IGC's work in the future. It thanked the Chair for his efforts and the Vice-Chairs. It recognized the work of the Facilitators who had put great effort and were committed to seeking to capture the positions of Member States with objectivity and pragmatism. The way of working in different configurations (plenary, informals, *Ad Hoc* Expert Group and contact groups) had dynamized the debate. It hoped that the IGC would be able to capitalize on that dynamic for significant progress in future sessions. It thanked those experts who had stayed positive in the *Ad Hoc* Expert Group and contact groups, whose inputs it valued. It expressed interest in the next *Ad Hoc* Expert Group, to take place in March 2019. It thanked the representatives of indigenous peoples and thanked them for accompanying and enlightening the IGC with their expertise and knowledge. It thanked the Secretariat for the preparation of the meeting, for its support throughout the meeting, as well as the preparation of the material that served as input and support in the work. It thanked the conference service and the interpreters who made the meetings possible.

212. The Delegation of Lithuania, speaking on behalf of the CEBS Group, extended its thanks to the Chair, the Vice-Chairs as well as the Facilitators for their dedication and energy in moving the work of the IGC forward. It thanked the Secretariat for its valuable contribution in preparing and during the session. It highly appreciated the assistance of the interpreters and WIPO conference staff who spared no efforts and ensured excellent working conditions. It also appreciated the strong engagement of representatives of IPLCs as well as other stakeholders and their valuable inputs into the discussions. It hoped that the Voluntary Fund would be replenished, so as to ensure the funded participation of selected indigenous representatives at IGC 39. The IGC had had a rich session on TK and TCEs and it appreciated the work of experts in the *Ad Hoc* Expert Group and in the contact groups. Though it was still early to predict the outcome on TK and TCEs, it looked forward with optimism to IGC 39 and reconfirmed the Group's commitment to the IGC process.

213. The Delegation of the UK, speaking on behalf of Group B, thanked the Chair for his continued dedication to the IGC and for his guidance. It thanked the Vice-Chairs, the Facilitators and the Secretariat for their hard work prior to the session and during the week. It thanked the interpreters and the conference service for their professionalism and their availability. It said that the Chair could count on the full support and constructive spirit of the Group B as work continued in the IGC.

214. The Delegation of Austria, speaking on behalf of the EU and its Member States, thanked the Chair for his relentless efforts to structure the discussions and guide the members towards a better understanding of mutual positions. It expressed high appreciation of the Chair's guidance and leadership. It thanked the Vice-Chairs for their enduring efforts to bring the IGC forward, and it thanked the Facilitators for accomplishing their difficult work. It thanked the Secretariat for its extremely hard work, and thanked all WIPO staff members who had perfectly organized the meeting. Special thanks went to the interpreters for literally enabling members to understand each other and for their patience and good work. Up until then, there had been significant gaps between the positions, which proved hard to be breached; however, the Chair never lost focus in creating a constructive spirit for the IGC's work. It hoped that the better understanding which it had gained under his chairmanship would lead to tangible results in the near future. It noted with satisfaction that the IGC had eventually reached a consensus and agreed with documents that could serve as a basis for future discussions. It assured that it would continue to work hard in order to reach acceptable results for all. To achieve that goal, it would continue to show a constructive spirit as well as try hard to further develop its common positions.

215. The representative of CEM-Aymara, speaking on behalf of the Indigenous Caucus, recognized the progress made during the session. However, he highlighted the urgent need for a solution to the misappropriation and misuse of TK and TCEs. The IGC had in its hands not only the protection of indigenous peoples' innovations and creations, but also the protection of their identity and dignity. The outcome of the IGC was important and urgent, for that reason he urged the Chair to bridge the gaps that still existed. He recalled Article 31 of UNDRIP. Indigenous representatives had heard with great concern the idea of developing a time limitation as an eligibility criterion for TK and TCEs. That temporal limit was unacceptable. Imposing such temporal criteria restricted innovation in the traditional context and contradicted the IGC mandate. The tiered approach was positive because it recognized the diversity of TK. However, it was still not in line with indigenous peoples' intention regarding their TK, given that it did not recognize holders' choice to share a certain element of TK or not. That decision was made under each peoples' indigenous law. A tiered approach would be effective as long as it guaranteed the holders' right to decide. It was important that the tiered approach incorporate a TK recovery mechanism. When a TK was not intended to be shared but had been diffused without the indigenous peoples' consent, the instrument had to establish a mechanism to regain control over such knowledge. He continued to support the discussion around that approach and welcomed the new paragraph (d), which marked the beginning of a potential solution for TK that had been diffused without consent. The IGC still needed to work on the language but it was a step in the right direction. Exceptions and limitations should be based on indigenous peoples' determination under the principle of FPIC. Furthermore, work should be done at the national level since there was no one-size-fits-all solution for everyone. Finally, he urged WIPO Member States to contribute to the Voluntary Fund. Many indigenous peoples could only participate in and contribute to the IGC through the Voluntary Fund. Indigenous participation in the IGC was key, since delegations got a firsthand understanding of the indigenous peoples' needs and aspirations in terms of TK and TCE protection. He concluded by stating "nothing about us without us."

216. The Chair closed the session.

Decision on Agenda Item 10:

217. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6, 7 and 8 on December 14, 2018. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated by February 15, 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 Thirty-Ninth Session of the Committee.

[Annex follows]

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[End of Annex and of document]

Nota informativa

para la 39.ª sesión del CIG

Preparada por el Sr. Ian Goss, presidente del CIG

Introducción

1. De conformidad con el mandato del Comité Intergubernamental sobre Propiedad Intelectual y Recursos Genéticos, Conocimientos Tradicionales y Folclore (CIG) para 2018/2019 y con el programa de trabajo de 2019, la 39.ª sesión del CIG deberá servir para emprender negociaciones sobre los conocimientos tradicionales (CC.TT.) y las expresiones culturales tradicionales (ECT), centrándose en el examen de las cuestiones transversales y no resueltas y la consideración de las opciones relativas a uno o varios proyectos de instrumentos jurídicos.

2. Quiero señalar que, como fue solicitado, la Secretaría actualizó para la 37.ª sesión del CIG los proyectos de análisis de las carencias en la protección de los CC.TT. y las ECT, preparados en 2008, y ha vuelto a publicarlos para la 39.ª sesión del CIG con las signaturas WIPO/GRTKF/IC/39/6 y WIPO/GRTKF/IC/39/7, respectivamente.

3. A fin de ayudar a los Estados miembros en sus preparativos para la 39.ª sesión del CIG, he tomado en cuenta los debates celebrados en la 37.ª y 38.ª sesiones y he preparado esta nota informativa, en la que se resumen las cuestiones transversales y no resueltas, a las que convendría que los Estados miembros prestaran especial atención en la 39.ª sesión. Algunas otras cuestiones relativas a los CC.TT./ECT resumidas y expuestas en la nota informativa preparada para la 38.ª sesión figuran en el Anexo para su ulterior consideración, si el tiempo lo permite.

4. He preparado la presente nota informativa para prestar asistencia a los Estados miembros y observadores en sus preparativos para la 39.ª sesión. Quiero subrayar que las opiniones que figuran en esta nota son solo mías, sin perjuicio de las posturas de los Estados miembros sobre las cuestiones que se comentan. En su condición de nota informativa, no es oficial ni es un documento de trabajo para la sesión. Sencillamente, se trata de un documento que tiene por objeto ayudar a los participantes a preparar la 39.ª sesión del CIG.

5. Quiero alentar la flexibilidad y el pragmatismo de los Estados miembros, e instarlos a hacer un esfuerzo concertado para “alcanzar un acuerdo” (como se menciona en el mandato del CIG), y a hacerlo desde una perspectiva abierta a la negociación y al compromiso.

6. Como ya he indicado, me parece que la mayoría de las cuestiones que se abordan en los documentos sobre los CC.TT. y las ECT son “transversales”. Al decir eso me refiero a que la mayor parte de las cuestiones políticas y técnicas están presentes en los dos textos. Ese dato no debe sorprender, dada la semejanza entre los CC.TT. y las ETC. En realidad, los pueblos indígenas no son los únicos que afirman que los dos ámbitos que son objeto de examen son partes interrelacionadas de un todo. Con todo, desde la perspectiva de la propiedad intelectual (PI), los CC.TT. y las ECT plantean ciertas cuestiones diferenciadas e históricamente han sido objeto de enfoques diferentes; hasta la fecha, el CIG ha trabajado

ampliamente en uno y otro texto y lo ha hecho en paralelo, pero por separado.[1] Eso supone que, en algunos casos, determinadas cuestiones normativas y jurídicas que coinciden o son muy similares se han abordado de manera diferente en cada texto, y que se hayan desaprovechado oportunidades para comparar y coordinar directamente ambos textos, aun cuando se juzgara necesario y conveniente. Por el contrario, la 37.ª y 38.ª sesiones del CIG ofrecieron a los participantes la posibilidad de trabajar con los textos al mismo tiempo y, por lo tanto, de realizar los cambios que consideraran oportunos para simplificar y mejorar los textos de forma coordinada, coherente e integrada.

7. Teniendo en cuenta los debates celebrados en la 37.ª y 38.ª sesiones del CIG, sugiero que la 39.ª sesión del CIG se centre en las siguientes cuestiones no resueltas:

- Objetivos
- Materia
- Alcance de la protección
- Excepciones y limitaciones.

8. Al examinar esas cuestiones no resueltas, se alienta a los Estados miembros a reflexionar acerca de si el instrumento o los instrumentos internacionales deberían constituir simplemente un marco de política o contemplar unas posibles normas mínimas o máximas permitiendo que la formulación más detallada de esos conceptos, así como las cuestiones relativas a la aplicación, se determinen en el plano nacional.

9. El enfoque tradicional de los instrumentos internacionales de PI ha consistido en acordar un conjunto de normas mínimas de protección a nivel internacional y, cuando fuera necesario y apropiado, establecer principios internacionales. Muchas cuestiones pueden y deben dejarse al arbitrio de la legislación nacional; por lo tanto, si bien algunas de las principales opciones de política relacionadas con la PI deben adoptarse a nivel internacional, la mayoría de los aspectos puntuales pueden dejarse en manos de la legislación nacional.

Objetivos (artículo 2 del texto sobre los CC.TT. y artículo 2 del texto sobre las ECT)

10. Los objetivos son fundamentales para la elaboración del texto dispositivo de todo instrumento, ya que definen la finalidad del instrumento. Eso permite lograr una redacción sencilla, directa y eficiente que redunda en un texto claro.

11. Como ha señalado anteriormente el CIG, la protección de los CC.TT. y las ECT no debe emprenderse por sí sola, como fin en sí mismo, sino como instrumento para el logro de los objetivos y las aspiraciones de los pueblos y las comunidades pertinentes y para la promoción de los objetivos de política nacional, regional e internacional. La manera en que se configura y define un instrumento jurídico internacional dependerá en gran medida de los objetivos que pretende alcanzar. Por lo tanto, un primer paso fundamental para la elaboración de instrumentos jurídicos internacionales para la protección de los CC.TT./ECT es determinar los objetivos de política pertinentes.

12. El texto sobre los CC.TT. contiene dos alternativas, mientras que el texto sobre las ECT contiene cuatro alternativas.

13. Se recuerda que, de conformidad con el mandato del CIG, el objetivo de las negociaciones es llegar a un acuerdo sobre uno o varios instrumentos jurídicos internacionales relativos a la PI que aseguren la protección equilibrada y eficaz de los

[1] No obstante, conviene señalar que las sesiones 27.ª (abril de 2014), 28.ª (julio de 2014), 37.ª (agosto de 2018) y 39.ª (diciembre de 2018) del CIG se centraron en las cuestiones transversales.

CC.TT. y las ECT. La protección de la propiedad intelectual es distinta de los conceptos de "preservación" y "salvaguardia". Cabe recordar que las declaraciones y acuerdos internacionales en ámbitos distintos de la OMPI se ocupan de los aspectos de la conservación, preservación y salvaguardia de los CC.TT. y las ECT en sus contextos políticos concretos.[2]

14. El CIG debería considerar la posibilidad de racionalizar los textos a fin de centrar la atención en objetivos básicos comunes y concisos relacionados con la PI para el instrumento o instrumentos. A grandes rasgos, entre los ejemplos de objetivos centrados en la PI cabría citar la prevención de la apropiación y la utilización indebidas de los CC.TT. y las ECT, la promoción de la innovación y la creatividad, y la prevención de la concesión indebida o errónea de derechos de PI.

15. Al señalar los objetivos relacionados con la PI, los Estados miembros podrían considerar qué tipo de daño o daños procurarían reparar uno o varios instrumentos sobre los CC.TT y las ECT, así como cuáles serían las lagunas existentes que, manteniendo una perspectiva de política, deberían colmarse, y reflexionar al respecto.

16. Al examinar las alternativas, sería útil que los Estados miembros consideraran los objetivos desde la perspectiva de todos los intereses, es decir, los de los beneficiarios, los usuarios y el público en general, teniendo en cuenta que, a mi juicio, las alternativas actuales suelen formularse atendiendo a una sola perspectiva.

17. Algunos Estados miembros propusieron reconocer "la necesidad de proteger, preservar y fomentar el dominio público". Convendría que el CIG considerara determinar si es necesario que en los objetivos se aborde la relación con el dominio público. En concreto, convendría que los miembros consideraran si es posible abordar esa cuestión en el preámbulo y no como objetivo específico, señalando que la protección del dominio público es un principio inherente al sistema de PI.

Materia

Enfoques para definir la materia

18. La primera cuestión relacionada con la materia que conviene que examine el CIG es el enfoque necesario para definirla.

19. La armonización internacional, el establecimiento de normas y la cooperación en el ámbito de la PI no han dependido en general de la determinación de definiciones definitivas y exhaustivas de la materia objeto de la protección. Se ha observado una tendencia a dejar que las autoridades nacionales determinen los límites de la materia objeto de protección, y que la terminología a nivel internacional se utilice más para expresar una orientación normativa común.[3]

20. La definición de la materia relacionada con la PI también puede expresarse de manera muy general cuando la definición no determina ni delimita el alcance real de la protección que ha de otorgarse en virtud de la legislación. Dicho de otro modo, la definición de la materia que por lo general es pertinente y la del alcance exacto de la materia protegida pueden constituir dos etapas conceptuales distintas. La segunda etapa,

[2] Con ese fin, en el análisis actualizado de las carencias, que figura en los documentos WIPO/GRTKF/IC/39/6 y WIPO/GRTKF/IC/39/7, se analiza el concepto de "protección" y se proporciona información básica sobre otras declaraciones y acuerdos internacionales en ámbitos distintos de la OMPI y más allá de la PI que tratan de la conservación, preservación y salvaguardia de los CC.TT. y las ECT.
[3] WIPO/GRTKF/IC/3/9, párr. 4.

consistente en determinar exactamente qué parte de la materia general ha de protegerse, puede adoptarse aplicando criterios de admisibilidad específicos, mediante exclusiones explícitas del alcance de la materia objeto de protección, o mediante referencia a categorías específicas de materia protegida. Por lo general, algunos o todos estos enfoques se adoptan en el mismo instrumento jurídico.[4]

21. Por ejemplo, el término "invención", el objeto de la protección por patente, tiende a definirse ampliamente en los instrumentos jurídicos (y no está definido en absoluto en instrumentos internacionales esenciales como el Convenio de París y el Acuerdo sobre los ADPIC). Del mismo modo, el objeto general de la protección por derecho de autor (las "obras literarias y artísticas") se define en términos amplios en el párrafo 1 del artículo 2 del Convenio de Berna ("comprenden todas las producciones en el campo literario, científico y artístico..."), pero el alcance real de la materia protegida se define en condiciones específicas, como en el caso de la fijación material.[5]

22. En la primera sesión del CIG se anunció un enfoque general: "Dado el carácter dinámico y sumamente diverso de los conocimientos tradicionales es posible que no se consiga elaborar una definición única y exclusiva del término. No obstante, para delimitar el alcance de la materia para la que se solicita protección no se necesita necesariamente una definición única. Este enfoque se ha adoptado en varios instrumentos internacionales en la esfera de la propiedad intelectual."[6]

Definición de " tradicional" (artículo 1 del texto sobre los CC.TT. y artículo 1 del texto sobre las ECT)

23. En la 38.ª sesión del CIG, se propuso una definición de "tradicional" que se incluyó en el texto sobre los CC.TT. y las ECT.

24. Aunque a menudo se piensa que la tradición está compuesta únicamente por imitaciones y reproducciones, también tiene que ver con la innovación y la creación en el marco tradicional. Por lo tanto, el término "tradicional" no significa necesariamente "antiguo", sino que los conocimientos y las expresiones culturales se derivan o se basan en la tradición, se identifican o se vinculan a un pueblo indígena o a una comunidad local y pueden realizarse o practicarse de manera tradicional.

25. Conviene que el CIG siga aclarando el significado preciso de "tradicional". Esto es fundamental, especialmente porque las expresiones culturales "contemporáneas", con inclusión de aquellas con orígenes "tradicionales", pueden protegerse mediante la legislación de derecho de autor.[7]

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[4] WIPO/GRTKF/IC/3/9, párr. 8.
[5] WIPO/GRTKF/IC/3/9, párrafos 9 y 10.
[6] WIPO/GRTKF/IC/1/3, párr. 65.
[7] El derecho de autor establece una distinción entre i) el patrimonio cultural preexistente y subyacente y la cultura tradicional, y ii) las producciones literarias y artísticas contemporáneas creadas por las generaciones actuales de la sociedad y basadas en el patrimonio cultural preexistente y en la cultura tradicional o derivadas de ellas:

- En general, la cultura tradicional existente es intergeneracional y es "propiedad" colectiva de uno o varios grupos o comunidades. Es probable que sea de origen anónimo, en la medida en que la noción de autoría es pertinente en absoluto. Por lo general, la cultura tradicional preestablecida como tal y sus expresiones particulares no están protegidas por el derecho de autor actual.
- Por otra parte, una producción literaria y artística contemporánea basada en una cultura tradicional que incorpore nuevos elementos o expresiones o inspirada en ella constituirá una "nueva" obra. Las expresiones y representaciones contemporáneas y basadas en la tradición y las representaciones de las culturas tradicionales están generalmente protegidas por el derecho de autor vigente (y el derecho sobre los diseños industriales) para el que son suficientemente "originales" y "nuevas", respectivamente.

[Footnote continued on next page]

Criterios de admisibilidad (artículo 3 del texto sobre los CC.TT. y artículo 3 del texto sobre las ECT)

26. Tanto el texto sobre los CC.TT. como el texto sobre las ECT contienen una formulación de criterios de admisibilidad, que especifican una delimitación más precisa de los conocimientos y las expresiones susceptibles de protección en virtud del instrumento o instrumentos jurídicos. En las definiciones de CC.TT. y ECT contenidas en el artículo dedicado en ambos textos a los términos utilizados también figura una formulación relativa a los criterios de admisibilidad. Convendría que el CIG considerara cuál es el lugar más adecuado para establecer los criterios de admisibilidad.

27. También se plantea la cuestión de si es verdaderamente necesario establecer criterios de admisibilidad, como se ha explicado anteriormente (véanse los párrafos 19 a 23) sobre los enfoques para definir los CC.TT. y las ECT.

Definición de "conocimientos tradicionales" (artículo 1 del texto sobre los CC.TT.)

28. Si bien el artículo 3 del texto sobre los CC.TT. establece que ese instrumento se aplica a los CC.TT., la definición de CC.TT. figura en el artículo 1, que recoge los términos utilizados.

29. En esa definición figuran algunos elementos de los criterios de admisibilidad (véanse los párrafos 27 a 28 del presente documento). Como ya se ha mencionado, convendría que los Estados miembros consideraran cuál es el lugar adecuado para la definición de los CC.TT. y los criterios de admisibilidad, a fin de evitar repeticiones.

Definición de "expresiones culturales tradicionales" (artículo 1 del texto sobre las ECT)

30. Cabe observar que, si bien el artículo 3 del texto sobre las ECT dispone que el instrumento se aplica a las ECT, en el artículo 1 sobre "Términos utilizados" se ofrece una definición de ese término, al igual de lo que sucede en el texto sobre los CC.TT.

31. En la definición se establecen criterios sustantivos de admisibilidad (véanse los párrafos 27 y 28 del presente documento) que determinan cuáles de las ECT comprendidas en la definición del artículo 1 recibirían protección. Como ya se ha mencionado, convendría que los Estados miembros consideraran cuál es el lugar adecuado para la definición de los CC.TT. y los criterios de admisibilidad, a fin de evitar repeticiones.

32. En la definición de ECT figuran, como notas al pie, ejemplos de las distintas formas de ECT. Convendría que los Estados miembros consideraran la necesidad de ofrecer esos ejemplos.

Alcance de la protección (artículo 5 del texto sobre los CC.TT. y artículo 5 del texto sobre las ECT)

33. El alcance de la protección tiene por objeto determinar qué actos específicos con respecto a los CC.TT. o las ECT protegidos deberían prohibirse o prevenirse. El texto sobre

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[Footnote continued from previous page]

Véase OMPI, Análisis consolidado de la protección jurídica de las expresiones culturales tradicionales/expresiones del folclore (2003), páginas 12 a 13, disponible en: www.wipo.int/edocs/pubdocs/es/tk/785/wipo_pub_785.pdf.

CC.TT. contiene cuatro alternativas, mientras que el texto sobre las ECT contiene tres alternativas.

34. Convendría que el CIG aclarara el enfoque apropiado (es decir, un enfoque basado en los derechos, un enfoque basado en medidas o una mezcla de los dos). En el enfoque basado en los derechos, se otorgarían derechos a los beneficiarios, que podrían gestionarlos y hacerlos valer; en el enfoque basado en medidas, los Estados están obligados únicamente a proporcionar "medidas" para la protección de los CC.TT./ECT, entre las que podría figurar una amplia serie de opciones jurídicas y prácticas, civiles y penales.

35. Asimismo, convendría que el CIG examinara hasta dónde debería llegar concretamente el instrumento internacional y el punto en el que la legislación nacional asumiría sus competencias. De hecho, en este ámbito se plantean nuevamente dos enfoques: el primero consiste en otorgar la máxima flexibilidad a los Estados para que determinen el alcance de la protección mediante la aplicación de la legislación nacional y local y otras medidas; el segundo consiste en actuar de manera más detallada y prescriptiva a nivel internacional para obtener el mayor grado de armonización posible.

36. Asimismo, cabe distinguir entre derechos patrimoniales y derechos morales. Por ejemplo, en el marco del derecho de autor, los derechos patrimoniales permiten al titular de los derechos obtener una retribución financiera por el uso de sus obras por terceros, mientras que los derechos morales se refieren al derecho a reivindicar la paternidad de una obra y de oponerse a toda mutilación o deformación u otra modificación de la misma o a cualquier atentado a la misma que cause perjuicio al honor o a la reputación del autor.

37. El CIG ha debatido durante varios años un "enfoque estratificado" (también denominado "protección diferenciada"), según el cual los poseedores de derechos podrían hacer valer distintos tipos o niveles de derechos o de medidas en función de la naturaleza y las características de la materia objeto de protección, el grado de control que poseyeran los beneficiarios y el grado de difusión.

38. En el enfoque estratificado se propone una protección diferenciada conforme a distintos tipos de CC.TT. o ECT dentro de un espectro que oscilaría entre CC.TT. o ECT disponibles al público en general y CC.TT. o ECT secretos, sagrados o desconocidos fuera de la comunidad, y cuyo uso está en manos de los beneficiarios.[8]

39. Este enfoque apunta a que los derechos patrimoniales exclusivos podrían ser apropiados para algunas formas de CC.TT./ECT (por ejemplo, los CC.TT. y las ECT secretos y sagrados), mientras que un modelo basado en derechos morales podría adecuarse, por ejemplo, a los CC.TT. y a las ECT que ya estén a disposición del público o hayan sido divulgados pero que de todas formas puedan ser atribuidos a pueblos indígenas o comunidades locales específicos.

40. Cabe recordar que en versiones anteriores del texto sobre las ECT se ha seguido un enfoque estratificado, empezando por el documento "La protección de las expresiones culturales tradicionales/expresiones del folclore: objetivos y principios revisados" (WIPO/GRTKF/IC/9/4). Las categorías de ECT que figuran en ese documento son las siguientes: las ECT de un valor cultural o espiritual o de una importancia singulares; otras ECT (podría decirse que son el resto de las de la primera categoría) y las ECT secretas. Aliento a los Estados miembros a consultar ese documento, pues también contiene un comentario en el que se explica el enfoque propuesto respecto de los niveles.

8 Véase el documento WIPO/GRTKF/IC/17/INF/9 (Lista y breve descripción técnica de las diversas formas que pueden presentar los conocimientos tradicionales).

41. Aunque la decisión incumbe al CIG, a mi juicio, la concesión de una protección diferenciada con arreglo al enfoque estratificado permitiría reflejar el equilibrio al que se alude en el mandato del CIG y la relación con el dominio público, así como los derechos e intereses de los propietarios y los usuarios.

42. En el contexto de las ECT, la protección diferenciada que se propone en el enfoque estratificado ofrece una posibilidad de responder a la realidad de las diferencias existentes entre los CC.TT. secretos, los CC.TT. de difusión restringida y los CC.TT. de amplia difusión, cuyas definiciones figuran en el artículo 1, dedicado a los términos utilizados. Se alienta encarecidamente a los Estados miembros a que examinen atentamente qué criterios resultan adecuados y deberían utilizarse en el contexto de las ECT, con el fin de determinar los niveles. Al hacerlo, deberían considerarse los aspectos prácticos y las repercusiones jurídicas de los niveles propuestos. Asimismo, cabe observar que los criterios que podrían ser pertinentes en el contexto de los CC.TT. podrían no ser necesariamente de aplicación en el contexto de las ECT, y viceversa.

43. En el supuesto de que la propuesta de aceptar la inclusión de otros beneficiarios (como los estados o las naciones), pero con un alcance diferente de la protección, reciba algún apoyo, sería conveniente examinar con detenimiento los derechos que se podrían conceder a dichos beneficiarios.

Excepciones y limitaciones (artículo 9 del texto sobre los CC.TT. y artículo 7 del texto sobre las ECT)

44. El texto sobre los CC.TT. contiene tres alternativas, mientras que el texto sobre las ECT contiene cuatro alternativas. Esas alternativas se basan en dos enfoques:

- conceder flexibilidad en el plano nacional a la plena regulación de las excepciones y limitaciones (alternativas 1 y 3 del texto sobre los CC.TT. y alternativas 1, 2 y 3 del texto sobre las ECT);

- brindar un marco que incluya listas de excepciones generales y específicas, orientado a que los Estados miembros puedan regular esas excepciones en el plano nacional (alternativa 2 del texto sobre los CC.TT. y alternativa 4 del texto sobre las ECT). Las excepciones generales contienen elementos de la “clásica” prueba de los tres pasos que se recoge en el Convenio de Berna de 1971, y elementos de derechos morales (relacionados con los conceptos de reconocimiento, utilización no ofensiva y compatibilidad con el uso leal). Las excepciones específicas abarcan el tipo de excepciones y limitaciones que deberían incluirse/permitirse.

45. Ante la posibilidad de introducir un enfoque estratificado para definir el alcance de la protección, algunas delegaciones se preguntan si no debería aplicarse también ese enfoque a las disposiciones sobre excepciones y limitaciones, es decir, que diversos tipos de actos objetos de excepción reflejen los distintos tipos de materia protegida y los derechos que se aplican a cada nivel. Convendría que los Estados miembros examinaran ese enfoque.

Otros recursos de utilidad

46. En el sitio web de la OMPI se ofrecen recursos útiles que los Estados miembros pueden utilizar como material de referencia en la preparación de la 39.ª sesión del CIG como, por ejemplo:

- WIPO/GRTKF/IC/39/6, La protección de los conocimientos tradicionales: Proyecto actualizado de análisis de las carencias, https://www.wipo.int/meetings/es/doc_details.jsp?doc_id=426449;

- WIPO/GRTKF/IC/39/7, Proyecto actualizado de las carencias en la protección de las expresiones culturales tradicionales, https://www.wipo.int/meetings/es/doc_details.jsp?doc_id=426450;

- WIPO/GRTKF/IC/17/INF/8, "Nota sobre los significados de la expresión "dominio público" en el sistema de propiedad intelectual, con referencia especial a la protección de los conocimientos tradicionales y las expresiones culturales tradicionales/expresiones del folclore", https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=149213;

- WIPO/GRTKF/IC/17/INF/9, "Lista y breve descripción técnica de las diversas formas que pueden presentar los conocimientos tradicionales", https://www.wipo.int/meetings/es/doc_details.jsp?doc_id=147152;

- Experiencias regionales, nacionales, locales y comunitarias: https://www.wipo.int/tk/es/resources/tk_experiences.html;

- Conferencias y ponencias sobre temas escogidos, https://www.wipo.int/tk/es/resources/tk_experiences.html#4

Anexo
Otras cuestiones transversales y cuestiones concretas y específicas del texto de los CC.TT.

Otras cuestiones transversales

Preámbulo/Introducción

1. El preámbulo no es un texto jurídicamente vinculante ni dispositivo de un instrumento multilateral, pero ayuda a interpretar las disposiciones dispositivas al contextualizar el instrumento y los fines con que se redactó. Su redacción suele adoptar la forma de principios, independientemente de que el instrumento sea declaratorio o jurídicamente vinculante.

2. En la 37.ª sesión del CIG se procedió de forma coordinada, coherente y holística para perfeccionar la sección preámbulo/introducción de ambos textos acerca de los CC.TT y de las ECT.

3. Sería conveniente que el CIG comprobara más detenidamente su pertinencia y reflexionara sobre cuáles de los conceptos guardan una relación más directa con la PI, habida cuenta de que su mandato consiste en alcanzar un acuerdo respecto de un instrumento jurídico internacional en materia de PI en aras de una protección equilibrada y eficaz de los CC.TT. y las ECT.

Definición de "apropiación indebida" (artículo 1 del texto sobre los CC.TT.)

4. Tanto el texto sobre los CC.TT. como el texto sobre las ECT hacen referencia al concepto de "apropiación indebida". A diferencia del texto sobre los CC.TT., que incluye una propuesta de definición de "apropiación indebida", el de las ECT carece de esa propuesta. Pese a que también se está debatiendo en el seno del CIG el concepto de la apropiación indebida en el contexto de los recursos genéticos (RR.GG.), hasta ahora no se ha alcanzado un acuerdo acerca de su significado o de la necesidad de definir dicho concepto específicamente en ese contexto.

5. El CIG podría considerar si es necesario contar con una definición de "apropiación indebida" en relación con los CC.TT. y/o las ECT, o si bastaría con una interpretación de buena fe del término, conforme al sentido corriente que haya de atribuirse a ese término en su contexto y teniendo en cuenta el objeto y fin de los instrumentos jurídicos internacionales pertinentes.[9]

6. Asimismo, quisiera señalar que en el texto sobre los CC.TT. figuran las definiciones de "uso indebido", "apropiación ilegal" y "uso no autorizado". Podría ser útil volver a examinar estos términos una vez aclaradas otras cuestiones. Si bien los términos citados se utilizan también en el texto sobre las ECT, sus definiciones no figuran en dicho texto.

Definiciones de dominio público y disponible públicamente (artículo 1 del texto sobre los CC.TT. y artículo 1 del texto sobre las ECT)

7. En la vigésima séptima sesión del CIG se introdujo en los textos relativos a los CC.TT. y a las ECT una definición del término "dominio público". Este concepto fundamental forma parte integral del equilibrio inherente al sistema de PI. Los derechos exclusivos se equilibran con los intereses de los usuarios y del público en general, con miras a fomentar y estimular el

[9] Véase el artículo 31 de la Convención de Viena, el cual estipula que "[u]n tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de estos y teniendo en cuenta su objeto y fin".

seguimiento de la innovación y la creatividad y el acceso a las obras e invenciones una vez dejan de estar protegidas.

8. Actualmente, el artículo 1 del texto sobre las ECT contiene dos alternativas para el uso del término “dominio público”. Mientras que la primera propone una definición del término, la segunda simplemente se remite al término tal y como se define en la legislación nacional. El texto sobre los CC.TT. contiene una definición del término “dominio público” similar a la que figura en el texto sobre las ECT, excepto que la definición de “dominio público” en este último documento alude a “materiales tangibles e intangibles”, mientras que en el texto sobre los CC.TT. se hace referencia exclusivamente a los “materiales intangibles”. El CIG podría estudiar la conveniencia de armonizar la definición contenida en uno y otro texto.

9. Dicho esto, si bien el concepto de dominio público es importante para comprender la interconexión entre la PI y los CC.TT./las ECT y para elaborar un sistema eficaz y equilibrado y similar al de la PI para la protección de los CC.TT. y las ECT, no está clara la utilidad de elaborar e incluir una definición específica de “dominio público” en los instrumentos sobre CC.TT. y ECT. Creo que dar una definición al “dominio público” es una tarea ardua que tendría una incidencia considerable y de gran alcance en la esfera de las políticas que iría más allá del ámbito de actuación del CIG.

10. El concepto de “dominio público” también guarda relación con la interpretación del concepto conexo de “disponibles públicamente”[10]. En ambos textos figura la misma definición del término.

Definición de uso/utilización (artículo 1 del texto sobre los CC.TT. y artículo 1 del texto sobre las ECT)

11. En uno y otro texto se incluyen definiciones similares de uso/utilización. La definición que figura en el texto sobre las ECT procede del texto sobre los CC.TT., y no parece quedar claro si, en realidad, esa definición sería aplicable a las ECT.

12. Como señaló una delegación durante la vigésima séptima sesión del CIG, la definición de “uso”/”utilización” hace referencia a “usos” fuera del ámbito tradicional. No obstante, la palabra “uso”, presente en la alternativa 2 del texto sobre las ECT y en el artículo 5 de uno y otro texto, se refiere al uso por los beneficiarios. Dicho de otro modo, la misma palabra no se emplea con idéntico significado en distintas partes de los textos. Tal vez sea aconsejable que el CIG examine esta observación y encuentre la manera de evitar confusiones.

Beneficiarios (artículo 4 del texto sobre los CC.TT. y artículo 4 del texto sobre las ECT)

13. Está claro que todavía no se ha logrado un acuerdo sobre esta cuestión. Tanto el texto sobre los CC.TT. como el texto sobre las ECT incluyen tres alternativas.

14. Algunas delegaciones están firmemente convencidas de que las comunidades locales y los pueblos indígenas deberían ser los únicos beneficiarios, mientras que otras consideran que, dadas las diferencias observadas entre los entornos y las legislaciones nacionales de los lugares susceptibles de poseer conocimientos tradicionales, resulta esencial poder disponer de un espacio de políticas flexible que tome en cuenta esas diferencias. Si bien parece haberse

[10] Ese concepto se examina, en particular, en el documento WIPO/GRTKF/IC/17/INF/8 (Nota sobre los significados de la expresión “dominio público” en el sistema de propiedad intelectual, con referencia especial a la protección de los conocimientos tradicionales y las expresiones culturales tradicionales/expresiones del folclore). Véase también el documento WIPO/GRTKF/IC/38/INF/7 (Glosario de los términos más importantes relacionados con la propiedad intelectual y los recursos genéticos, los conocimientos tradicionales y las expresiones culturales tradicionales).

alcanzado un amplio consenso acerca de que las comunidades locales y los pueblos indígenas deberían ser los principales beneficiarios, se plantean también opiniones diversas respecto de la posibilidad de reconocer a otros beneficiarios como los estados y las naciones.

15. Convendría que los Estados miembros consideraran la necesidad de conceder cierta libertad a la legislación nacional, habida cuenta de las alternativas que contienen los textos parecen reflejar las distintas situaciones relativas a los titulares de los CC.TT./las ECT en todo el mundo.

16. En mi opinión, es preciso que los textos sean más claros al establecer la relación entre los distintos conceptos relativos a i) beneficiarios, ii) titulares de los derechos y iii) administradores de los derechos (esta cuestión se aborda más adelante).

Sanciones, recursos y ejercicio de los derechos/Aplicación (artículo 6 del texto sobre los CC.TT. y artículo 10 del texto sobre las ECT)

17. Los textos sobre los CC.TT. y las ECT contienen varios conceptos distintos. Únicamente comparten un concepto (el de la alternativa 1 en ambos textos). Dado que esta disposición de procedimiento probablemente sería aplicable tanto en el ámbito de los CC.TT. como en el de las ECT, los Estados miembros podrían reexaminar ambas versiones, simplificarlas y ver en qué partes una comparación entre las dos podría redundar en la mejora de ambos textos.

18. Para simplificar, sería conveniente que los Estados miembros consideraran la posibilidad de brindar un marco general a escala internacional, dejando que los pormenores se definan en la legislación nacional.

Administración de los derechos/Intereses (artículo 8 del texto obre los CC.TT. y artículo 6 del texto sobre las ECT)

19. El artículo 8 del texto sobre los CC.TT. y el artículo 6 del texto sobre las ECT tratan del modo de administrar los derechos e intereses y de quiénes deberían hacerlo. Ello podría concernir, por ejemplo, a la prestación de apoyo para la administración y la observancia de los derechos de los beneficiarios.

20. No se ha alcanzado, al parecer, un acuerdo respecto del alcance de la participación de los poseedores de CC.TT. y de ECT en el establecimiento/la designación de la autoridad competente.

21. Un camino que los Estados miembros podrían considerar sería conceder flexibilidad, en el plano nacional, en lo que respecta a la aplicación de los mecanismos relativos al establecimiento de autoridades competentes, en lugar de tratar de imponer una “solución única” en el plano internacional.

Duración de la protección (artículo 10 del texto sobre los CC.TT. y artículo 8 del texto sobre las ECT)

22. En lo que respecta a la duración de la protección, cada texto sigue un enfoque diferente.

23. La formulación en el texto sobre los CC.TT. parece similar al primer párrafo de la opción 1 del texto sobre las ECT. No obstante, cabe señalar que, a diferencia del texto sobre las ECT, contiene una referencia al artículo 5 (enfoque estratificado).

24. El texto sobre las ECT incluye tres opciones: la opción 1 establece un plazo de protección en virtud los criterios de admisibilidad y determina un plazo indefinido con respecto a los

derechos morales; la opción 2 vincula el plazo de la protección al disfrute ininterrumpido del alcance de la protección y la opción 3 atañe únicamente a la duración de los aspectos patrimoniales de las ECT, cuyo plazo de protección es limitado. Los Estados miembros podrían considerar si es posible fusionar las opciones y si deberían imponerse plazos con respecto al período de protección de los aspectos patrimoniales de las ECT.

25. Tal vez los Estados miembros deseen considerar un enfoque similar con respecto al texto de los CC.TT.

Formalidades (artículo 11 del texto sobre los CC.TT. y artículo 9 del texto sobre las ECT)

26. El texto sobre los CC.TT. y el texto sobre las ECT tienen en común dos párrafos e incluyen algunos elementos adicionales.

27. El CIG podría considerar el enfoque estratificado del artículo 5 del texto sobre los CC.TT. y del artículo 5 del texto sobre las ECT al examinar estas formalidades. Cabría contemplar que no se establezcan formalidades respecto de algunos tipos de CC.TT. y ECT, así como el establecimiento de algunas formalidades para otras clases de CC.TT. y ECT. Además, las formalidades podrían diferir según el tipo de derechos que se van a conceder. Nuevamente, convendría recordar que las primeras versiones del texto de las ECT anteriormente señalado ya proponían alguna forma de registro y examen previos con respecto a las ECT para las que se solicitara el nivel de protección más alto, aunque no para las demás ECT, como puede verse en el documento “La protección de las expresiones culturales tradicionales/expresiones del folclore: objetivos y principios revisados” (WIPO/GRTKF/IC/9/4).

Disposiciones transitorias (artículo 12 del texto sobre los CC.TT. y artículo 11 del texto sobre las ECT)

28. Los artículos 12.1 del texto sobre los CC.TT. y 11.1 del texto sobre las ECT parecen reflejar consenso con respecto a que el instrumento debería aplicarse a todos los CC.TT. y las ECT que, en el momento de su entrada en vigor, cumplan los criterios de protección. La redacción de esos párrafos no es idéntica en ambos textos. Convendría que los Estados miembros estudiaran la redacción más detalladamente y eligieran la manera más clara de expresar aquello sobre lo que existe acuerdo.

29. Por lo que respecta a la cuestión de los derechos adquiridos por terceros, en el artículo 12.2 del texto de los CC.TT. se presentan tres opciones, mientras que el artículo 11.2 del texto de las ECT incluye solo dos. Es necesario seguir examinando la cuestión para conciliar los diferentes puntos de vista. Para lograr esa conciliación podría reformularse el texto para expresar de manera más clara y sencilla este importante concepto.

30. Convendría que los Estados miembros cotejaran ambos textos e introdujeran las modificaciones que consideren oportunas.

Relación con otros acuerdos internacionales (artículos 13 y 14 del texto sobre los CC.TT. y artículo 12 del texto sobre las ECT)

31. Ambos textos contienen conceptos similares. No obstante, el texto sobre los CC.TT. incluye una cláusula de no derogación que figura como un artículo independiente (el artículo 14), mientras que en el artículo del texto de las ECT que aborda la relación con otros acuerdos internacionales (el artículo 12) se incluye una cláusula similar. Tal vez los Estados miembros deseen considerar la posibilidad de incorporar esa cláusula y adoptar la misma formulación en ambos textos, para evitar confusiones.

Trato nacional (artículo 15 del texto sobre los CC.TT. y artículo 13 del texto sobre las ECT)

32. En cuanto al trato nacional, el texto de los CC.TT. contiene tres alternativas y difiere en grado significativo del texto de las ECT. Sería conveniente que los Estados miembros cotejaran ambos textos e introdujeran las modificaciones pertinentes en aras de la coherencia.

Cooperación transfronteriza (artículo 16 del texto sobre los CC.TT. y artículo 14 del texto sobre las ECT)

33. En esta disposición se aborda la importante cuestión de los CC.TT./ECT compartidos entre distintos territorios. Si bien la redacción es más o menos similar a primera vista, se aprecian algunas variaciones en la terminología, que es posible que los Estados miembros deseen examinar más detenidamente a fin de hallar la formulación más adecuada para ambos textos.

34. Puedo observar que en el texto sobre los RR.GG. se hace referencia a las leyes y los protocolos consuetudinarios. Los Estados miembros podrían reflexionar acerca de si esa referencia podría ser adecuada o útil en el contexto de los CC.TT. y las ECT.

Fortalecimiento de capacidades y fomento de la sensibilización (artículo 15 del texto sobre las ECT)

35. Ambos textos incluyen disposiciones acerca del fortalecimiento de capacidades y el fomento de la sensibilización. Los Estados miembros podrían examinar la posibilidad de incluir también un artículo sobre el fortalecimiento de capacidades en el texto relativo a los CC.TT. o, cuando menos, adoptar una perspectiva uniforme de esta cuestión.

Cuestiones concretas y específicas del texto de los CC.TT.

Bases de datos y protección complementaria/preventiva (artículo 5BIS del texto sobre los CC.TT.)

36. En los textos relativos a los CC.TT. y los RR.GG. se examina la posibilidad de crear bases de datos y adoptar otras medidas complementarias/preventivas. Podría resultar útil consultar los artículos correspondientes del texto sobre los RR.GG. Tal vez los Estados miembros consideren oportuno examinar la finalidad de tales bases de datos y sus modalidades de funcionamiento. Otras cuestiones fundamentales que cabría considerar son: ¿Quién debería encargarse de alimentar y mantener las bases de datos? ¿Deberían establecerse criterios para armonizar su estructura y contenido? ¿Quién debería tener acceso a las bases de datos? ¿Cuál podría ser su contenido? ¿En qué forma se expresaría el contenido? ¿Debería facilitarse una guía? ¿Cuáles serían los beneficios y los riesgos de facilitar y fomentar el desarrollo de bases de datos de acceso público?

Requisito de divulgación (artículo 7 del texto sobre los CC.TT.)

37. Los requisitos de divulgación propuestos fueron examinados detenidamente en las sesiones 35.ª y 36.ª del CIG y en sesiones anteriores en las que se abordó la cuestión de los RR.GG., y se señaló que el debate en torno a los RR.GG. abarca los “CC.TT. asociados”. Los Estados miembros todavía no han llegado a un acuerdo al respecto, por lo que la cuestión sigue sujeta a examen.