

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

**Fortieth Session**  
**Geneva, June 17 to 21, 2019**

**DRAFT REPORT**

*Document prepared by the Secretariat*

1. Convened by the Director General of the World Intellectual Property Organization (“WIPO”), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “the IGC”) held its Fortieth Session (“IGC 40”) in Geneva, from June 17 to 21, 2019.
2. The following States were represented: Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Bolivia (Plurinational State of), Brazil, Brunei Darussalam, Canada, Chile, China, Colombia, Côte D’Ivoire, Croatia, Cuba, Czech Republic, Denmark, Djibouti, Dominican Republic, Egypt, Ecuador, Ethiopia, Finland, France, Georgia, Germany, Ghana, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Latvia, Lithuania, Malaysia, Malawi, Mali, Morocco, Mexico, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Niger, Nigeria, Oman, Pakistan, Panama, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saudi Arabia, South Africa, Spain, Syrian Arab Republic, Samoa, Senegal, Seychelles, Slovakia, Sudan, Sweden, Switzerland, Tajikistan, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United States of America, Yemen, Zambia and Zimbabwe (94). The European Union (“the EU”) and its Member States were also represented as a member of the Committee.
3. The Permanent Observer Mission of Palestine participated in the meeting in an observer capacity.
4. The following intergovernmental organizations (“IGOs”) took part as observers: South Centre (SC); Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC PATENT OFFICE); African Intellectual Property Organization (OAPI); World Trade Organization (WTO); African Regional Intellectual Property Organization (ARIPO); and African Union (AU) (6).
5. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: ADJMOR; Agencia Internacional Prensa Indígena (AIPIN); Assembly of First Nations; American Intellectual Property Law Association (AIPLA); Association of Kunas United for Mother Earth (KUNA); Center for Multidisciplinary Studies Aymara (CEM-Aymara); Indigenous Peoples’ Center for Documentation, Research and Information (DoCip); Centre for International Governance Innovation (CIGI); Civil Society Coalition (CSC); Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ); CropLife International (CROPLIFE); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); Health and Environment Program (HEP); Indian Movement – Tupaj Amaru; Indigenous Information Network (IIN); Indigenous World Association (IWA); International Indian Treaty Council; International Trademark Association (INTA); Knowledge Ecology International, Inc. (KEI); Maasai Aid Association (MAA); Native American Rights Fund (NARF); Nga Kaiawhina a Wai 262 (NKW262); Tebtebba Foundation – Indigenous Peoples’ International Centre for Policy Research and Education; and Tulalip Tribes of Washington Governmental Affairs Department (24).
6. The list of participants is annexed to this report as Annex I.
7. Document WIPO/GRTKF/IC/40/INF/2 provided an overview of the documents distributed for IGC 40.
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 40.

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

10. The IGC Chair, Mr. Ian Goss, opened the session and invited the Director General to make opening remarks.

11. The Director General, Mr. Francis Gurry, said it was a pleasure to see so many delegations for that extremely important meeting. IGC 40 was the last one before the General Assembly ("GA") and the last one in the current mandate. It was up to the IGC to deliver a recommendation to the GA which would report on the extremely good work undertaken by the IGC in the course of the current mandate in the past two years. He thanked the Chair, Mr. Ian Goss and the two Vice-Chairs, Mr. Jukka Liedes and Mr. Faizal Chery Sidharta, for their extraordinary engagement in the process and for keeping a momentum for the IGC to be able to deliver its results. He mentioned the Chair's text on genetic resources ("GRs") and associated traditional knowledge ("TK"), which was an extremely important step forward in the IGC process. He was delighted to have heard so much positive feedback about the Chair's text. He thanked the Government of Canada for its contribution to the Voluntary Fund, which had permitted the participation of indigenous peoples and local communities ("IPLCs") at IGC 40. He recalled the importance of the representation of IPLCs in the IGC, for which the Voluntary Fund was the vehicle. Despite the generous contribution from the Government of Canada, the Voluntary Fund was again running short. He mentioned the Indigenous Panel and welcomed the three speakers, Mr. Wilton Littlechild, Ms. Lucy Mullenkei and Ms. Valmaine Toki, who would be engaging on "Intellectual Property and Traditional Knowledge/Traditional Cultural Expressions: Indigenous Peoples' and Local Communities' Perspectives on Objectives". He looked forward to a constructive outcome that could be transmitted to the GA.

12. The Chair thanked the Vice-Chairs, Mr. Jukka Liedes and Mr. Faizal Chery Sidharta, for their assistance, support and valuable contributions. They operated as a team, and engaged between the IGC sessions. He had consulted with Regional Coordinators ("RCs"), and thanked them for their continued support and constructive guidance. There were two key agenda items to be completed at IGC 40. The IGC had to continue the text-based negotiations on TK and traditional cultural expressions ("TCEs"). There would also be a stock-taking session on all three subject matters, including consideration for future work and recommendations to the 2019 GA. In support of that work, he had prepared two Chair's Information Notes to assist participants' preparations. He had also issued a Chair's Text on GRs and associated TK, on his own authority, as announced at IGC 36. Those documents would be addressed under Agenda Items 6 and 7. IGC 40, as previous sessions, was on live webcast on the WIPO website, for the sake of openness and inclusiveness. All participants were required to comply with the WIPO General Rules of Procedure. The meeting was to be conducted in the spirit of constructive debate, in which all participants were expected to take part with due respect for the order, fairness and decorum that governed the meeting. As the Chair of the IGC, he reserved the right, where applicable, to call to order any participant who might fail to observe those rules of good conduct or whose statements were not relevant to the issues. Under Agenda item 2, opening statements on all agenda items could be allowed by regional groups, the EU, the Like-Minded Countries ("LMCs") and the Indigenous Caucus. Any other opening statements could be handed to the Secretariat in writing or sent by email to grtkf@wipo.int. Member States and observers were encouraged to interact with each other informally, as that increased the chance that Member States would be aware of and perhaps support observers' proposals. He acknowledged the importance and value of the indigenous representatives, as well as other key stakeholders, such as representatives of industry and civil society. The IGC should reach an agreed decision on each agenda item as it went along. Each decision would be gavelled at the end of each agenda item. On Friday, June 21, the decisions as already agreed would be circulated or read out again for formal confirmation by the IGC. The report of the session would

be prepared after the session and circulated to all delegations for comment. The report of the session would be presented in all six languages for adoption at the next IGC session.

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

### *Decision on Agenda Item 2:*

13. *The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/40/1 Prov. 2 for adoption and it was adopted.*

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

15. 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 Notes prepared by the Chair. It had studied the note on TK/TCEs for consideration at that session, including the Chair’s textual language on key articles on TK and TCEs. It hoped it would contribute to the deliberations. It had also studied the note regarding discussions on Agenda Item 7. Apart from undertaking negotiations on draft articles on TK and TCEs, IGC 40 would also take stock of the progress made under the current mandate. With regard to the draft articles on TK/TCEs, it favored discussions on the core issues in order to arrive at common landing zones, namely objectives, subject matter, scope of protection, and exceptions and limitations. How to define TK and TCEs would lay down the foundations of the IGC’s work. Most members of APG believed that the definitions of TK/TCEs should be inclusive and capture the unique characteristics of TK/TCEs. Furthermore, there should have a comprehensive definition that did not require separate eligibility criteria. Most members were also in favor of a differential level of protection of TK/TCEs, and believed that such an approach offered an opportunity to reflect the balance referred to in the IGC’s mandate and the relationship with the public domain as well as balance in the rights and interest of owners, users, and the wider public interest. Some members were in a different position. Establishing the level of rights based on the characteristics of TK and TCEs could be a way forward towards narrowing the 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. On scope of protection, although some members had different positions, most members of APG were in favor of providing maximum possible protection for TK and TCEs, depending on the nature or characteristics of the TK/TCEs. On exceptions and limitations, it was of fundamental importance to ensure the provision be considered in a balanced manner between the specific situations of each Member State and the substantive interests of TK and TCE holders. Hence, exceptions and limitations should not be extensive, so as to compromise the scope of protection, while at the same time giving enough policy space for each Member State, based on their national priorities. Some members had a different position, however, most members of the APG reiterated that there was a need for legally binding instrument(s) providing effective protection of GRs, TK and TCEs. It hoped that IGC 40 would be able to come up with a recommendation to the GA to guide the future work of the IGC based on the exceptional progress made under the current mandate. It assured the Chair of its full support. It remained committed to engaging constructively in negotiating a mutually acceptable outcome. It was hopeful the discussions in the session would lead to visible progress in the IGC’s work.

16. The Delegation of Tajikistan, speaking on behalf of the Group of Central Asian, Caucasus and Eastern European Countries (“CACEEC”), welcomed all participants in the meeting and hoped that there would be fruitful work in the future on all the issues. It was certain that under the leadership of the Chair and the professional approach of the work of the IGC, the IGC’s work would be productive and yield positive results for all members. It stood ready to participate in consultations on all topics in order to ensure a successful session and wished everyone fruitful and productive work.

17. The Delegation of Croatia, speaking on behalf of the Central European and Baltic States Group (“CEBS Group”), considered all the documents prepared by the Chair as very important tools for the continuation of the negotiations. IGC 36 in June 2018 had not reached consensus on the text and consequently was not able to transmit the Rev. 2 document to the GA. The Chair’s personal efforts on the matter were regarded as a contribution to the future debates on GRs. At the same time, it acknowledged progress reached on TK and TCEs and looked forward to the discussions on the draft articles. It was very much aware that IGC 40 was the last meeting under the current mandate and it considered the different available texts a very good basis for discussions on TK and TCEs. It thanked the Permanent Mission of Indonesia for organizing a retreat in Montreux on May 27 and 28, which had allowed for further exchanged of views on unresolved issues. It reiterated its readiness to constructively engage in discussions during that week on the substantive issues as well as on the future work of the IGC for the next biennium. As always, the decisions had to be acceptable to all and be reached by consensus.

18. The Delegation of Uganda, speaking on behalf of the African Group, assured the Chair of its unwavering support to ensure the success of the session. The Chair’s Information Notes were all extremely useful documents to guide the IGC’s work. It endorsed the Chair’s proposed methodology for the week. The urgency for action for effective international protection for TK and TCEs had never been more evident. IPLCs continued to be marginalized, opening them to adverse, palpable effects, which included commercial exploitation of their knowledge assets with no or minimal compensation, social disintegration and the sheer disappearance of GRs, TK and TCEs. The African Group had always approached the IGC negotiations and would continue to do so from the perspective of the economic and moral value of TK and TCEs. It was about that knowledge that IPLCs created, and should own, and should sell and retain adequate compensation. Its quest had never been nor would ever be to overhaul the entire intellectual property (“IP”) system, but rather to improve it and cure the inherent and systematic historical gaps or imbalances identified in the WIPO Gap Analyses. That had historically informed its call for a bare minimum international framework for the protection of GRs and TK/TCEs, leaving articulation of the details at the national level. It acknowledged that the copyright system and the entire IP system were already being used or could be used to protect certain TK and TCEs, but its concern was the extent to which the current system did not recognize the needs and special characteristics that the protection of that knowledge required. That should be the focus of the discussions. Significant progress had been made during that mandate. For instance, on TK and TCEs, there was near consensus on the definition of TK, protectable subject matter and eligibility criteria, with the exception of some issues (particularly beneficiaries and time qualifiers), which could be resolved at a high-level political debate, i.e. a diplomatic conference. Similarly, regarding GRs and associated TK, IGC 36 had witnessed almost near consensus due to the significant flexibility exercise by the large majority of WIPO Member States, particularly on long outstanding issues, namely a narrow scope of the instrument (leaving opportunity for future negotiations to extend the scope), relationship with other international instruments, as well as on sanctions and remedies, noting that revocation of rights granted should be used as a last resort and in instances of fraudulent intent. However, the revised text was never to be agreed on mere technicalities. The African Group appreciated the Chair for preparing the Chair’s text on the draft international legal document relating to IP, GRs and associated TK. It was convinced by the Chair’s motivation to attempt to balance the policy interests of all Member States and other stakeholders, as well as to ensure that clearer understanding of the practical

modalities of an international disclosure requirement to enable policymakers to make informed decisions regarding the costs, risks and benefits of a disclosure requirement. It was hopeful that IGC 40 would give positive consideration to the text. Regarding future work, IGC 40 was to take stock of the work on GRs, TK and TCEs and make a recommendation to the GA. In view of the significant progress made on the subject of GRs and associated TK, the IGC should recommend convening a diplomatic conference to conclude a treaty for the international protection of GRs and associated TK in the next biennium and consider additional meetings for TK and TCEs. It welcomed the Chair's Information Note on options for future work, including a new IGC mandate and sound working methodologies. It gave positive consideration to the Chair's suggestions and stood ready to engage constructively in negotiations on that agenda item. It reiterated its support to the Chair in ensuring a successful outcome for IGC 40. It would continue to constructively engage with all Member States and stakeholders.

19. The Delegation of Guatemala, speaking on behalf of GRULAC, said that the IGC mandate for the 2018-2019 biennium set out that the IGC would expedite its work to reach agreement on one or various international legal instruments. At IGC 40, the discussions should focus on the examination of cross-cutting and unresolved issues with respect to TK/TCEs, such as objectives, subject matter, scope of protection, and exceptions and limitations. The IGC should also carry out an evaluation of the various items and prepare a recommendation to the GA on future work. It expressed the importance for the IGC for the 2020-2021 biennium to have a balanced mandate to allow to achieve the goals of having one or several legal instruments to give effective protection to GRs and TK/TCEs. It thanked the Facilitators for their efforts and dedication in drafting the documents that had given a broad overview of the discussions in the various positions on the topics. It highlighted the importance of the contribution and participation of IPLCs, which was essential to move the work forward. To that end, it called upon Member States to make contributions to the Voluntary Fund. It thanked the Delegation of Indonesia and the African Group for their collaborative work in preparing the meeting. It urged delegations to have a constructive, open and frank discussion to achieve positive results on those issues.

20. The Delegation of China was pleased to attend IGC 40, which was a very important session, because it was the last session within the current mandate. It had always supported the work of the IGC. It hoped that substantive progress would be made in order to adopt a binding instrument(s). It appreciated the efforts of the Chair in moving forward the IGC's work, in particular the Chair's text on GRs, though many outstanding issues needed to be resolved. Progress had been made in the previous sessions. At IGC 40, it would continue to adopt a proactive and pragmatic attitude to participate fully in discussions. It also supported that the GA continue to give a mandate to the IGC. Together with all other countries, it wanted to make substantive progress.

21. The Delegation of Canada, speaking on behalf of Group B, was confident that the IGC would continue to make progress under the Chair's leadership during the week. It acknowledged the progress made by the IGC during the current mandate. More work needed to be done to narrow existing gaps, with a view to reaching a common understanding on core issues. It remained hopeful that further progress could be made in resolving outstanding issues related to TK and TCEs during that week. 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. As the IGC's current biennial mandate drew to a close, it remained critical to continue the work consistent with that mandate and make meaningful advancements, using sound working methods and 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 protections for GRs, TK and TCEs, including Member States' experiences. It looked forward to the active participation of IPLCs as well as other stakeholders.

It acknowledged their valuable and essential contribution to the work of the IGC. It welcomed the latest contribution by the Government of Canada to the WIPO Voluntary Fund. That contribution allowed to cover part of the expenses for the recommended participants for IGC 40. Yet, the amount available after IGC 40 would not be sufficient to cover all the eligible costs related to any new applicant in a future session of the IGC. Therefore, it remained hopeful that the Voluntary Fund would be replenished again soon. It remained committed to contributing constructively toward achieving a mutually acceptable outcome.

22. The Delegation of Indonesia, speaking on behalf of the LMCs, supported the methodology and work program proposed by the Chair. It assured the Chair of its full support and cooperation in rendering the meeting a success. It confirmed its commitment to working constructively in negotiating a mutually acceptable outcome. The issues the IGC was facing were important issues not only for all Member States but more importantly, for IPLCs everywhere that had created and developed tradition-based knowledge, cultural expressions and innovation long before the modern IP system had been established. The communities had the right to maintain, control and protect their IP over their natural resources and cultural heritage. Better recognition for both moral and economic rights of traditional and cultural heritage, including GRs, TK and TCEs, was needed. It hoped that the discussion would focus on scope of protection and exceptions and limitations. The IGC could further narrow gaps, come closer to mutual agreement on the protection of TK and TCEs. The LMCs were looking at the Chair's Information Notes with interest and were hopeful that the proposed texts would be useful in guiding towards a common understanding and agreement. Substantial progress had been made in the IGC, noting the progress regarding GRs and associated TK at IGCs 35 and 36. It refused to let any progress be lost. It was confident that IGC 40, building on the progress made at the past sessions, would also yield progress on TK and TCEs. IGC 40 was not only to undertake negotiations on TK and TCEs but also to take stock and make recommendations to the GA. At the conclusion of the session, the IGC would have completed the work program approved under the mandate for 2018-2019. In that regard and in accordance with the mandate, the IGC would need to submit to the GA the result of the work in accordance with the objective of the current mandate. Further, the GA in 2019 would take stock of progress made and based on the maturity of the texts, including levels of agreement on objectives, scope of protection and nature of the instrument(s), decide on whether to convene a diplomatic conference and/or continue the negotiations. LMCs understood the underlying motivation in the formulation of the Chair's text on GRs and associated TK to arrive at common ground, taking into account all perspectives as well as the practicality of implementation at that stage for the protection of GR and associated TK. With regard to the Chair's Information Note on Agenda Item 7, it agreed with the assessment that significant progress had been made with the texts over the biennium. The LMCs were ready to engage with regard to the future work of the IGC, including possible sound working methods of the future work that would allow more efficient and effective use of time in the IGC. Noting the importance of effective protection for GRs, TK and TCEs, the IGC should move forward, taking the next step of convening a diplomatic conference with a view to adopting legally binding instrument(s) providing effective protection to GRs, TK and TCEs. It expressed its confidence to the Chair to enable to make progress.

23. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that the previous session had been the third thematic session to discuss TK/TCEs. Very helpful discussions had been held in the *Ad Hoc* Expert Group preceding IGC 39 and in the contact groups, some progress had been made on issues concerning the subject matter of protection and eligibility criteria and on objectives. It looked forward to continuing discussions on the basis of the Rev. 2 documents emerging from IGC 39 (documents WIPO/GRTKF/IC/40/4 and WIPO/GRTKF/IC/40/5). It wished to make further technical comments on some elements of the texts later under Agenda Item 6. As regards methodology, transparency and inclusiveness remained a necessity. It was appreciative of the Chair's efforts to facilitate progress on GRs by means of providing a text intended to serve as a possible alternative for further discussion. The

Chair's personal initiative provided an opportunity to be considered for future work on GRs. As one of the major tasks of the session was to discuss a recommendation for the GA on future work, it reiterated its recognition of the importance of the work carried out by the IGC and its support for the continuation of its work in the next biennium. It looked forward to participating actively in the discussions on the renewal of the mandate and work program. Regarding the new mandate, the Delegation was in support of embarking from the text of the current mandate as a starting point for negotiations on future work. As to working methods, it remained convinced of the usefulness of evidence-based discussions and reliance on national experiences in the IGC. Finally, the 2019 GA was not in a position to convene a diplomatic conference on any of the three topics. In addition, any decision on further actions should be taken at the end of the mandate period, as that was the established practice of the IGC. It looked forward to participating constructively in all discussions and hoped to achieve a successful outcome.

24. The representative of the Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, thanked the Government of Canada for its contribution to the Voluntary Fund, which enabled the participation of four indigenous representatives at IGC 40. The credibility of the IGC process was dependent of the participation of IPLCs. With the Voluntary Fund once again depleted, she urged Member States to contribute and consider supporting indigenous participation through the WIPO core budget. She looked forward to working in accordance with the methodology set out by the Chair, and emphasized the importance of indigenous representatives' participation in all contact groups and informals, including on future work. She appreciated the progress made and the convergence among many members. She considered the Chair's textual proposals on TK and TCEs as a possible way forward. She would make specific proposals during the week. She drew attention to the recent example of misappropriation, or use without free, prior and informed consent ("FPIC"), and misattribution by Nike of the sacred TK and TCEs of the Guna people. The example illustrated clearly that the instruments developed in the IGC had to be able to prevent that type of cultural harm. Regarding scope of protection, any tiered approach had to include effective and binding mechanisms to ensure that IPLCs had the ability to protect their TK and TCEs based on certain criteria regardless of degree of control or degree of diffusion. Exceptions and limitations had to be extremely narrow and conform to indigenous customary laws and concerns. It welcomed the Chair's GRs text which clarified and consolidated the points of consensus. She would provide suggestions on how it could be improved. Member States had to recognize that there were human rights and other instruments that concerned indigenous peoples' IP rights. The IGC instruments should not undermine or preempt the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP"), particularly Article 31, or compromise existing rights. She commended to the IGC the recommendations contained in the official report of the UN Permanent Forum on Indigenous Issues ("UNPFII") at its Session 18, in April 2019, focusing on the theme of TK. The UNPFII had recommended that WIPO: (1) fast-track the negotiations and use its core budget to fund indigenous peoples' participation in the deliberations; (2) update the 2016 technical review of key IP-related issues of the draft instruments (WIPO/GRTKF/IC/29/INF/10) to reflect current issues, emphasizing concepts such as "balancing" and "public domain" and how those might conflict with indigenous peoples' human rights and customary laws; and (3) organize a second indigenous expert workshop before 2021. She looked forward to constructive dialogue and the Member States' serious consideration of the proposals made by the indigenous representatives. Through effective engagement with IPLCs, the IGC could mutually develop strong protection of TK, TCEs and GRs.

25. [Note from the Secretariat: the following opening statements were submitted to the Secretariat in writing only.] The Delegation of Nigeria was grateful to the Delegations of South Africa and Indonesia and to the TK Division for supporting and hosting pre-consultative fora to assist in preparing some delegates of the African Group for IGC 40. It aligned itself with the statement delivered by the Delegation of Uganda, on behalf of the African Group. It was



committed to working with all stakeholders to ensure that the IGC build upon the progress made in the textual work of the past four sessions. As it was the last deliberation on TK and TCEs in the biennium, it was an opportunity to further bridge the gap on those conceptual issues that had posed immense difficulties in the course of the negotiations. It would focus its energy on the scope of protection (the tiered approach) and on exceptions and limitations. The Chair's documents would hopefully facilitate efficient deliberations. It referred to the working methodology proposed by the Chair. It welcomed the progress made on the tiered or differentiated approach pursuant to the scope of protection. It was committed to further working on refining the concept in order to build consensus. With regard to exceptions and limitations, it would prefer a simple statement of exceptions and limitations that would allow flexibility at national and local levels. Having an open-ended enumerative statement of exceptions and limitations was not the right approach, as it would not only undermine the scope of protection but also negate the essence of the protection of TK and TCEs which was the core of the IGC mandate. Making reference to libraries, museums, teaching, learning, among other things, as justifiable enumerative grounds of exception reflected a misunderstanding of the uniqueness of TK and TCEs. Historically, as a result of deficit of ethics and colonial legacies, the above sites could provide an avenue for the misappropriation of TK and TCEs. Unlike in copyright and other regimes, locating TK and TCEs in libraries, museums and classrooms did not constitute effective warrant for exempting them from protection. The often sacred and secret nature of TK and TCEs required traditional and customary protocols based on FPIC and the holders of the knowledge, which museums and libraries did not guarantee. National laws and customary protocols were better placed to deal with the issues of exceptions and limitations. It noted and recognized the Chair's effort in ensuring that the significant progress made on the GRs text, which was the most advanced text, was sustained. It recalled how the IGC had come to an emerging cross-regional consensus on the GRs text at IGC 36, which was not agreed. It noted the Chair's effort to build on the progress made by proposing a Chair's text. While the text had yet to be formally presented for consideration whether at planetary or across regional blocs, it saw a potential pathway through the Chair's text going forward on GRs without prejudice to other work on the GRs text. IGC 40 was the last meeting for the present biennium and it was required to do stock taking. The IGC had made significant progress. It had an advanced GRs text and two major outstanding issues on the TK and TCEs texts, which it was working on to arrive at a consensus. The Delegation was fairly open in the spirit of constructive engagement with regards to how to collectively envision the mandate of the IGC for the next biennium and the specificity of the status of the three texts. Regarding the issue of mandate renewal and proposals to the WIPO GA, the IGC needed a stronger mandate that gave it a sense of urgency to complete its work with a well-thought-out methodology. For so long, the work of the IGC had remained sluggish, a situation that seemed to lead the IGC to believe that it would continue negotiations *ad infinitum*. It had to aspire towards a mandate that would push it with a sense of urgency to finalize negotiations. While recognizing the very complex nature of the subject matters, with the right political will, the IGC could arrive at a fair and balanced outcome. The failure of the IGC to deliver on its mandate would create a sense of disillusionment in the African Group as well as in the LMCs, GRULAC and APG, with consequential loss of faith in the WIPO process and the Development Agenda ("DA").

26. The Delegation of Ecuador aligned itself with the statements made by the Delegation of Guatemala, on behalf of GRULAC, and the Delegation of Indonesia, on behalf of the LMCs. It recognized the progress made in the work carried out thus far; however, there were still a number of areas that required further work. Regarding the mandate for the 2020-2021 biennium, it emphasized the importance of the renewal of the mandate and aligned itself with the statement made by the Delegation of Guatemala, on behalf of GRULAC, on the need for a balanced mandate that would make it possible to fulfil the planned objectives. In order to have as much time as possible to address the substantive topics of the IGC, the aim of the methodology should be to ensure that time was used efficiently. It agreed that the consolidated document on GRs should be among the working documents. The IGC had to focus on

considering the scope of the policy objective on the IP system as a whole and not restrict consideration to patents or the system that governed them. That required other types of IP rights to be taken into account. It was also important to consider the provisions of international agreements, such as the Convention on Biological Diversity (“the CBD”) and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (“the Nagoya Protocol”). The moral and economic rights of the derivatives obtained from a State’s GRs had to be recognized. That would enable the origins of derivatives to be traced, in recognition of the fact that that issue affected the consumers of the final product as well as the countries of origin. The ownership of the genetic material would remain in the country of origin irrespective of the location of the GRs. It supported the fact that the negotiations were based on texts and that they achieved the scope of the planned objectives by means of a binding international instrument covering each of the issues addressed in the discussions.

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

*Decision on Agenda Item 3:*

27. *The Chair submitted the draft report of the Thirty-Ninth Session of the Committee (WIPO/GRTKF/IC/39/18 Prov. 2) for adoption and it was adopted.*

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

*Decision on Agenda Item 4:*

28. *The Committee unanimously approved the accreditation of the Centre for International Sustainable Development Law (CISDL) and For Alternative Approaches to Addiction, Think & do tank (FAAAT) as ad hoc observers.*

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

29. The Chair acknowledged the death of Mr. Gregory Younging, a member of the Cree Nation in Manitoba, who had participated in the IGC and contributed to the discussions. The Chair expressed his heartfelt condolences to his family, his peoples and his Nation. In relation to the Voluntary Fund, the Government of Canada’s contribution to the Voluntary Fund had been able to fund four indigenous representatives at IGC 40. The Voluntary Fund was about to be depleted again. It might be only able to fund one more indigenous representative for another session. He recalled the decisions of the 2018 GA, recognizing the importance of participation of IPLCs in the work of the IGC, noting that the Voluntary Fund was depleted, and encouraging Member States to consider contributing and/or consider other alternative funding arrangements. He called upon delegations to consult internally and contribute to the Voluntary Fund. The importance of the Voluntary Fund to the credibility of WIPO and to the IGC could not be overemphasized.

30. [Note from the Secretariat]: The Indigenous Panel at IGC 40 addressed the following topic: “Intellectual Property and Traditional Knowledge/Traditional Cultural Expressions: Indigenous Peoples’ and Local Communities’ Perspectives on Objectives”. The three panelists were: Mr. Wilton Littlechild, Ms. Lucy Mullenkei and Ms. Valmaine Toki. The Chair of the Panel was Mr. Nelson De León Kantule. The presentations were made according to the program (WIPO/GRTKF/IC/40/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:

“Chief Littlechild spoke first, by acknowledging that the 2019 is the International Year of Indigenous Languages, and the importance of the UNDRIP. He demonstrate the need and importance of protecting TK, TCEs and GRs. He then introduced the Truth and Reconciliation Commission of Canada, which was developed as a result of over 18,000 lawsuits. Chief Littlechild outlined the possible paths of reconciliation. He gave examples of indigenous peoples saying that the first part of the reconciliation process would be to give indigenous peoples back their languages, their ceremonies, their traditions. In addition, the importance of the promotion of indigenous games and sports as a way to carry on language and culture as well as display the richness of indigenous cultures to the outside world. Chief Littlechild identified these as the first steps towards healing.

Ms. Mullenkei spoke about the inherent interconnectedness of TK, TCEs and GRs. She highlighted that while the WIPO IGC made the distinction among TK, TCEs and GRs, indigenous peoples considered them altogether. It was therefore important for the IGC to consider them as a unit that went hand-in-hand together. She also addressed the question of benefit-sharing as it related to TK, TCEs and GRs. A significant portion of TK was considered sacred by IPLCs and its use should require FPIC of the IPLCs involved. She also raised concerns about the documentation of TK, in particular, that TK could be taken away from IPLCs and forced into the public domain. She addressed the need of further awareness and education. To this aim, she emphasized the importance of the participation and inclusion of IPLCs within the IGC discussions, urged Member States to contribute to the Voluntary Fund, and asked the WIPO GA to agree on the UNPFII recommendations regarding the participation of IPLCs.

Ms. Toki addressed the question of the role of UNDRIP within the IGC objectives. She identified the fundamental rights of indigenous peoples that has been outlined in UNDRIP and drew particular attention to Article 31. She articulated a need to reorient the IGC negotiations. Ms. Toki made a call to use the rights outlined in UNDRIP as a benchmark for the negotiations in the IGC. She outlined the need to acknowledge the purpose and intent of all actions. She also echoed the calls of the previous speaks, advocating for further participation of IPLCs within these negotiations and calling upon Member States to make contributions to the Voluntary Fund.”

31. [Note from the Secretariat]: The Advisory Board of the WIPO Voluntary Fund met on June 19, 2019 to select and nominate a number of participants representing indigenous and local communities to receive funding for their participation at the next session of the IGC. The Board’s recommendations were reported in document WIPO/GRTKF/IC/40/INF/6 which was issued before the end of the session.

*Decisions on Agenda Item 5:*

32. *The Committee took note of documents WIPO/GRTKF/IC/40/3, WIPO/GRTKF/IC/40/INF/4 and WIPO/GRTKF/IC/40/INF/6.*

33. *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.*

34. *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.*

35. *The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Reza DEHGHANI, Counsellor, Permanent Mission of the Islamic Republic of Iran, Geneva; Mr. Nelson DE LEÓN KANTULE, Representative, Asociación Kunas Unidos por Napguana (KUNA); Mr. Mahmud JUMAZODA, Second Secretary, Permanent Mission of Tajikistan, Geneva; Ms. Subama MAPOU, Representative, ADJMOR; Ms. Lucy MULENKEI, Representative, Indigenous Information Network (IIN); Mr. Moses PHAHLANE, Deputy Director, Multilateral Trade Issues, Department of International Cooperation, South Africa; Ms. Aurelia SCHULTZ, Counsel, Office of Policy and International Affairs, Copyright Office, United States of America; and Ms. Heidi VASCONES MEDINA, Third Secretary, Permanent Mission of Ecuador, Geneva.*

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

37. *Acknowledging the contribution to the Committee's work made by the Indigenous Expert Workshop held in 2013, as reflected in its Report (WIPO/GRTKF/IC/25/INF/9), and with reference to the recommendation*

*made by the United Nations Permanent Forum on Indigenous Issues (UNPFII) at its Eighteenth Session in 2019, the Committee requested the WIPO Secretariat to organize, within existing resources, an Indigenous Expert Workshop during the biennium 2020-2021, following similar arrangements mutatis mutandis to those as agreed at the Twentieth Session of the Committee under Agenda Item 8.*

*38. Acknowledging the contribution to the Committee's work by the Technical Review of Key Intellectual Property-related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (WIPO/GRTKF/IC29/INF/10) (the Technical Review), which was prepared by an indigenous expert, and with reference to the recommendation made by the UNPFII at its Eighteenth Session in 2019, the Committee requested the Secretariat to commission, within existing resources, the updating by an indigenous expert of the Technical Review for the Committee's consideration during the biennium 2020-2021.*

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

39. The Chair said that according to the current mandate, IGC 40 should undertake negotiations on TK and TCEs with a focus on addressing unresolved and cross-cutting issues and consider options for a draft legal instrument(s). Regarding the results of Agenda Item 6, it was proposed that a revised version of document WIPO/GRTKF/IC/40/4 and a revised version of document WIPO/GRTKF/IC/40/5 could be produced, recalling the decisions on documents WIPO/GRTKF/IC/40/4 and WIPO/GRTKF/IC/40/5, which stated that the IGC would be invited to review and comment on the documents towards developing a revised version thereof. He had consulted with the RCs and interested delegations on the work program and working methodology for that session last week. A methodology similar to the one used in previous IGC sessions would be followed, taking into account the length of time allocated to Agenda Item 6. The three days allocated to that Agenda Item would allow for one full revision of both documents only. The Facilitators might share work-in-progress on Tuesday. Those revisions had no status until the IGC noted them and sent them forward to the stock-taking session under Agenda Item 7. Mr. Paul Kuruk from Ghana and Ms. Lilyclaire Bellamy from Jamaica would continue in the challenging tasks of Facilitators. They would listen to all interventions in plenary and informals and undertake drafting and incorporating technical proposals submitted. They might also come forward with their own ideas in an attempt to narrow gaps, remove duplication or correct technical errors and, importantly, ensure that all Member States' interests were

captured within the working documents. That might not initially include the verbatim proposals, subject to how they found those proposals and whether or not they could actually narrow gaps. He had produced an Information Note on TK and TCEs, which articulated the focus of the discussion and reflected the progress made in previous meetings. As requested by some members, he had included some textual proposals on the scope of protection and on exceptions and limitations. In relation to those textual proposals, he had incorporated material on the subject matter, objectives and eligibility criteria, because all those elements were linked. Delegations could not look at them in isolation. He had incorporated them as a single framework because that was what the IGC needed to agree on. Without a single framework there might be many more alternatives in the text. The IGC needed to agree on a single approach and it had started to do that in the last couple of meetings, as reflected in the Chair's Information Note on Future Work. In relation to the textual proposal on scope of protection, there were two broad views: a measures-based and a rights-based approach. In his textual proposal, he had only focused on the tiered approach at that stage. There was still a need for discussion and consideration of the measures-based approach. He was trying to rationalize the tiered approach so there was more clarity around that approach. In producing that textual proposal, he wanted to move away from all the definitions in the list of terms. Within the scope of protection, he had focused his proposal on two elements that linked with the eligibility criteria: the level of the control of TK and TCEs within the community and the linkage between the TK/TCEs and the IPLCs or beneficiaries. The textual proposals in relation to TK and TCEs were somewhat different, but not in the core criteria within that article, i.e. the control and linkage. He had moved away from the terms "secret" and "sacred" because they were challenging, particularly as there was a better understanding of the eligibility criteria and a focus on those two elements of control and linkage. The term "sacred" was still a very important term that required greater dialogue, noting that indigenous representatives wanted to keep that term. There had to be a dialogue about how that term would operate within the tiers, because there were some challenges once knowledge was in the public domain. The proposals on exceptions and limitations had been his greatest challenge. Within the articles on TK and TCEs, a chapeau had one alternate approach which stated that there could be exceptions and limitations, which should be addressed at the national level. It was a general, broad exception, whereby members could consider establishing exceptions and limitations at the national level. The IGC could try and rationalize those. There was also a whole raft of specific exceptions. He recalled that the IGC was establishing an IP instrument that should set maximum-minimum standards, and leave a significant amount of flexibility at the national level for implementation. In that area, there was significant divergence in legal systems among Member States. Some of those specific exceptions listed in relation to copyright went to some of the issues around the conceptual divide in relation to understanding of customary laws and protocols and belief systems. In the end, he had avoided specific exceptions and limitations in his textual proposals. He suggested having a broad discussion about those issues. One of the questions that members needed to consider was whether there should not be any specific exceptions at the international level. His textual proposals had no status and were just his thoughts and ideas. They were there to aid members in the discussions. He wanted the IGC to be cognizant of trying to establish a single framework, because that was fundamental to moving the work forward. Regarding methodology, the Chair said that he had had no formal feedback. He had initially planned to establish contact group(s), but upon reflection and due to the limited time, he did not want to get into issues of transparency and inclusiveness and he did not think there was enough time to do both contact groups and informals. He intended to move to informals first up. Those informals would cover the scope of protection, and exceptions and limitations, though they would also touch on some related elements. The same methodology for the informals would be followed. The chair would be the Vice-Chair, Mr. Jukka Liedes.

40. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that IGC 39 had been the third thematic session to discuss TK/TCEs. Building on helpful discussions in the *Ad Hoc* Expert Group proceeding IGC 39 and in the contact groups, some

progress had been made on issues concerning the subject matter and eligibility criteria in Articles 1 and 3 and on objectives in Article 2. It looked forward to continuing the discussions on the basis of the Rev. 2s emerging from IGC 39 (documents WIPO/GRTKF/IC/40/4 and WIPO/GRTKF/IC/40/5). Such instruments should be non-binding. Regarding the closely connected issue of eligibility criteria, it welcomed the tendency of eliminating overlaps and maintaining a set of eligibility criteria. As to Article 1, it remained subject to debate what judgments should be included in the definitions. As to the definition of TCEs, it looked forward to continuing discussions on the wording “in which traditional cultural expressions and knowledge are expressed”. Article 3 in both texts took into consideration its concerns relating to the so-called temporal aspect. It supported Alt 2. Regarding the issues of objectives, Alt 2 was its strong preference and had been retained. Amendments in Alt 2 correctly reflected its proposal made during informal discussions at IGC 39 as well as its final editorial comment about the relevant part of Rev. 2. While it welcomed some progress made in the text-based discussions, it continued to advocate solid and evidence-based working methods, as in the current mandate. It recalled its two proposals for studies (documents WIPO/GRTKF/IC/39/16 and WIPO/GRTKF/IC/39/17). In substance, it proposed that the Secretariat undertake studies of national experiences and domestic legislation in relation to the protection of TK and TCEs. To inform discussions at the IGC, the studies should analyze domestic legislation and concrete examples of protectable subject matter and subject matter that was not intended to be protected, and take into account the variety of measures that could be taken, some of which could be measures-based, while others could be rights-based. It was also supportive of a similar proposal by the Delegations of the United States of America (“USA”) and Japan which aimed at conducting a study by the WIPO Secretariat on existing *sui generis* systems for protection of TK and TCEs. It was interested in working with other delegations to explore possibilities to consolidate their proposals. It stood ready to engage in such cooperation at IGC 40 in the context of discussions related to the new mandate.

41. The Delegation of Croatia, speaking on behalf of the CEBS Group, took note of the previous discussions held by the IGC in plenary, contact groups as well as during the *Ad Hoc* Expert Group organized prior to IGC 39. It considered that some progress had been achieved, especially under the issues of subject matter and eligibility criteria. The discussion on the basis of Rev. 2s emerging from IGC 39 (documents WIPO/GRTKF/IC/40/4 and WIPO/GRTKF/IC/40/5) would go in the right direction. It reiterated its preference for having a non-binding instrument. It welcomed the initiative to eliminate overlaps and keep the eligibility criteria. In Article 3, it was important to maintain the temporal element of 50 years or five generations, as in Alt 2. In the article on objectives, it preferred a balanced protection and having IPLCs as beneficiaries, as in Alt 2. It recalled its concern over the term “misappropriation” and its preference for “misuse”. It welcomed progress achieved thus far and reiterated its support to the evidence-based approach, as reflected in the existing mandate. It supported the two proposals made by the Delegation of the EU, on behalf of the EU and its Member States, on the studies, which could enhance the discussions, following an evidence-based approach.

42. [Note from the Secretariat: This part of the session took place after the distribution of the Facilitators’ work-in-progress dated June 18, 2019, prepared by the Facilitators.] The Chair said that the Facilitators’ work-in-progress had no status and was simply presented to get initial feedback to determine in what direction the Facilitators would go. The feedback would help inform further development of the final revision, which would be produced in the evening. In the Facilitators’ work-in-progress, there were two clear approaches for the scope of protection, and exceptions and limitations. The IGC was tending towards a rights-based versus a measures-based approach, though those were not mutually exclusive. Under exceptions and limitations, it was looking at a prescriptive approach versus an approach that provided flexibility at the national level. It was important to give clarity to those approaches and to link them to clear frameworks.

43. [Note from the Secretariat: The Vice-Chair, Mr. Jukka Liedes from Finland, was chairing the session at this point.] The Vice-Chair invited the Facilitators to present their work-in-progress.

44. Mr. Paul Kuruk, speaking on behalf of the Facilitators, said that the Facilitators had been asked to review the draft texts on TK and TCEs and to propose texts for the IGC's consideration, that would be concise, narrow gaps, avoid repetition and redundancy and preserve the integrity of Member States' proposals. Their work took into account interventions of Member States during the informals. They had chosen to work on the draft text on TK first and then to present the revisions as a work-in-progress. They planned to revise the draft text on TCEs for presentation the next day. They focused on Article 5 and Article 9 of the TK text. In Article 9, they had deleted sub-paragraph (d) of paragraph 9.1. They had renumbered the next section as (d). At the end of Article 9.3, they had corrected an error and renumbered the last sub-paragraph as (e). At the end of paragraph 9.3 of Alt 2, they had deleted the cross-reference to Article 5.1, because they had deleted the previous Alt of Article 5.1. Paragraph 9.4 of Alt 2 had also been deleted, as they had not found any expressions of support for that paragraph. Paragraph 9.6 had been amended to accommodate the requests of a Member State. They had deleted the reference to "protected" before "traditional knowledge" throughout Article 9.6. They had deleted Alt 3 since there was no expression of support for that alternative.

45. Ms. Lilyclaire Bellamy, speaking on behalf of the Facilitators, said that the Facilitators had worked in a way that was a departure from the usual way of work, hoping to achieve openness and transparency. They had tried to incorporate all of the interventions made by the Member States. Regarding Article 5, she asked delegations to listen with an open mind. In Alt 1, the Facilitators had deleted the word "safeguard" and retained the word "protect" because protection was more in keeping with what WIPO was mandated to do. They recommended the retention of the word "protect" and the deletion of the word "safeguard" in both Alt 1 and Alt 2. In Alt 2, paragraph (b) began with "where with reference to the customary laws and practices", they had merged or utilized existing text proposed by the Chair to capture the essence of what the TK was. In the original text, there was "narrowly diffused", and in the original paragraph (d) which was now paragraph (c), there was "widely diffused." They had tried to encapsulate both "narrowly" and "widely diffused" using the language proposed by the Chair. The new text read: "Where with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, the traditional knowledge is no longer under the exclusive control of beneficiaries, but is still distinctively associated with the beneficiaries' cultural identity...". They had deleted paragraph (c), so they had renumbered paragraph (d) as paragraph (c), where they had deleted a number of words. They had tried to address TK in its totality rather than limiting it to the "narrowly diffused" and "widely diffused". For TK that was utilized without the prior informed consent ("PIC"), they had inserted "and/or not in accord with customary laws and practices of indigenous [peoples] and local communities". They had deleted "or with their prior informed consent", because PIC was present earlier. In keeping with the presentations during the informals, they had allowed for beneficiaries, IPLCs, to have the possibility of a request, so they had proposed "shall have the possibility to request from the relevant national authorities..." She said they had deleted Alt 3 and Alt 4 in Article 5 because based on the transcript of the discussions, there was not a lot of support for those two alternatives. She invited delegations not to ask for any text to be reinserted, but to just look at it with fresh eyes and see if they could live with it.

46. The Vice-Chair opened the floor for any comments or questions.

47. [Note from the Secretariat: All speakers thanked the Facilitators for their work.] The Delegation of Indonesia said that it could live with that text on the condition that the IGC could



rebuild trust among all members, which should have the same objective of the effective protection of TK and TCEs.

48. The representative of Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, raised a question regarding Article 9. She recalled her multiple interventions during the informals to the effect that one element was missing in Alt 1, which was the involvement, PIC or consultation with IPLCs. She had assumed that the proposal had enjoyed support. In fact, some Member States had commented that if IPLCs were in the text, the words “where appropriate” could be included, because the conditions and contexts in different countries were diverse. She expected to see that reflected in the text. She hoped it was merely an oversight.

49. The Delegation of Nigeria would continue to study that text and consult at the regional level. It suggested, under Article 5, Alt 2, paragraph (c), replacing the very last word “diffusion” with “utilization”. It made that observation without prejudice to its overall assessment of whether it wanted to proceed with the reincarnated Alt 2.

50. The Delegation of the Islamic Republic of Iran said the work-in-progress document captured the main topics and issues raised during the consultations. It had been supportive of the approach undertaken by the Facilitators to reduce the number of alternatives and produce two different alternatives for each article, which reflected the main different perspectives of Member States. Regarding exceptions and limitations, it preferred Alt 1, but another alternative which had been discussed extensively was to develop a compromise alternative, in line with the proposal made by the Chair. It suggested producing that additional alternative in Rev. 1 for the consideration of Member States. It would be a welcome inclusion to bridge the current gaps.

51. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that, without having studied the document in thorough tail and without having been able to consult with its Member States, it could work on the basis of that document, subject to further clarifications, discussions and comments.

52. The Delegation of the USA recalled that during the informals, it had supported Alt 2 of Article 9 with the modification of paragraph 9.6 to improve readability and clarity. The Facilitators had subsequently deleted paragraph 9.4 of Alt 2. That was an important part of Alt 2 and it would prefer to have that paragraph reinserted. In paragraph 9.6, the Facilitators had omitted the word “protected” before “traditional knowledge” and that was a very important word because that differentiated the TK as subject to protection under that instrument from the broad set of TK that fell within the definition of TK in that draft instrument. The word “protected” should be reinserted in the first line of Article 9.6 in paragraphs (a), (b) and (c). With respect to Article 5, it had proposed a new alternative that would take the criteria for eligibility and incorporate that into the scope and conditions of protection. That would narrow the gaps by simplifying the text and eliminating redundancy. It reread that language that was proposed the day before so that it might be included in the text. It read as follows: “Where traditional knowledge is distinctly associated with the cultural heritage of beneficiaries as defined in Article 4 and 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 below: 1. Where the protected traditional knowledge is secret, whether or not it is sacred, Member States should encourage that (a) beneficiaries that directly communicate traditional knowledge to users have the possibility under national law to maintain, control, use, develop, authorize or prevent access to and use/utilization of their protected traditional knowledge and receive a fair and equitable share of benefits arising from its use by said users; (b) users identify clearly discernible holders of said protected traditional knowledge and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries. 2. Where the protected traditional knowledge is narrowly diffused, whether or

not it is sacred, Member States should encourage the best practice that (a) beneficiaries that directly communicate the protected traditional knowledge to users receive a fair and equitable share of the benefits arising from its use by said users and; (b) users identify clearly discernible holders of the protected traditional knowledge when using said traditional knowledge and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries.

3. Member States should use best endeavors to achieve and preserve traditional knowledge that is widely diffused.” In the TCEs text, it took note with some disappointment that in Alt 3 of Article 5, Option 1 had been deleted. In that particular option, there were a number of important elements that were not reflected in the current text, including one option relating to false and misleading uses of TCEs, which was the subject of a very productive ongoing work stream within the IGC. As a result, it wished to see it restored into the text. It could continue the discussion, once those important concepts were preserved in the text.

53. The Delegation of South Africa recalled its interjection in the informals, along with the Delegation of Nigeria, in support of the Indigenous Caucus, regarding the inclusion of “where applicable”. It requested that the Indigenous Caucus’s request be considered, based on the support by the African Group. It supported the principle of having the two streams of work. It welcomed that document, notwithstanding that it would study it further. It asked clarification from the Delegation of the USA about introducing more than two options and wondered if that was narrowing gaps and seeking consensus, or whether Member States were drifting apart. It asked the Facilitators to condense the options into one workable option with three different philosophical underpinnings.

54. The Delegation of Indonesia, in keeping with the positive momentum despite the development of the discussion, reflected that different countries might have different definitions of “bridging”. As to the comment by the Indigenous Caucus as supported by the Delegation of South Africa, instead of having different alternatives with regard to exceptions and limitations, it could live with the addition of “in consultation with indigenous peoples and local communities, where applicable”, not “where appropriate”. It requested to bracket the word “peoples.”

55. The Delegation of Croatia, speaking on behalf of the CEBS Group, said that the text was a good basis for further discussions, subject to internal coordination.

56. The Delegation of Japan said that the international instrument should not extend the scope of protection to the public domain, taking into account the current IP system. If the public domain was under protection by the instrument, potentially third parties could be affected by using TK or TCEs that were already in the public domain. Alt 4 of Article 5.2 had not yet been thoroughly discussed. Therefore, it hoped that Alt 4 of Article 5.2 in the TK text and Alt 1 of Article 5.2 in the TCEs text would be retained. It requested to keep the word “safeguard” in all alternatives, and a measure-based approach should be a possible way forward. It looked forward to seeing the revised TK and TCEs texts.

57. The Delegation of Switzerland asked the Facilitators to consider streamlining the text. In the informals, it had made an intervention to that effect. In Alt 2 of Article 5, the idea of setting up an obligation to Member States appeared twice: first in the chapeau and then in subparagraphs (a) and (b). It proposed to streamline that text by starting the chapeau with “Member States should/shall take legislative, administrative and/or policy measures as appropriate” and then delete one of the references to the Member States, with the understanding that the rights and measures-based approaches were not mutually exclusive. The same amendment could be done in Alt 1 by making it clear that it was actually Member States that should/shall take legislative, administrative and/or policy measures as appropriate.

58. Ms. Lilyclaire Bellamy, speaking on behalf of the Facilitators, said that the Facilitators had considered the proposal. However, putting that phrase in the chapeau did not flow consistently with paragraph (c). She said they could tweak the language to make it work.

59. The Delegation of China said that the text, especially Alt 2, had undergone some changes with regard to the format. The terms “narrowly diffused” had been removed. In the original alternative, there was a distinction between different concepts. The revised text had adopted some concepts from the tiered approach from the Chair’s Information Note. It wondered why it had been adopted in that way. During the consultations, it had some concerns related to the concept in the Chair’s Information Note of “control” and “when associated with”. In practice, it could be very difficult to implement. It asked the Facilitators what their consideration was and why they had made the changes.

60. Ms. Lilyclaire Bellamy, speaking on behalf of the Facilitators, clarified that they had deleted paragraph (c). In paragraph (b), “narrowly diffused” had been replaced by “no longer under the exclusive control of beneficiaries but is still distinctively associated with the beneficiaries”. The use of those words captured what was conceived under “narrowly diffused”. Paragraph (c) had been revised in an attempt to reduce the text and explain what diffusion was.

61. The Delegation of China thanked Ms. Lilyclaire Bellamy for her explanation. It wished to, in relation to paragraph (c) where it referred to IPLCs, expand the scope to “beneficiaries” to include nations and ethnic groups.

62. The Delegation of Nigeria took notice of the intervention by the Delegation of the USA to reinsert a whole length of its own vision of the tiered approach. It asked the Delegation of the USA, in the interest of narrowing the gaps, for clarity on whether they were trying to abandon Alt 1, and found a process through which they could meet somewhere down the road with the tiered approach. That exercise had gone beyond staking grounds and claiming spaces, which undermined the objective of closing the gaps. The IGC had been taking three steps forward and four steps backwards. That was not movement.

63. The Delegation of India said that it would comment after having studied the text. It requested to look into setting minimum standards. Details should be left to national authorities.

64. The representative of Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, supported the changes of the Delegation of Nigeria, regarding replacing “diffusion” with “utilization”. She thanked the African Group and the Delegation of Indonesia for supporting her proposals. She signaled that she had some text to propose to strengthen paragraph (c), which she would do later.

65. The Delegation of Egypt said that the informals had been adopted to help make progress and help achieve the objective of closing the gaps. In the IGC, there had to be the desire and will to come up with solutions. After 20 years, there was a tendency to draw out the work of the IGC. When the Facilitators made those amendments and modifications, they were reflecting the discussion.

66. The Delegation of the USA responded to the questions of the Delegations of South Africa and Nigeria about the new alternative that it had suggested to Article 5 of the TK text. The questions were concerning whether the new alternative would add to the number of alternatives and whether the Delegation was supporting more than one alternative in that particular article. It had previously supported Article 3, which was no longer in the text. It had replaced the new article that it had proposed, which would be contained in the text and would contain the desirable and clarified elements of former Alt 3 of Article 5 and would also incorporate the eligibility criteria that had been in Article 3. It had been looking to close gaps with that, and it

should not be adding a new alternative. It was replacing a former alternative which had been its alternative before. There was a question about Alt 1. That was never its alternative, and other delegations had supported that alternative. In Article 5 of the TCEs text revised by the Facilitators, particularly with respect to Alt 3, Option 1 had been deleted. It was disappointed because important specific concepts contained in Alt 3, Option 1 were missing. In particular, in that option, there was a notation with respect to “protection against false and misleading uses” which was a very productive area that it had been working on. It regretted to see that that was missing. In paragraph (b), the concept of attribution was there but not the concept of “protecting the integrity of TCEs” which was also reflected in Alt 3, Option 1. To correct for those defects, it submitted that the concepts and language for discussion reflected in Alt 3, Option 1 of Article 5 be preserved. With respect to the formal process, it wished to see the language preserved. It was open to further discussions back and forth in an iterative context on how best to integrate those important missing concepts in the document. It wished to study Article 9 closely. It expressed concerns with regard to the structuring of proposals as drawn from the Chair’s text, so it was studying those and would have further comments in the discussion. With respect to specific exceptions in Article 9.3, it drew attention to paragraph (d). That was an important exception that had been in the international community for approximately twice as long as the discussions in WIPO. It requested to remove the brackets around Article 9.3(d).

67. Ms. Lilyclaire Bellamy, speaking on behalf of the Facilitators, clarified that the Facilitators had been only able to look at the TK text, not the TCEs text.

68. [Note from the Secretariat: This part of the session took place on June 19, 2019.] The Chair invited the Delegation of the USA to introduce document WIPO/GRTKF/IC/40/11.

69. The Delegation of the USA introduced document WIPO/GRTKF/IC/40/11, 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 in the IGC’s mandate to use an evidence-based approach in its consideration of national experiences regarding IP and GRs. That document had first been introduced in 2018, following the release of the report on the economic impact of disclosure requirements in patent applications for GR-based innovation commissioned by the International Federation of Pharmaceutical Manufacturers Associations (“IFPMA”) and CropLife International at an IGC side event. It had updated that document to incorporate findings of the report. The paper analyzed the impact that disclosure requirements would have on research and development in the field of biotechnology and pharmaceuticals due to the uncertainties they would introduce into the patent system and was based on recent peer-reviewed economic studies. That paper considered the effect of patent review delays on business growth, including employment and sales growth for startups. Its findings were that each year of patent review delays would reduce employment growth for a startup by an average of 19.3 percent and sales growth by an average of 28.4 percent or over five years following a first-action decision on a patent application. The paper considered legal uncertainty from disclosure requirements which might encourage companies to forego patent protection in favor of weaker or nondisclosed forms of protection such as trade secrets. Or worse yet, companies might decide to innovate less and instead rely on research done by others. A new disclosure requirement could lead to legal uncertainty in granted patents, which could affect a firm’s overall market competitiveness, including negative effects on licensing, research, investment. The Delegation had certain economic concerns about proposals of disclosure requirements that were 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 that paper.

70. The Chair opened the floor for comments

71. The Delegation of Japan expressed its appreciation to the Delegation of the USA for providing document WIPO/GRTKF/IC/40/11. 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 heavy growth of industries utilizing GRs in emerging and developing countries, both presently and in the future. It shared a common, grave concern about the mandatory disclosure requirement, as stated at IGC 39. The analysis based on the objective data shown in that document was highly useful to advance the work of the IGC, using an evidence-based approach. For example, taking into account the fact that the terms of patent rights were limited (basically, 20 years from the filing date), both panel A and panel B shown in figure 4 in the document were very persuasive. In addition, that document shed light on the effect of the disclosure requirement on start-up companies. Since supporting start-up companies was critical for emerging, developing and developed countries, it also offered all Member States valuable insight for that highly important aspect. It remained committed to contributing to constructive discussions in the IGC in an evidence-based manner, based upon the valuable lessons obtained from the detailed analysis shown in the document.

72. The Delegation of Egypt said that all those documents up for acknowledgement and approval had already been presented over many sessions in the past. Its opinion had not changed on that issue. The IGC would continue its work for two more years and did not need any more documents. The concerns of the delegations presenting those documents should be only resolved through discussions and negotiations. Therefore, there was no need for any new documents.

73. The Delegation of the Republic of Korea supported document WIPO/GRTKF/IC/40/11. It had the same concern that disclosure requirements would pose delays in the patent-granting process and put a burden on inventors or applicants, eventually hindering the development of GR-related inventions. Recently, it had held a meeting with GR users and stakeholders and had had a chance to hear their opinions on the possible impact of introducing disclosure requirements in the patent system. The participants had expressed their concerns that patent filing dates could be significantly delayed when they attempted to meet the disclosure requirements for each GR used in an invention. According to the past experience, if disclosure requirements were introduced, additional research and review time could be required to examine submissions, thereby placing additional financial and human resources burden on patent offices. That might lead to a delay in the patent granting process. It stood ready to constructively discuss that document.

74. The Delegation of Uganda, speaking on behalf of the African Group, thanked the Delegation of the USA for presenting the document. Regarding procedure, according to the IGC's mandate as unanimously agreed by all Member States, IGC 40 was to discuss two subject matters: TK and TCEs. The document submitted by the Delegation of the USA was about disclosure requirements, which was a GR matter. It was gravely concerned about the failure to follow the agreed mandate. It wanted to see a balanced approach in all the studies and documents submitted to the IGC for discussion. The mandate required the IGC to conclude an international instrument(s) for the effective protection of GRs, TK and TCEs in a balanced manner. The interests of users and rights holders had to be taken into account. That document basically spoke to only the users rather than holders of the TK, TCEs and GRs.

75. The Delegation of New Zealand thanked the Delegation of the USA for presenting the results of its study. In 2018, New Zealand had conducted a consultation exercise on disclosure of origin in patent applications and commissioned an economic study on the impact of a disclosure requirement on patent applications sent upon the Intellectual Property Office of New Zealand. That study concluded that a disclosure requirement, along the lines of that described

in the Chair's text on GRs, would have minimal impact on both patent applicants and the Intellectual Property Office. That study was available on the New Zealand Government website.

76. The Delegation of India, as regards the disclosure requirement, said that the efforts in research and development ("R&D") for an invention were not a one-day effort. Between the time a scientist or institution started R&D and based thereon inventions were made, there was a considerable time lag. People very well knew that they had to abide by the disclosure requirement, if necessary, based on territorial rules and regulations. The idea that it delayed the patent application was unfounded.

77. The Delegation of Nigeria aligned itself with the statement made by the Delegation of Uganda, on behalf of the African Group. Going forward, it asked whether the IGC would be discussing a pile of several documents that were yet to be introduced, or take them into notice and move forward. It was a judgment call at the Chair's discretion. There was an opportunity in that tendency to overwhelm the IGC with documents or pretend to do so. It had been receiving documents since negotiations had started in the IGC. A study had no meaning if it was one-sided and far from being objective. The mandate was to negotiate instrument(s) for the effective protection of TK, TCEs and GRs. There were many interests competing on those subject matters. One might be thinking about a mandate language with regard to those studies. It was not helpful that one particular negotiating block commissioned its own studies and kept piling them up. It might be interesting for the Secretariat to weigh in. Those studies were filtered objectively, so the interest of every stakeholder represented in the mandate were evaluated in the studies being presented. It was the Chair's judgment call whether the IGC would receive those documents and take notice of them, because they were already marked as official WIPO documents or continue to go through the cycle over and over again, given what it had scheduled for the remaining of that session.

78. The Chair said that the documents had been reissued for IGC 40. It was up to Member States how they engaged with those documents. It was also up to the Member States whether or not they wished to continue resubmitting them.

79. The Delegation of the USA said that it had reviewed New Zealand's economic evaluation of disclosure of origin requirements paper. While it found the information on patent filings and filing fees in New Zealand quite interesting, it was not convinced that the analysis was applicable to other Member States, especially those that received a much higher number of patent applications. It also had not found adequate support for some of the assertions made in the paper, for example those in Table 3.2 on materiality of direct impact. In some cases, the paper mentioned discussions and consultation but did not document those discussions. Another example was that the administrative cost assumptions in Table 4.1 were not well documented. For instance, the Intellectual Property Office of New Zealand implementation cost of \$400,000 appeared to be arrived at based on other changes of similar magnitude in other industries, yet the authors did not document those. It was unclear what industries and what changes had been used for comparison. The additional costs of application processing were at least based upon the projected number of future applications, but the additional per application cost was not well documented. Further, the compliance cost estimates were based mostly on assumptions, regarding the amount of time that it would take applicants to comply with the new requirements, but the justification for the assumptions was lacking. It was not clear what was the basis for the assumptions. The conclusion regarding the impact of the mandatory disclosure requirement on R&D in New Zealand, even if correct, would not necessarily be generalizable to other countries, which had different R&D infrastructure in place.

80. The Delegation of China said that in 2008, China had revised its patent law by adding new elements, such as the disclosure of the origin of the GRs. In the past 10 years of implementation, internally and externally, it had not noticed whether the applicant thought it had

added an extra burden or had delayed the patent process for IP examiners. They did not think such new requirements had increased their burdens. It had not conducted detailed economic research and calculation or assessments, but based on internal and external feedbacks, it had not found any delay or uncertainty impact.

81. The representative of Tulalip Tribes said that the Delegation of Nigeria had covered many of his concerns. He reflected on the hypothesis of a new environmental law proposed to protect the environment, and a party arguing the economic impact on an industry. If that was the only criteria used, one would never make progress in protecting the environment. The IGC was there to protect TK. Two things were at stake: one was disclosure of origin and the other was to provide information to patent officers to evaluate claims on patents in the form of prior art or in the claims of other property rights. When one did not consider the impacts on IPLCs, it was a very one-sided study, which failed to address the policy issues discussed at the IGC. Economics could be a concern, but similar concerns also had to be taken into account to balance that equation and look at the impacts of nondisclosure of origin on IPLCs. One impact was to put the entire burden on the disclosure of TK. In order for those studies to be considered, they really had to be balanced. That discussion illustrated the disputes over methodologies as well. The papers were based on certain methodologies and having consensus and agreement on those methodologies would take a lot of time in the IGC, in order to accept them on *prima facie* evidence.

82. The Delegation of South Africa seconded the statement made by the Delegation of Uganda, on behalf of the African Group, and the questions it had raised, which had not been addressed adequately. It inquired about the purpose for presenting the papers, which had been presented before. Opinions had been expressed by different groups, and there was nothing new being put on the table from both the presenters of the paper and from those critiquing the paper. Those views had been heard before. It wondered what the purpose was for the IGC to continue to reiterate the same issues that had been dealt with before. The IGC needed to look at the effective use of its time. The Delegation had attended the seminars and had interacted very actively on the issue. It did not support the submissions.

83. The Delegation of the Plurinational State of Bolivia did not want to continue the analysis on the study presented by the Delegation of the USA because that was not the mandate of the session. Countries had different interests, which should be balanced. There had to be more legal certainty for TK, which should not be patented in an undue manner. Countries had to continue to strive for the goals of the IGC and not just for the presentations.

84. The Chair invited the Delegation of the USA to introduce document WIPO/GRTKF/IC/40/12.

85. The Delegation of the USA introduced document WIPO/GRTKF/IC/40/12, entitled "Identifying Examples of Traditional Knowledge to Stimulate a Discussion of What Should be Protectable Subject Matter and What was not Intended to be Protected". It had re-tabled that document, based on past discussions in the IGC, when some delegations had expressed interest in the document and its objective, which included informing the IGC on what TK should be protected and what was not intended to be protected. One of the examples described in that paper, which was for the first time highlighted in that statement, explained how ancient Polynesians and Pacific Islanders used boards and planks to ride waves as a means of travel for recreation and how that knowledge migrated with those communities to Hawaii where the art of surfing was perfected. The paper also discussed how modern football or soccer could trace back to activities in Asia in the second century B.C. and native and North Americans in the 17th century. That 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 on its work on TK. It

wished to continue the discussion on the paper because it was a valuable tool that would facilitate an evidence-based approach, as mandated by the GA. It looked forward to further discussion on that paper.

86. The Chair opened the floor for comments.

87. The Delegation of Japan expressed its appreciation to the Delegation of the USA for providing document WIPO/GRTKF/IC/40/12. There were many things to be considered before initiating a discussion of the scope of protection. The document listed many well-known products or activities that might possibly be related to TK and it was a good starting point for the discussions. It picked one example, tea, from the document. 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 and what was the criteria for protecting tea as TK? Who should own the rights to tea? Who were the beneficiaries? What was the exact scope of protection for tea? Before any of those questions were answered, the IGC needed to determine specific criteria and reach a universal understanding about tea.

88. The Delegation of Egypt reiterated its opinion about the studies. The IGC was not an academic environment. It was an international organization's forum with a certain mandate, and it needed to draft an international legal instrument(s). Despite the fact that 20 years had passed, the IGC had not reached that point. Therefore, it did not need any new documents, whether studies or others.

89. The Delegation of the Republic of Korea supported the proposal made by the Delegation of the USA in document WIPO/GRTKF/IC/40/12. That paper would contribute to a common understanding by identifying some of the many well-known products and activities based on TK and therefore, facilitate a discussion on which TK should be protected and what should be available for all to make and use without restriction.

90. The Chair invited the Delegation of the USA to introduce document WIPO/GRTKF/IC/40/13 Rev.

91. The Delegation of the USA introduced document WIPO/GRTKF/IC/40/13 Rev., entitled "Traditional Culture Expressions: A Discussion Paper". It was a slightly revised version of a paper introduced in a previous IGC session. The revision took into account prior discussions in the IGC. The purpose of that paper, consistent with the mandate of the IGC, was to facilitate an informed discussion in the context of reaching a common understanding regarding the treatment of TCEs. The principal mechanism to facilitate such an informed discussion was to set forth examples. For the sake of convenience, the paper organized the examples into four categories: TCEs in action, such as dance; material TCEs, which would include visual arts and handicrafts; music and sound TCEs, such as traditional ballad; or verbal and written TCEs, such as a fairy tale. It highlighted one example from the arts and handicrafts category: the Amish quilt, which was a new example in that paper. The paper read: "The Amish people are a group of traditionalist Christian church fellowships in the United States with Swiss German Anabaptist origins. Reflecting the value placed by the Amish on simplicity in dress and lifestyle, Amish quilts, with roots in many cultures, are known for their use of community-sanctioned colors and styles. Made to mark marriages and births, Amish quilts are passed from generation to generation as heirlooms, but the colorful, handmade quilts are also available for purchase by persons outside Amish communities." That example could be useful to facilitate an informed discussion of a number of significant issues under consideration within the IGC, such as the concept of a "local community", the notion of distinctiveness of a TCE that was or might be shared by other communities, and the question of the cross-border movement of TCEs. It looked forward to any questions and to continuing the conversation.



92. The Chair opened the floor for comments.

93. The Delegation of Japan thanked the Delegation of the USA for document WIPO/GRTKF/IC/40/13. Sharing concrete examples of national experiences and practices could help draw a line between protectable TCEs on the one hand and non-protectable TCEs on the other. It supported the discussions on the proposal. That kind of exercise could complement and even facilitate text-based negotiations.

94. The Delegation of Egypt said that it did not accept another document of that kind, including documents WIPO/GRTKF/IC/40/14, WIPO/GRTKF/IC/40/15, WIPO/GRTKF/IC/40/16 and WIPO/GRTKF/IC/40/17. It asked the Chair to take its opinion onboard.

95. The Delegation of India said that WIPO had issued very nice updated Gap Analyses. It could not find any reason for having the same thing in a different format.

96. The Chair invited the Delegation of the USA to introduce document WIPO/GRTKF/IC/40/14.

97. The Delegation of the USA introduced its “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/40/14), which it proposed together with the Delegation of Japan. After it had reintroduced the document at IGC 37, a number of Member States had expressed interest in that study. The proposal was intended to provide valuable contributions to the IGC’s work on reaching an agreement on an international legal instrument for the effective protection of TK. Over the past 20 years, a number of WIPO Member States had introduced laws, provisions to protect TK, for example, according to information contained in the WIPO website, Kenya and Zambia had passed laws on the protection of TK and TCEs in 2016. It wanted to learn more about those and other regulations related to the protection of TK. That study was intended to generate important information to inform the IGC in support of its mandated work. The Delegation of the EU, on behalf of the EU and its Member States, had proposed other studies in the IGC, which it welcomed and supported. The Delegation of the EU, on behalf of the EU and its Member States, was interested in working with other delegations to consolidate study proposals. It welcomed that initiative. It looked forward to working with the Delegation of the EU, on behalf of the EU and its Member States, and other delegations to consolidate and carry out the proposed studies. It invited the IGC’s support for that proposal.

98. The Delegation of the EU, speaking on behalf of the EU and Member States, was supportive of the proposal for a study contained in document WIPO/GRTKF/IC/40/14. In the context of its own similar proposals resubmitted at IGC 39, it recognized a potential overlap of ideas to incorporate evidence-based working methods, as reflected in the current IGC mandate. It was also sensitive to feedback received from other IGC participants in response to proposed calls for studies. It noted the guidance from the Chair that a balanced approach was key. The EU had already signaled a readiness to engage in exploring possibilities to coordinate proposals to together process information on national experiences and gain a better understanding of existing *sui generis* systems for the protection of TK/TCEs. It wanted to inform the IGC with other delegations, in particular the Delegation of the USA to find a possible way forward. It was hopeful that such cooperation could result in outcomes acceptable to all.

99. The Delegation of Japan thanked the Delegation of the USA for the proposal. The IGC should follow an evidence-based approach, as stipulated in the mandate, particularly paragraphs (c) and (d). As a cosponsor, it proposed that the WIPO Secretariat invite those WIPO Member States that had a *sui generis* national law for protecting TK to respond to the

questions contained in the Annex to the document. Compiling the responses obtained by conducting that study would undoubtedly lead to effective discussions in the IGC.

100. The Delegation of the Republic of Korea supported the proposal in document WIPO/GRTKF/IC/40/14, because it could provide a useful basis for Member States to discuss TK issues in a more balanced way.

101. The Delegation of India did not support that proposal precisely on the reason that all those *sui generis* systems developed by various Member States were well known to everybody. If any Member State wanted to get to know it better, it could do it bilaterally. There was no need for a separate study delaying the IGC process.

102. The Chair invited the Delegation of the USA to introduce document WIPO/GRTKF/IC/40/15.

103. The Delegation of the USA introduced document WIPO/GRTKF/IC/40/15, entitled “Joint Recommendation on Genetic Resources and Associated Traditional Knowledge”, cosponsored by the Delegations of Canada, Japan, Norway, the Republic of Korea and the USA. That document could be used as a confidence-building measure to help the IGC move forward on key issues concerning GRs and associated TK. That proposal would promote the use of opposition systems to allow third parties to dispute the validity of a patent, development and use of voluntary codes of conduct in the exchange of access to databases, among other things, in order to prevent the erroneous granting of patents for inventions based on GRs and associated TK. With respect to voluntary codes of conduct, a number of pharmaceutical and biotechnology inventions, including life-saving medicines, biofuel, and agricultural products, utilized compounds and processes in nature and some included associated TK. Many companies had established guidelines and rules for proper bioprospecting. It wanted to continue the discussion on that proposed joint recommendation, because it captured key objectives and facilitated the establishment of effective mechanisms for the protection of associated TK. It invited other delegations to express their support to that proposal and welcomed additional cosponsors. It looked forward to continued discussions on that proposal.

104. The Chair opened the floor for comments.

105. The Delegation of Japan, as a cosponsor of the proposal, supported the joint recommendation, which was a good basis for the discussion on the issues regarding IP and GRs and associated TK, especially on preventing the erroneous granting of patents. It looked forward to continuing discussions on that joint recommendation.

106. The Delegation of the Republic of Korea, as a cosponsor, supported document WIPO/GRTKF/IC/40/15. The prevention of erroneously granted patents and the use of the opposition system measures would be an effective and efficient form of promoting protection of GRs and associated TK.

107. The Delegation of India said that, on its own, that joint recommendation was welcome, but it should not hinder the IGC process. India had developed the Traditional Knowledge Digital Library (“TKDL”), which was very much used for the purposes of stopping the erroneous granting of patents.

108. The Delegation of Egypt said that it would not welcome any new suggestions, as it had pointed out earlier.

109. The Chair invited the Delegation of Japan to introduce document WIPO/GRTKF/IC/40/16.

110. The Delegation of Japan, together with the Delegations of Canada, the Republic of Korea and the USA, introduced 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/40/16). Most of the Member States shared a common recognition of the importance of establishing databases as a defensive measure to prevent the erroneous granting of patents for inventions dealing with TK and associated TK. It had been contributing to the discussions at IGC and other fora. It looked forward to continuing discussion on the joint recommendation with Member States.

111. The Chair opened the floor for comments.

112. The Delegation of the USA supported the comments made by the Delegation of Japan. As a cosponsor of the joint recommendation on the WIPO Portal, it viewed that proposal as a valuable contribution to the work of the IGC that aimed to provide an international legal instrument(s) for the effective protection of TK. In particular, the proposal helped to address concerns raised in the IGC relating to the erroneous grants of patents. It looked forward to discussing the WIPO Portal proposal. It invited other delegations to express their support for that proposal.

113. The Delegation of the Republic of Korea, as a cosponsor, supported document WIPO/GRTKF/IC/40/16. A well-developed database was a practical and feasible method for reducing the number of erroneously granted patents in Member States and protecting GRs and associated TK. Developing an integrated database system at WIPO would effectively enhance the protection of GRs and associated TK.

114. The Delegation of India said that it had developed the TKDL, a database for defensive protection. It welcomed such proposal, with the understanding that it should not delay the IGC process.

115. The Delegation of Egypt said that document deserved the same treatment as the other documents. There was no place for new initiatives and new documents in the IGC.

116. The Chair invited the Delegation of the Republic of Korea to introduce document WIPO/GRTKF/IC/40/17.

117. The Delegation of the Republic of Korea introduce document WIPO/GRTKF/IC/40/17, entitled “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”, cosponsored with the Delegations of Canada, Japan, Norway, the Russian Federation and the USA. Through that study, one would be able to hear diverse opinions or experiences not only from GR providers but also from patent examiners and patent users who would be directly influenced by the introduction of the disclosure requirements. Thus, that proposal would provide up-to-date information on existing national laws and their implementation as well as concrete information on practices and experiences of all parties impacted by the patent disclosure regimes. The study would help reflect the views from various stakeholders in a more detailed and balanced manner and contribute to accessing the possible impact of the disclosure requirement on the patent system and understand core issues in the IGC better. It invited other Member States to seriously consider the merits and values that such studies could bring to an understanding of the issue being negotiated and to be open to contributing to and supporting such proposals.

118. The Chair opened the floor for comments.

119. The Delegation of the USA supported the proposal made by the Delegation of the Republic of Korea regarding document WIPO/GRTKF/IC/40/17. In the past sessions, the IGC had held constructive discussions about national laws and how disclosure requirements and access and benefit-sharing (“ABS”) systems functioned. Those discussions had helped inform the text-based negotiations. Questions in the study explored such issues as the impact of the national disclosure requirements in securing compliance with ABS systems and the penalties associated with noncompliance. For example, there was a new provision in the Industrial Property Act of Uganda of 2014 that required mandatory disclosure of GRs. It wanted to know more about how it was implemented and used. That study was to help provide important information to support the IGC’s work and was not intended to slow down the work of the IGC.

120. The Delegation of Japan supported the proposal. The importance of an evidence-based approach had been recognized by many Member States, so that proposed study was an effective and productive way to foster a common understanding on core issues on GRs and associated TK without delaying the text-based negotiations.

121. The Delegation of India said that the updated Gap Analyses done by the WIPO Secretariat were sufficient to move forward on the text-based negotiation at the IGC. There was no need for any further analysis of such type. Member States were well informed and if required, they could have that bilaterally as well.

122. The representative of AIPLA said that it would be invaluable to gather more information in that area. It appreciated that the studies being proposed to assess the potential impact of an international legal binding framework to protect indigenous resources, including GRs and TK, would establish disclosure requirements. It had sent a targeted request to subcommittees focusing on GRs and plants, asking those members to report on their experience with disclosure requirements. In response to that inquiry, the committee had received only a few responses, which were limited to summaries of disclosure laws in each respondent’s respective jurisdiction. The committee had subsequently made a targeted inquiry into Swiss practitioners and the Swiss Patent Office to learn more about experience with the Swiss disclosure requirement. Based on the results, the committee determined that no practical impact of the Swiss disclosure rules had come to the attention of either the Swiss Patent Office or Swiss patent attorneys, at least in part because those requirements were easily circumvented since they did not apply to the European patent system. Those results had been previously reported to the IGC in 2018. In an attempt to address possible shortcomings of targeted inquiries, the committee had conducted a survey in July 2018. Because the previous response rate to the targeted inquiry might have been low due to fear of repercussion by practitioners in disclosure requirements countries, they had prepared an online anonymous survey. In order to get a greater number of responses, the survey was directed not only at the committee of the AIPLA membership at large but also at various international organizations that dealt with IP in the broader sense and were active in the biotechnology space. For example, the online survey was forwarded to several NGOs representing innovative parties and their legal representatives who the committee assumed would be likely to assert patents for inventions related to GRs and TK. Although the survey was widely distributed to respondents from five continents, it was not designed, conducted or tracked by a professional survey company and that was unscientific. Certain design flaws became apparent when analyzing results. For example, the format was not designed to track whether the respondents in private practice would have knowledge of the GRs or TK laws on their clients’ decisions or whether some potential survey respondents chose not to respond out of fear of government reprisal, despite the anonymous format of the survey. Finally, some respondents contradicted themselves, an indication that some of the questions were unclear. All of which suggests the need to formulate a more precise survey and circulate it to a wider set of stakeholders who might have greater knowledge of the impact of disclosure requirements on the R&D decisions, before any conclusive determination could be made. Accordingly, in order to more accurately assess the impact of worldwide disclosure requirements, the committee

planned to consult with polling professional and coordinate with other organizations representing IP practitioners and owners.

123. The Chair closed the discussions on those documents.

124. [Note from the Secretariat: This part of the session took place after the distribution of Rev. documents dated June 19, 2019, prepared by the Facilitators.] The Chair opened the discussion on the two revised documents on TK and TCEs. In reviewing those documents, only errors and omissions would be addressed. Any other interventions would be recorded in the report of the meeting. He would invite the Facilitators to explain the key changes, based on the feedback received in plenary the day before. He recalled that the Facilitators worked for the delegations. Their job was to make sure the revisions considered all participants' interests. It was quite a demanding task, so there were potentially errors and omissions. Those identifying errors and omissions could notify the Facilitators directly in order to have them corrected.

125. Mr. Paul Kuruk, speaking on behalf of the Facilitators, said that the day before, they had presented in plenary their work-in-progress. After the plenary, they had worked on both draft texts on TK and TCEs, taking into account all the interventions made. They had worked on the two articles discussed in informals: scope of protection, and exceptions and limitations. In Article 9 of the TK text, they had made additional revisions to reflect comments and requests following their presentation. Regarding Alt 1, they had inserted the phrase "in consultation with the beneficiaries, where applicable" to correct an omission. The new provision read as follows: "In complying with the obligations set forth in this instrument, Member States [may in special cases,] [should] adopt justifiable exceptions and limitations necessary to protect the public interest, in consultation with the beneficiaries, where applicable, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries nor unduly prejudice the implementation of this instrument.]" In paragraph 9.6 of Alt 2, they had reinserted the word "protected" before TK and bracketed it, based on the request of a Member State. In paragraph 9.7 of Alt 2, they had replaced the existing text with another provision, which was previously found in Alt 4 of Article 5.2. That paragraph had been deleted from their work-in-progress, but a Member State had asked that to be reintroduced. They had therefore accommodated that request, but determined that Article 9 on exceptions and limitations provided a better placement for the provision. Accordingly, they had moved paragraph 5.2 to paragraph 9.7. They had replaced the existing text with the text of paragraph 5.2, as the latter provision dealt essentially with the same subject matter and was determined to be more concise. In Article 7 of the TCEs text, they had revised the text to reflect the changes made to the TK text. Thus, in Alt 1 of Article 7, they had incorporated the reference to "in consultation with beneficiaries where applicable". They had deleted Alt 3 of Article 7, for it was redundant, as its subject matter was adequately captured in Alt 1. For similar reasons, they had deleted what was previously described as paragraph 7 of Alt 4, as it reflected the same subject matter covered in the remaining provision, which was renumbered as paragraph 7.1 of Alt 3.

126. Ms. Lilyclaire Bellamy, speaking on behalf of the Facilitators, said that on Article 5, they had looked at the TK document first. The first change to Article 5 was in the title, which read "Scope of [and Conditions of] Protection". They had recommended deleting one of the "of" for the title to read "Scope [and Conditions] of Protection". They had incorporated and reflected the text as recommended and presented in plenary the day before. In the TK document, in Alt 1, there was a recommendation to retain the word "safeguard", so the word "safeguard" had been returned to its position. In Alt 2, paragraph 5.1, a Member State had recommended moving the final sentence in paragraph (a) and using that in paragraph 5.1. They had tweaked that entire paragraph and indicated that they had not done the change earlier because it had not flown properly. They had thus moved the final paragraph, and given it its own number. They had deleted the letter (d) (not the paragraph) and inserted a new number so that the final paragraph would read as 5.2. The substance and essence remained the same. They had retained the

integrity of the text. They had just moved the paragraph. They had also been asked to insert in its entirety Alt 3. They had replaced Alt 3 in its entirety in the text. They had removed paragraph 5.2, but had retained the paragraph in paragraph 9.7, as Alt 2. In the TCEs text, on Article 5, they had retained Alt 1, exactly as it was. In Alt 2, they had put in “unauthorized utilization”. Alt 2 in the TCEs text was a mirror of the TK text. In Alt 3 of Article 5 in the TCEs text, the first option had been retained and the second option had been deleted, as it had not received any expressions of support.

127. [Note from the Secretariat: This part of the session took place after a short break when delegations reviewed the Rev. documents.] The Chair said that as per the methodology and work program, the plenary was invited to identify any obvious errors or omissions in the revision documents. Those corrections would be made by the Facilitators that evening. Any other comments on the revised documents, such as new proposals, drafting improvements and other substantive comments would be recorded in the full report of the session. At the end of the discussions, the text as corrected, if necessary, for obvious errors and omissions, would be noted and transmitted to Agenda Item 7. The texts were not adopted at that stage but simply noted and transmitted. In relation to errors and omissions, some Member States had discussed those with the Facilitators and hopefully they had already been addressed. He opened the floor for comments and statements.

128. [Note from the Secretariat: All speakers thanked the Facilitators for their work.] The Delegation of Guatemala, speaking on behalf of GRULAC, said that the documents were a good basis for the future discussion.

129. The Delegation of Uganda, speaking on behalf of the African Group, said that the integrity of the texts as well as Member States’ positions were maintained. Under the scope of protection, references to moral rights, i.e. secret and sacred TK, had been reinstated in the document, and that was commendable. Individual members of the African Group would be making additional substantive comments on their concerns on some of the articles. The African Group reviewed the Rev. documents positively so they could be used as a basis for future negotiations.

130. The Delegation of the EU, speaking on behalf of the EU and its Member States, considered the texts as presented acceptable as a basis for further negotiations. It would have comments and possibly questions on some of the changes, but its initial assessment was positive.

131. The Delegation of Croatia, speaking on behalf of the CEBS Group, said that the documents served as a good basis for future discussions.

132. The Delegation of the Russian Federation, with regard to Article 5, said that Alt 1 and Alt 2 were preferable because they contained a reference to the possibility of the scope and conditions of protection in conformity with national legislation. The documents could later serve as a basis for further discussion.

133. The Delegation of China noticed that many delegations had made their observations which had been included in the revised texts, including observations it had made through exchange and discussion with the Facilitators, who had respected and understood its concerns. The two documents related to TK and TCEs could be a good foundation for further discussions.

134. The Delegation of the Islamic Republic of Iran said that the document was more streamlined and had less alternatives. It was happy to join the consensus to accept the texts as the basis for future consideration.

135. The Delegation of Niger said that there was an error in Article 9 at the last sentence. The word “interests” had to be replaced by the word “rights” of beneficiaries. It would read: “provided such exceptions and limitations shall not unreasonably conflict with the rights of beneficiaries”.

136. The Delegation of Thailand said that those texts were a good basis for further discussion.

137. The Delegation of Japan was grateful to the Facilitators for retaining the provision regarding exclusion of the public domain from the scope of protection, which was present in Article 5.2 of Alt 4 in the original TK text and then in Article 9.7 in the revised text. However, that provision should be in Article 5 because it related to core and essential elements for defining a clear border of the scope of protection. Therefore, it suggested to move the provision from Article 9.7 to Alt 1 of Article 5.2 in Article 5. That would also improve consistency between the TK and TCEs texts.

138. The Delegation of Canada was not identifying an error or omission in the revised texts, but in the spirit of being constructive, it had considered the practical application of the approach detailed therein, and submitted two comments for the consideration of the IGC. It had been considering the merits of all proposed approaches, including the tiered approach. Its first comment related to that article in the TK text. Its concern in considering the revised text was that the top tier, where access was restricted and TK might be secret or sacred, was not sufficiently distinct from the second tier, where TK was no longer under the exclusive protection of the beneficiary, but was still distinctively associated with the beneficiary’s cultural identity. The new iteration of the tiered approach reduced the conceptual clarity of the text. That raised practical concerns for the implementation of an eventual instrument. Its second comment related to the relationship between the TK and TCEs texts. While it appreciated the perspective that TK and TCEs were deeply interrelated and should be considered holistically, it cautioned that not all changes to one text could or should be equally applied to the other without consideration of the different characteristics and features of each. While there were many cross-cutting issues, and the current IGC mandate had sought to address those issues, there were nevertheless some important conceptual differences between TK and TCEs that needed to be considered and reflected in the draft texts. With an eye to the future work of the IGC, Member States would need to consciously consider whether the articles as they had evolved were appropriate to the subject matter they addressed. It recommended that the IGC consider undertaking an exercise of applying the models developed in the text to specific examples of TK and of TCEs, to better understand how they might work in practice.

139. The Delegation of Indonesia, speaking on behalf of the APG, said that it was well aware of the complexity involved in capturing all of the discussions, inputs, technical proposals and reflecting them into a balanced document and maintaining clarity in the text. The documents were a good basis for further discussion in future sessions.

140. The Delegation of India said that, at least on the articles of the scope of protection, and exceptions and limitations, very good understanding could be made, and a new draft had come out. Considering the diverse socioeconomic conditions of Member States and allowing a scope of flexibility, the IGC should come up with a legal framework specifying a minimum standard only, while details should be left to the respective national authorities. As regards the scope of protection, it agreed with the Chair’s proposition that it was important to consider the practicality and the legal implications of the proposed tiers in the tiered approach. Benefit-sharing was proposed only for secret or sacred TK and TCEs. The question arose as to how others would come to know or could use a secret TK or TCEs, given the mere fact that it was secret. If others could use the TK or TCEs, it might be argued that that TK or TCEs was no longer secret and that there was hence no case for benefit-sharing. Every legitimate case for ABS would potentially get trapped in litigation over the secret nature of the TK or TCEs. Practically, there

would be no case for exclusive economic rights. That was especially true for TCEs, which were expected to have been explicitly expressed and not a secret subject matter. The texts had been framed in such a way that in case of litigation or otherwise, the onus of proof fell on the owners of TK or TCEs and not on the wrongful users of TK or TCEs. Delegations should recognize the fact that it would be an awful task for the IPLCs to prove that a particular TK or TCEs was secret or sacred in the absence of any documentary evidence. Lastly, the TK and TCEs texts were taken mirror images of each other, but that was not the case in practice. The IGC should look into that aspect as well.

141. The Delegation of Indonesia, speaking on behalf of the LMCs, understood that capturing all interventions, inputs, proposals and discussions in the past two days was not an easy job, while the Facilitators had to maintain integrity and clarity in the texts. However, it welcomed the integration of the results of all work on those two provisions into the new Draft Articles on TK and TCEs. The texts were ready to be sent to the GA for further consideration.

142. The Delegation of the Republic of Korea asked for clarification on Alt 2 of Article 5.1 in both the TK and TCEs texts. Article 5.1(a) was about access to TK and TCEs that was/were restricted, however, 5.1(b) would be a place where TK and TCEs were no longer under the exclusive control of beneficiaries. It wondered how to clearly draw lines between access to TK and TCEs when they were restricted and when they were no longer under the exclusive control of the beneficiaries.

143. The Delegation of Nigeria called attention to Article 5.1(b) of the TCEs text as well as to the TK text, recognizing the observation made by the Delegation of China, and taking into account the reappearance of “sacred” and “secret” TK or TCEs. It wondered whether that was feasible. It was not demanding any answer from the Facilitators, but left it for their consideration. With regard to Article 5.1(b), in the interest of drafting consistency and of the very strategic attempt to marry the Chair’s text with previous language of the tiered approach, it asked whether, after “beneficiaries” on the third line, the Facilitators could consider including “including where the TCEs are diffused”. The text would continue to read: “but are still distinctively associated with the beneficiaries”. In reaction to the last observation made by the Delegation of the Republic of Korea, the issue of evidentiary threshold in relation to diffusion, or in the current language, “where a TK or TCEs is no longer distinctly associated with the beneficiaries”, was not one that would require documentary evidence. The language that drew in the validation or the proof of diffusion or use was already captured in the text by way of paying attention to the customary practices of IPLCs. The Indigenous Caucus had talked about that from the point of view of intent, and if time permitted and if they were willing, the Caucus might be able to speak about that.

144. The Delegation of Egypt said, when comparing Article 5 in the TCEs text with Article 5 in the TK text, there was a missing phrase in the TCEs text, in the third line, which was “taking into consideration exceptions and limitations, as defined in Article 9, and in a manner consistent with Article 14]”. There was no such operative provision in the TCEs text dealing with non-derogation and there should be one.

145. The Chair closed the discussion on Agenda Item 6.

*Decisions on Agenda Item 6:*

*146. The Committee developed, on the basis of document WIPO/GRTKF/IC/40/4, a further text, “The Protection of Traditional Knowledge: Draft Articles –*



*Facilitators' Rev.”, and on the basis of document WIPO/GRTKF/IC/40/5, a further text, “The Protection of Traditional Cultural Expressions: Draft Articles – Facilitators' Rev.”. The Committee decided that these texts, as at the close of this agenda item on June 19, 2019, be considered by the Committee under Agenda Item 7 (Taking Stock of Progress and Making a Recommendation to the General Assembly), in accordance with the Committee's mandate for 2018-2019 and the work program for 2019, as contained in document WO/GA/49/21.*

*147. The Committee took note of and held discussions on documents WIPO/GRTKF/IC/40/7, WIPO/GRTKF/IC/40/8, WIPO/GRTKF/IC/40/9, WIPO/GRTKF/IC/40/10, WIPO/GRTKF/IC/40/11, WIPO/GRTKF/IC/40/12, WIPO/GRTKF/IC/40/13 Rev., WIPO/GRTKF/IC/40/14, WIPO/GRTKF/IC/40/15, WIPO/GRTKF/IC/40/16, WIPO/GRTKF/IC/40/17 and WIPO/GRTKF/IC/40/INF/7.*

## **AGENDA ITEM 7: TAKING STOCK OF PROGRESS AND MAKING A RECOMMENDATION TO THE GA**

148. The Chair recalled the IGC mandate and the role of IGC 40. The aim of the work under Agenda Item 7 was to take stock of progress made and reach agreement on a recommendation to the GA. The IGC would review the materials and not open them up. The IGC would take stock of it and consider the recommendations to the GA. If the IGC was unable to conclude recommendations, it would still transmit the texts on GRs, TK and TCEs in a factual report, as usual. The Chair referred to his Information Note on Agenda Item 7, which was informal and had no status. Any views expressed in that Note were his alone and were without prejudice to any Member States' positions on the issues discussed. The Information Note was simply there to reflect on and to assist in the negotiations. He had consulted with RCs and interested delegations on the work program and working methodology for IGC 40 the week before. He had circulated the agreed methodology and program. On Agenda Item 7, he would convene informal consultations, to take place in the margins of the session. At that stage, he would only invite RCs and the Delegation of the EU, the LMCs and the Indigenous Caucus. In relation to stock-taking, he had produced a Chair's text on GRs, under his own authority and without prejudice to any Member States' position. It was an attempt to move the deliberations on GRs forward, which had stalled, from his perspective, noting that the consolidated document had two broad approaches on the table: a mandatory disclosure proposal and defensive measures. In one approach, it was stated that there was no disclosure regime. In the introductory remarks to his text, he questioned how effective the current consolidated working document was in moving the deliberations forward. He had attempted to pick up the positive movement of compromise at

IGC 36 amongst many Member States. He had attempted to balance the interests of all Member States, indigenous peoples and other key stakeholders, including industry. He did not believe Member States could make informed decisions about the disclosure without a clear understanding of the potential modalities of the clear model being on the table. That was needed so that the Member States that did not support such an approach at that time and members that did, but had different views on the scope of that instrument, could make informed decisions regarding the risks, benefits and the cost of such a regime. In relation to the text, while he had been taking feedback, he was not negotiating the core elements. Within that text, if he felt there was a chance that could get consensus, which might change a key element, he would be looking at that. He believed that his text was a balanced, compromise proposal, accepting that every Member State would have issues. He asked members to look at that text and ask themselves if it protected their primary interests. As to its status, it was his proposal produced under his authority and available for consideration at the stock-taking session, but it had no status. When considering the document, it was important to read both the articles and the explanatory notes, as they were intertwined. The articles were the primary mechanism, yet it was important to read the notes because they gave context to articles. It was important to recognize that the IGC was not opening up, not negotiating GRs during IGC 40. He had simply provided that text to members in relation to the stock-taking session and to the recommendations to make in relation to the text.

149. [Note from the Secretariat: The Chair had informal consultations with the RCs, the Delegation of the EU, the representative of the LMCs and the representative of Indigenous Caucus. The following session took place on June 20, 2019.] The Chair appreciated the efforts of the RCs and the Delegation of the EU, the representative of the LMCs and Indigenous Caucus representative for engaging with members and providing some initial feedback to help the Chair understand the different perspectives. He said there had been really good progress, but much work remained. He said that he had issued a Chair's Information Note on Future Work in a similar format to the one issued prior to the 2017 GA. Essentially, it covered the questions and issues that needed to be considered in relation to future work. It also covered the lessons learned from the biennium and provided an overview of the Chair's perspective of the negotiations. That note did not prejudge any Member States' position. They were his views and had no status. However, he hoped that they had assisted members in their preparations and considerations of the IGC's work. In particular, when reflecting on future work, members needed to consider the level of resolution of key issues, the level of agreement, the number of outstanding issues that had to be resolved, as well as the current readiness for political decision-making. It did not matter what mandate or working methods the IGC had. The IGC would only come to a final conclusion with political will. He assumed that all members wished to continue the work of the IGC, based on the IGC's objective, reflected in subparagraph (a) of the current mandate, as affirmed at the 2018 GA. There were some suggestions for language changes in that area, which had to be considered. In relation to GRs, the IGC needed in the next 12 to 18 months, or certainly within the next mandate, to seriously consider getting a final agreement. The IGC could not continue to circle opposing proposals. In essence, the vast majority of members across groups supported some form of mandatory disclosure requirements, which was administrative in nature, though there were differences of view in the scope of the regime, such as applicability of IP rights and scope of the trigger, which was at the heart of any instrument in relation to mandatory disclosure. It was one of the key issues that the IGC still needed to work on. The inclusion of obligations relating to compliance with national ABS regimes, including PIC and the nature of the sanctions, in particular, the potential for the revocation of patents. At IGC 36, there had been a missed opportunity, where positions had been nearing a compromise. As a result, under his own authority, he had produced a Chair's text on GRs and associated TK, which attempted to balance the different interests and concerns. He was not negotiating the text. He was, however, taking feedback. He had received feedback on that area and identified opportunities to make some edits which were reasonable and improved the clarity of the document and the intent of the objectives. That

document had been discussed in the mandate discussion. About the way forward, he had put a number of options to consider: to include the Chair's text to help aid the negotiations; to take a parallel path where the IGC could continue the normative negotiations in relation to GRs; to do some work on some of the defensive measures reflected in some proposals, in the consolidated working document and in the joint statement. Alternatively, the IGC could continue in the current way, which was on two paths: one path was towards normative discussions on mandatory disclosure and the other was focused on some of the issues raised in the joint recommendations and in the consolidated document on defensive measures. In relation to TK/TCEs, the IGC had concluded the negotiations, and his points had not changed significantly. He said those were very complex negotiations with significant challenges. They considered moral and economic rights with potential impacts across the full spectrum of IP rights and with potential for the introduction of *sui generis* systems, in addition to the environments of the IPLCs across the world, which were vastly divergent, including different legal frameworks for protecting their rights and interests and the utilization of different types of laws, including soft laws. The IGC also needed to recognize the conceptual divide in relation to how indigenous belief systems, customary laws and practices interacted with the extent IP policies and laws. That was captured in the Gap Analyses updated by the WIPO Secretariat. One also needed to reflect on the need to balance the role that the IP system played in promoting and supporting innovation and creativity, transfer and dissemination of knowledge and economic development for the mutual benefit of all stakeholders. In that respect, ensuring legal certainty within the IP system and accepting an accessible public domain were key elements in preserving that integrity. That was the greatest challenge. In relation to the texts under development, there had been significant progress. The IGC was reaching consensus on key areas including subject matter in relation to the definitions of TK/TCEs. The IGC was also starting to move towards an agreement on objectives, where there were three alternatives. The IGC had nearly agreed on the eligibility criteria, save for the temporal issue. Progress was made to further rationalize the tiered approach, but the scope of protection was at the heart of the instrument and certainly, more work was needed in that area, particularly looking at measures and rights based approaches. In relation to exceptions and limitations, there was a challenge in relation to the diverging approaches of providing flexibility at the national level, which he supported, and being overly prescriptive. If the IGC could resolve the issues in relation to scope of protection and exceptions and limitations and establish a single framework going forward, the IGC would be in really good shape in the next year or so. In particular, the IGC needed to start focusing on rationalizing the text and building a single framework. He said that another issue to consider was whether the IGC would move forward with everything in a complete package of three subject matters or take an incremental approach. That affected the priority of the work. Over the biennium, the IGC had gained significant momentum and needed to build thereon. It was very important to focus the IGC's work and continue efforts, and that had to be reflected in the mandate for the future work. During the informal consultations, objectives were a topic Member States and group of countries were interested in considering. There was an additional language in subparagraph (b), which was not controversial. Members or groups had indicated around working methods, such as "inclusive" and "open" rather than "sound". One of the major issues was intersessional working groups ("IWGs"), as raised by a number of groups. He asked the Secretariat to give an overview of the IWGs that had taken place in 2010 and 2011 to understand how they operated, when they were conducted, etc. By their very nature, IWGs would replace formal IGC meetings. There were already six IGC sessions planned for the biennium. That was about the limits that the WIPO Secretariat and participants were capable of doing. It was a challenge to do that many meetings. With IWGs, there were risks associated with political will and the maturity of delegates in the negotiations. In the past, the material had come forward from the IWGs only for the IGC plenary to unpick it and to revert to well-known positions. That was a lot of work with not much outcome. He invited the Secretariat to give a briefing on the IWGs.

150. The Secretariat recalled some elements of the modalities of the IWGs. The 2009 GA had decided to establish three IWGs in the 2010/11 biennium. IGC 16 decided the modalities of IWGs. More details were included in the IGC 16 decisions. The IGC was still the decision-making body. IWGs were to support and facilitate the negotiations of the IGC. IWGs were to provide legal and technical advice and analysis, including, where appropriate, options for the consideration of the IGC. The IWGs had reported to the IGC on the outcome of their work and submitted recommendations and texts relating to the decisions in the IGC. The participation in the IWGs were open to all Member States and accredited observers. Each Member State and accredited observer could be represented by one technical expert to participate in his/her personal capacity. Funding for each IWG had been provided by WIPO for one representative each from 71 developing countries and countries with economies in transitions. Indigenous representatives had been funded by the Voluntary Fund, as decided by the Advisory Board of the Voluntary Fund. Observers had been participating in the same capacity as at the IGC. There had been a separate room at WIPO headquarters from where the discussions in the IWGs could be followed by the representatives of Member States and accredited observers. Only nominated experts had been in the meeting and all the other participants from Member States had followed the discussions in a separate room. Regarding the basis of the work at the IWGs, the IWGs had taken all the WIPO working documents, including the texts at that moment as might be revised in line with the IGC's mandate. The working languages at the IWGs had been the six official languages of the UN. The Chair and the Vice-Chairs of the IGC had been invited to the IWGs meeting and each IWG had elected their own Chair and Vice-Chairs. Each IWG had been a five-day meeting.

151. The Chair opened the floor for statements on Agenda Item 7. He recalled that the IGC was still negotiating future work through the informal consultation.

152. The Delegation of Indonesia, speaking on behalf of the APG, recalled the current IGC mandate. It had studied the Chair's Information Note regarding Agenda Item 7. It conveyed its appreciation to the Chair. Progress had been made within the IGC with various degrees of perspectives. It had seen a shift towards more IP-focused objectives in the three subject matters. There had also been a shift towards framework documents that established a set of standards or mechanisms which provided flexibility for implementation at the domestic level. It hoped that IGC 40 would be able to come up with a recommendation to the GA that would guide the IGC's future work based on the progress made under the current mandate. Most of the APG members reiterated the need for a legally binding instrument(s) providing effective protection of GRs, TK and TCEs. No one could ignore the progress made, and negotiations in the protection of GRs, TK and TCEs should continue. It confirmed the APG's full support and cooperation in the discussion under Agenda Item 7. It was committed to engaging constructively for a mutually acceptable outcome.

153. The Delegation of Guatemala, speaking on behalf of GRULAC, said that the IGC needed to have a balanced mandate for the next biennium to achieve its objectives and arrive at an agreement of one or several international instruments on TK and TCEs. The work of the next biennium would have to be based on the work already achieved by the IGC, including text-based negotiations, focusing particularly on reducing existing gaps and reaching a common understanding on core issues such as definitions, beneficiaries, objectives, scope of protection, protection on an international level, exceptions and limitations, and relationship with the public domain. It hoped that that future mandate would be an essential part of the process of inclusivity and transparency. It hoped to be able to increase the number of IGC meetings to progress the work. It was ready to debate and reflect on the working methods proposed with a view to closing off the differences between members. It wished to continue the negotiations on the draft texts on GRs, TK and TCEs. The Chair's proposed text on GRs could be included in the working documents for IGC 41. All additional studies should be focused on achieving progress in the negotiations, as per the mandate. It stressed the importance of the participation

of IPLCs and to include their contribution in the IGC's work. It suggested that such participation should not be simply subject to the Voluntary Fund. The IGC should look at other possible mechanisms to ensure their participation. It urged participants to maintain constructive and open discussions to allow, in a pragmatic manner, to achieve a positive result.

154. The Delegation of China said that the IGC had just completed its biennium, which had made progress, to some extent. It agreed with the Chair regarding the negotiation, in particular on GRs. The major issue was about political will. Most Member States had such political will. It agreed that the Chair's text on GRs and associated TK would be the basis for future discussions. Regarding the IGC's mandate and future mandate, it supported that the GA renew the mandate of the IGC. Regarding work priorities, working methodologies, working documents and other technical issues, it would continue, in a flexible and open manner, to discuss with other delegations. It hoped that other regional groups could reflect the same flexibility so as to achieve substantive results in the next biennium, i.e. agreeing on legally binding international instruments.

155. The Delegation of Uganda, speaking on behalf of the African Group, appreciated the Chair and his Bureau on their dedicated efforts to guide the IGC as it embarked on the next part of the work, i.e. to take stock of the progress made, make a recommendation to the GA and come up with options for future work. It recalled the current IGC mandate. From a logical perspective, taking stock of work done in the 2018-2019 biennium should clearly show the areas where gaps were narrowed, where a common understanding was reached, and the areas where difficulties remained. That would help inform future work, refocus energies and give a clear picture of the work to be undertaken, and the amount of time which would be required to take the IGC to a logical conclusion of its work. Before assessing the progress made, it recalled that there was no perfect international IP instrument that took into account all interests of all Member States and stakeholders. IP instruments had historically been a result of political compromises. That explained why, save for the WIPO Convention, no international IP instrument enjoyed universal membership of all WIPO Member States. It would be unhistorical, in the IGC, for any one Member State or other stakeholder to measure progress made or lack of it, solely on the basis of and extent to which their own individual interest had been reflected in the instrument(s) for the protection of GRs, TK and TCEs, without due regard to the interests of other Member States, stakeholders, users and rights holders. In the last few weeks, the African Group and individual members had been heavily involved in that process, reaching out to other delegations to find areas of divergence and common landing zones going forward. It commended the Government of South Africa for organizing a pre-IGC meeting in Pretoria. It paid tribute to the Government of Indonesia for convening a meeting in Montreux to consider the future work of the IGC. It thanked the Secretariat for supporting the meetings. It thanked the Member States and stakeholders that had participated. Regarding the stocktaking and taking into account the Chair's assessment of work done so far, it was an undeniable fact that significant progress had been made under the current mandate. The IGC was nearing agreement on all the core issues of the TK/TCEs texts, including definition of TK/TCEs, protected subject matter and eligibility of criteria. It was also becoming clear that some outstanding issues would only be resolved at the highest political levels. With regard to the GRs text, IGC 36 had made substantial progress, however, the revised text was never agreed. It thanked the Chair for consequently, under his own authority, preparing the Chair's text on GRs. That text should be included as a working document of the IGC under the next mandate. The text did not adequately address all the interests of the African Group, but there was a fair attempt to balance the interests of all Member States and other stakeholders. The text also attempted to address the practical modalities of implementation at the national level. The Chair's text could be a useful reference document for the 2019 GA and future IGC sessions. Regarding the future work of the IGC and taking into account the significant progress made as well as outstanding work, the IGC's mandate should be renewed to finalize the texts for the protection of GRs, TK and TCEs. The IGC was in a position to recommend to the GA for the

consideration of additional meetings as well as convening a diplomatic conference in the near future. It supported the continued involvement of IPLCs in the IGC process. Funding should not be based solely on the Voluntary Fund. It reiterated its support to the Chair in ensuring the successful outcomes. It would engage with pragmatism with all other Member States and stakeholders to find a mutually agreeable outcome.

156. The Delegation of Canada, speaking on behalf of Group B, noted the Chair's Information Note on future work, thanked him for his efforts to organize informal consultations on future work and was pleased to know they had taken place in a positive spirit. It acknowledged the progress made under the mandate on GRs, TK and TCEs. More work needed to be done to narrow existing gaps with a view to reaching a common understanding on core issues. Therefore, at IGC 40, efforts should focus on making a reasonable recommendation to the GA which accurately reflected the current status of the IGC's work. It remained open to exploring different options of a future mandate, which would lead to tangible outcomes of the work of the IGC. However, at that stage, it was premature to recommend the convening of a diplomatic conference on any of the three issues. It thanked the Chair for the text on GRs and associated TK. It supported maintaining the Chair's text on GRs and associated TK for future discussions.

157. The Delegation of Croatia, speaking on behalf of the CEBS Group, was aware of the progress achieved in the IGC during the 2018-2019 mandate, notably on the issues of TK and TCEs. The IGC's future work needed to focus on narrowing gaps on some core issues. In the absence of a Rev. 2 on GRs, it expressed gratitude for the Chair's text on GRs and associated TK, which might serve as a good alternative for future discussions. In order not to lose that text, it supported raising its status in a manner to be decided by the IGC, with the view that it would serve as one of the inputs for future work. It supported the evidence-based approach and would prefer the Secretariat to carry out a consolidation of studies of already existing national and regional solutions on the issue. Having in mind the limited human and financial resources of the Secretariat and the wish to maintain the same quality of work, if faced with the dilemma between engaging the Secretariat in organizing different types of expert meetings or carrying out a compilation study of national and regional legislations and measures, it would opt for the latter. As to the recommendations the IGC should send to the 2019 GA, they should realistically reflect the status of negotiations to be reached at the end of IGC 40. The negotiations on GRs, TK and TCEs had to continue in the next biennium, but given the current maturity of the negotiations, the GA in 2019 would not be in a position to convene a diplomatic conference on any of the three issues at the end of the next biennium. It reiterated its willingness to engage constructively in future discussions on all three topics.

158. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the Chair and the Secretariat for conducting information consultations on Agenda Item 7. It reiterated its recognition of the importance of the work carried out by the IGC and its support for the continuation of its work in the next biennium. It supported embarking from the text of the current mandate as a starting point. It was appreciative of the Chair's efforts to facilitate progress on GRs by means of providing a text intended to serve as a possible alternative for further discussions. The Chair's personal initiative provided an opportunity to be considered for the future work on GRs. It supported raising the status of the Chair's text on GRs in order not to lose the text for further discussion. It was open to exploring possible ways of doing that, including an adequate reference in the mandate text and/or a decision by IGC 40 to adopt it as a working document. Its support to the Chair's text was on the basis that it would influence the course of further discussions. However, it was not ready to accept it as the sole basis for further negotiations. It also supported that it remained as the Chair's text. The 2019 GA was not in a position to convene a diplomatic conference on any of the three topics. It recalled that it had two proposals for studies on TK/TCEs. It was exploring possibilities to consolidate initiatives with other proponents in the context of its proposal in document WIPO/GRTKF/IC/40/14. It was sensitive to the feedback from other delegations. It noted guidance from the Chair that a

balanced approach in conducting studies was key. It was open to leave it for the Secretariat to establish the terms of reference for such a study. It had a preference for such a study to be conducted within the next mandate to influence text-based discussions on TK/TCEs. It could also accept an open-ended engagement in a targeted evidence-based activity. It was open to exploring related implications on enabling activities. It looked forward to participating constructively in further discussions and remained committed to achieving an efficient work program for the IGC that was acceptable to all.

159. The Delegation of Indonesia, speaking on behalf of the LMCs, recalled the current mandate. It thanked the Chair for his text on GRs and associated TK. It understood the underlying motivation in the formulation of the Chair's text, which was to arrive at a common ground, taking into account all perspectives as well as the practicality of implementation. It hoped that the IGC could consider the Chair's text positively, to observe the progress made at IGC 36 and to narrow gaps on the subject of GRs and associated TK. With regard to the Information Note on Agenda Item 7, it agreed with the Chair's assessment that significant progress had been made within the texts over the biennium. It thanked the Chair for the options for future work. It was ready to engage constructively for a mutual agreement with regard to the IGC's future work, including possible sound working methods that would allow having a more efficient and effective use of time in the IGC. It hoped that IGC 40 would be able to come up with a recommendation to the GA to guide the IGC's future work based on the progress made under the current mandate, as reflected in the working documents as well as the text on GRs and associated TK prepared by the Chair, which reflected a focus on the IP system. Expectations in relation to the scope of protection for TK/TCEs had been narrowed, aided by the introduction of a more practical tiered, rights-based approach. There was a shift towards framework documents that provided a set of standards or mechanisms for flexibility at the domestic level. Based on the progress made under the current mandate, the IGC would be able to deliver a recommendation to the GA that outlined key deliverables and/or outcomes for future work. Taking into account the different nature of the three equally important subject matters under the IGC as well as taking into account the different perspective on the level of maturity between the three working documents, discussions on future work should consider the question between parallel and incremental approach, while also safeguarding the work on all three subject matters. It reemphasized the urgent need to prevent the misuse and misappropriations of GRs and associated TK. A legally binding instrument could prevent and tackle transnational problems through a full compliance mechanism. It was high time for all stakeholders to finalize the text on the protection of GRs. Most of the technical work was done, as reflected in the IGC's work at IGC 36 and in the Chair's text. Member States needed to show political will to go forward. The normative agenda to conclude a legally binding instrument(s) could not be stalled without possible and strong reasons. No one could ignore the progress made and undo the process conducted since 2000 when the IGC had been established and progress made through the text-based negotiations since 2010. Noting the importance of effective protection for GRs, TK and TCEs for all, the IGC should move forward, 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.

160. The representative of the Native American Rights Fund, speaking on behalf of the Indigenous Caucus, appreciated the Chair's textual proposals on TK/TCEs as well as the Chair's GRs text, which she supported as a basis for further discussion. She acknowledged the progress made on the texts during the current biennium. Some texts might be more advanced or mature, yet the texts should proceed together for finalization as a package. She appreciated the inclusion of the Indigenous Caucus representation in the various working methodologies employed under the mandate and looked forward to the continued participation under the 2020-2021 mandate. She recalled the recommendations of the UNPFII to WIPO on convening an indigenous expert meeting and updating the technical review of the draft texts carried out by Mr. James Anaya in 2016. That would contribute positively to the future work of the IGC.

161. The Delegation of Brazil expressed its appreciation to the Chair's efforts to facilitate the discussions, using tools to advance the text-based negotiations. Such was the case for the Chair's text on GRs and associated TK, which was an initial framework for further improvements. It supported the statement made by the Delegation of Guatemala, on behalf of GRULAC, to the effect that it was a working document of the IGC. Regarding the mandate, the Delegation could not conceive WIPO without the IGC. The IGC had a strategic role in WIPO, recognizing the contribution to human society of collectively generated TK and TCEs. In its almost 20 years of existence, the IGC had produced a large and solid body of knowledge, clarifying concepts, terms, activities and through the deliberation of studies and technical notes. Substantive discussions among members had always contributed to that reflection. It was time to move that process to concrete outcomes with the mandate that supported the ripening of texts and the formation of minimum consensus, not unanimity, for the adoption of international legal instrument(s). Regarding GRs, the international legally binding disclosure regime on GRs and associated TK would streamline the procedures for identifying the origin and source of GRs. It would also provide a key tool to ensure compliance with the existing international regime for the conservation of the biological diversity. A clear and consistent disclosure regime would stimulate investments on R&D regarding new biotech inventions, in line with WIPO's mission and the higher goals of the IP system. The Delegation would continue to contribute constructively to the discussion. It invited all delegations to work together with that goal in mind.

162. The Delegation of the Plurinational State of Bolivia said that the IGC had made progress in the negotiation process, but it had taken too long, because of some inflexible positions. It was a priority to have concrete results. That was even more important for countries like the Plurinational State of Bolivia, where there were many IPLCs, and the recognition of their rights was primordial, as was their inclusion in the discussion on issues that directly affected them. The goals needed to be better defined in the new mandate, with an increased commitment from Member States to move forward. The IGC needed to advance. It reiterated its ability to maintain an open dialogue, wishing to improve methodology and accelerate the IGC's work.

163. The Delegation of Nigeria identified with the statement made by the Delegation of Uganda, on behalf of the African Group. As the IGC settled down to discuss the future mandate of the IGC and proposals to the GA, it needed a strong mandate that pushed it towards some sense of urgency to complete its work, with a well thought-out and effective methodology. The Delegation was committed to a legally binding instrument(s) coming out of the IGC. Progress had been made on the GRs text, and it welcomed the Chair's GRs text and identified with the suggestion to make it part of the mandate language. The IGC had significantly narrowed gaps and isolated outstanding issues in the TK and TCEs texts, in a harmonized framework. The IGC was at the cusp of both a package deal and incremental options. Everything would depend on political will as to how to proceed. Meanwhile, the IGC had to aspire towards a mandate that would push it with a sense of urgency to wrap up negotiations. Recognizing the very complex nature of the subject matters, with the right political will, the IGC could arrive at a fair and balanced outcome. A failure of the IGC to deliver on its mandate and the possibility that the IGC continue on that elongated manner of conducting its assignment, would create a sense of disillusionment among those IPLCs with a loss of faith in the WIPO process, not to mention the DA. It would be a dent in the WIPO leadership and investment on the collective endeavors of nearly two decades of the IGC as well as to the international multilateral process, if the providers of global GRs and the holders of TK and TCEs were to be frustrated out of the WIPO process to explore cross-regional options for coordinated protection of those resources. That was not a desirable outcome after two decades of so much effort and investment.

164. The Delegation of the Islamic Republic of Iran aligned itself with the statements made by the Delegation of Indonesia, on behalf of the APG and the LMCs. The international protection of TK, TCEs and GRs was significant for the Islamic Republic of Iran. Despite the progress



made during the current mandate, the IGC faced difficulties to fulfill its mandate. The beneficiaries had the right to reproach the IGC for not being able to fulfill its mandate and to accommodate their long-standing expectations. There was a need to break the habit of always throwing the ball into the court of the next mandate. For any practice, there was some stringent requirement that must be met and among them, political will was first and foremost. The time for reaching an agreement on instruments on GRs, TK and TCEs should eventually come. The rules for the protection of all subject matters should be crystallized in the form of legally binding instrument(s) aiming at filling gaps in the international IP system. Contrary to the views of some delegations, an international legally binding instrument(s) was the only option to secure the protection of those three subject matters. Based on the lessons learned from the current mandate on the methodology and recognizing the importance of intersessional work, it invited the IGC to consider establishing IWGs with a clear mandate to discuss the technical issues and make recommendations to the IGC on possible ways to narrow gaps. On the Chair's text on GRs and associated TK, it commended the Chair for his initiative and proposed to submit the text to future IGC sessions as a working document, despite the difficulties it had around that proposal.

165. The Delegation of Canada was ready to engage on all issues related to a new mandate. As per the mandate, the IGC was engaging in text-based negotiations. Negotiations by definition involved working towards an outcome that all parties could accept. The Delegation said it had long held concerns about the manner in which the text was negotiated at the IGC, as opposed to how negotiations progressed in other contexts. The application of the principle of integrity of proposals in the IGC context had been a hindrance to working towards an outcome all could accept. It was only through working in good faith on the same text that one could identify issues and find ways to address differences so as to revise and refine text in a way that could lead to convergence of positions. The IGC was considering ideas that were novel to all systems, such as the tiered approach. It would only be through collectively working through the ideas, whether or not one was fully committed to a specific option at a given stage, that one would be able to determine whether the IGC could arrive at a mutually acceptable outcome. It wished the new mandate to reflect the importance of and need for a more flexible approach to text-based negotiations that would allow Member States to propose changes to any text. Differences could clearly be identified, including with brackets. The text might not be pretty or elegant, but that was not unusual in a negotiation. It was not uncommon to see a rainbow after a storm.

166. The Delegation of the USA said that progress had been made since the IGC's mandate renewal in identifying and advancing key substantive issues under the current mandate. It appreciated the efforts of the Secretariat, the Chair and the Facilitators in helping to structure the discussions in an organized and efficient manner so as to advance that important process. Nonetheless, a significant amount of work was outstanding in all three subjects. Key issues remained unresolved. Text-based negotiations should continue, however, more work was required to reach a common understanding on the nature and content of the instrument(s). Elements of the mandate should continue to include references to the IGC's continuing work and text-based negotiations without prejudice to the nature of the outcome, the objective of reaching agreement on a text(s) of an international legal instrument(s) relating to IP, to promote the balance and effective protection of GRs, TK and TCEs, the IGC continuing to build on the existing work carried out by the IGC, focusing on narrowing existing gaps and reaching a common understanding on core issues. IGC meetings during the next biennium should be equal for all three topics. There should be continued use of all WIPO working documents as well as contributions of Member States using an evidence-based approach, including studies and examples of national experiences. The GA should be taking stock of progress made. A new element for the mandate should include the utilization of the WIPO Secretariat to undertake the studies requested by Member States and fast track work on database proposals.

167. The Delegation of Mexico said that some aspects should be borne mind when defining how to continue the IGC's work. It recognized and acknowledged the Chair's efforts and those of the Vice-Chairs and Facilitators and the group's work, which had allowed identifying the gaps and spaces of common understanding so as to identify the positions of Member States and the IGC on the central topics under consideration. It acknowledged the valuable contributions of the representatives of IPLCs who had shared their experiences in their lives and the high value and symbolism that their TK and TCEs had for them. It was crucial to understand their perspective of the IGC's work. One could not continue to put off the respect of the rights of IPLCs with regard to their GRs, TK and TCEs. The IGC had the responsibility to identify the most efficient way of complying with its mandate to ensure that IP became a tool that offered protection to IPLCs. Due to the relevance and links that they had with the natural environment and with their TK and TCEs, the work of the IGC had to continue. It was indispensable to renew the mandate for a new biennium, bearing in mind the sense of urgency that the members should attach to the IGC's work with a view to making progress and achieving specific, concrete results. The IGC should focus its efforts on bringing together positions and ensuring that the texts were cleaner and contained fewer redundancies. There needed to be greater political will to achieve consensus on key issues. The Chair, the Vice-Chairs and the Facilitators might lead in drafting exercises for each of the topics which reflected common denominators. It wanted the IGC to have more time to achieve what it was committed to doing. Therefore, it would support an increase in the number of days of the meetings or extra sessions in the next biennium. That would allow the participation of all parties, including the possibility of evaluating, at the end of the biennium and in line with progress made, the convening of a diplomatic conference. It suggested to reflect on how the topics were distributed throughout the sessions so as to ensure a more efficient use of the time allocated to avoid the feeling that there was not enough time for the due consideration of each one of the themes and the inclusivity and transparency of the conditions in the development of the IGC's work. It was necessary that the future work focus on the texts that had been considered by the IGC, which demonstrated an important level of progress. It acknowledged the efforts made by the Chair in presenting a text on GRs and associated TK in his personal capacity. It highlighted the positive contribution of inclusion of notes in that document, which allowed a better understanding of the meaning of the text proposed. The Delegation was ready to ensure that the document be taken into account as a working document.

168. The Delegation of Malaysia associated itself with the statements made by the Delegation of Indonesia, on behalf of the APG and the LMCs, and noted that the IGC was at the tail end of the current mandate. The IGC had materialized six sessions in addition to the expert groups held prior to a few IGC sessions. It recognized the informal discussions surrounding that area, the retreat conducted by the Delegation of Indonesia and the discussions held by the African Group. Most speakers had acknowledged the progress made in the IGC in accordance with the mandate, recognizing the Chair's effort in coming up with a text on GRs and associated TK, which supported the renewal of the IGC mandate and accelerated the work of the IGC to arrive at the objective of reaching an agreement on international instrument(s). It supported the text-based work on the three subjects and noted the levels of maturity of the texts. It could not deny the progress made especially on the GRs text and hoped to take a final position on the adoption of a diplomatic conference at the earliest opportunity. It stressed the important element of political will on pushing that process forward. The IGC had compiled a wealth of information and reasons for which instruments were needed, after discussions over almost 20 years. It was time to take a position. It was only by political will and with a spirit of positive multilateralism that the IGC could resolve any of the remaining issues.

169. The Delegation of Colombia confirmed its wishes to make progress on the instruments with regard to TK and TCEs and wished them to be binding. It welcomed the work done up thus far, and was certain that there would be a new opportunity to continue bringing positions together. It thanked the Chair for his text on GRs and associated TK and welcomed its content

on a binding disclosure requirement. That contribution reflected a possible consensus, as expressed by Member States. It was confident that there were points of common understanding. It proposed continuing on that path to bring positions closer together and to ensure the flexibility that all were seeking.

170. The Delegation of Ghana said that significant progress had been made in meeting the objective set for that biennium to develop texts that would ensure the balanced and effective protection of GRs, TK and TCEs. It was hopeful that there was a possibility of concluding the process if parties continued to negotiate in good faith. However, it echoed the sentiments made by certain delegations about the lack of clarity concerning the adopted methodology. Some of the structures proposed, such as *ad hoc* expert groups, informals and contact groups were useful, but the difficulty was how to translate the results of the bodies into the texts under development. It was really not productive to have extended, constructive discussions by experts which would then simply be dumped in the background as documents for consideration and would not find a place in the consolidated document. That was due in part to the development that had not occurred in the IGC setting for the past 18 years. For most international discussions, it was very clear how the decisions were made. What was never contemplated was a situation where all parties were put in a classroom with a big blackboard and every delegation had a piece of chalk and they could go at will to make additions and subtractions to what was on the board. That was what the IGC appeared to be doing. That was the reason it was so difficult. Consensus was an important part of the process, but consensus was relevant when it came to more substantive issues in the negotiations. Other matters, such as pure procedural matters, did not always require consensus. The UN Charter made that clear and WIPO had rules along those lines as well. Certain parties were not committing to abide by common sense rules. For any particular article there were pros and cons, so the IGC should agree by consensus to have two clear contrasting positions in the article. If *demandeurs* had a particular alternative, they should make all efforts to make the contributions with regards to that. As to the mandate, delegations who might not be interested in a particular theme could come up with contrasting positions. It might be better to at least come up with mutual bodies that would be able to take onboard the themes expressed in good faith by all parties, and then come up with text that reflected the contrasting positions. The advantage was that one clearly knew who was committed to what approach. In informals or on the sidelines, one could engage to try to add to or to subtract the views. It was currently very difficult, especially where delegations came with very clear text and expected that all the commas and periods be included, otherwise they would not support it. If the IGC could, as part of the next biennium, spend some time working with the regional groups to come into clear agreements on the subject that would be most helpful. All interests would have to be reflected in international laws. The reason why the IGC was trying to come up with the particular instrument was to agree on giving away part of sovereignty. That was not inconsistent with international law. The Delegation wished to create space in the next set of discussions to come to some common agreement on the rules of procedure, not on substantive issues, as to how Member States' interventions and proposals would be reflected in a consensus document.

171. The Delegation of Australia said that the IGC had made huge strides under the current mandate. All Member States should be proud of the contributions they had made to that undertaking. It noted the Chair's efforts in drafting a compromise text on GRs and associated TK, which aimed to balance the rights and interests of users of GRs and associated TK and those of providers and knowledge holders. With the proliferation of national GRs regimes, the more uniform standard presented by the Chair's text was a presentable standard which did not undermine the primary role of incentivizing and rewarding innovation. The disclosure of GRs and TK was important for Australia's Aboriginal and Torres Strait Islander peoples. That was the first step of recognizing the value of indigenous innovation through the IGC. It saw the Chair's text as a serious and thoughtful attempt on the Chair's part to bridge the positions. It

urged all members to consider it in that light. It looked forward to considering the future mandate of that important committee.

172. The Delegation of Japan recognized that Member States had not yet been able to reach consensus on a number of fundamental issues on GRs, TK and TCEs. To overcome that situation through narrowing the existing gaps among the Member States, taking an evidence-based approach was the most effective and feasible way. Member States needed to share their respective national experiences and information on domestic situations more. It emphasized the importance of conducting studies for sharing information on GRs, TK and TCEs among Member States in order to deepen mutual understanding and realize more constructive discussions. It hoped that all would recognize the importance of such kinds of studies. The new mandate should include language on the necessity of the studies.

173. The Delegation of Switzerland recognized that the IGC had made progress on various issues during the current mandate. At the same time, considerable work remained to be done both on the technical and on the political level. Those levels were interlinked. Progress on the technical level might also help to enhance the support on the political level. It remained important to have sufficient time to carefully discuss and evaluate positive but also potential negative implications of proposed solutions for the existing IP system and the beneficiaries. With regard to GRs, it supported to further work on a mandatory disclosure requirement that contained both minimum and maximum standards. It thanked the Chair for his text on GRs and associated TK. That text contained a clearer model of the disclosure requirement and contained useful approaches on how to advance the IGC's work on other issues, including on an information system. The Chair's text still needed further refinement, in particular, as regards the content of disclosure, the sanctions, remedies as well as a better reflection of the rights and interests of IPLCs. That refinement, including editorial changes, was needed to enhance the clarity of the text and to provide sufficient legal certainty for providers of GRs, IPLCs and patent holders. With regard to TK/TCEs, it was pleased that further progress had been achieved. Yet, fundamental differences continued to exist, including on the conceptual level on how to draft the instruments in order to provide effective and balanced protection for TK/TCEs. It remained hopeful that further progress and concrete outcomes could be achieved under the new improved mandate.

174. The Delegation of India appreciated the Chair's preparation of the text on GRs and associated TK. It supported the inclusion of the Chair's text as a working document for future sessions, on the understanding that the Chair's text would complement the other working documents for future discussions on GRs and would not be the sole basis of the discussions on GRs. The IGC needed a strong and innovative mandate. The primary focus of the IGC should be on text-based negotiations. There was a need to bridge gaps on core issues in all the three texts. Recognizing the complexity of issues and the divergence of positions, a strong political will was required to arrive at a common landing ground. There had been considerable progress in the discussions in the past two years. Hence, the mandate should be strong enough to push forward progress in the next biennium. It stood committed to participating in all future sessions.

175. [Note from the Secretariat: the following statement was submitted to the Secretariat in writing only.] The Delegation of Samoa said that it had entered those discussions very late and hoped to bring fresh eyes to help but not more opinions to delay and hinder the important work. It hoped that it would not be its last session. It supported the continuation of the work of the IGC. The next mandate should be effective and single-minded to bring the discussions to a conclusion as soon as practicable with the aim of arriving at an international instrument(s) with the dominant objective, as other IP instruments, to streamline IP protection for GRs, TK and TCEs, keeping in mind the lessons learned from previous negotiations. The standpoints should be balanced, weighing all interest groups, to fairly address the interests of beneficiaries and to enhance and facilitate access to GRs, TK and TCEs by users in light of general IP principles of

enhancing creativity and innovation and in particular providing appropriate solutions to problems at the heart of the patent regime, keeping in mind that reaching a consensus was urgent for Samoa and other Pacific Islands because of the impact of climate change and the fact that many of the beneficiaries were taking their TK, TCEs and knowledge of GRs to the grave. For the sake of humanity and the world, it called upon members to unite to avoid the development of any fallback positions that might be detrimental to the sustainability and development of intellect in the GRs, TK and TCEs regimes. Political will would be needed and, to a certain extent, bravery and courage to step out of fox holes and consider the interests of neighbors rather than just one's own.

176. [Note from the Secretariat: The Chair had informal consultations with the RCs, the Delegation of the EU, the LMCs representative and the Indigenous Caucus representative, and the recommendations to the 2019 GA were agreed. The following session took place on June 21, 2019.] The Chair was pleased to report that the recommendations to the 2019 GA were agreed. All Member States agreed to renew the IGC mandate.

177. The representative of the Assembly of First Nations, speaking on behalf of the Indigenous Caucus, thanked those who had worked on the draft recommendations to the GA. The participation by indigenous peoples in the work of the IGC was imperative. He was grateful that a representative of the Indigenous Caucus had participated in the informal sessions, and that the Caucus had been able to contribute to the drafting of proposals. At IGC 39, there had been no funding for a single indigenous participant selected by the Voluntary Fund to attend the IGC. At IGC 40, the contribution from the Government of Canada had enabled four representatives of IPLCs to attend and participate in the negotiations. However, the Voluntary Fund once again was nearly depleted. In 2018, the recommendations from the IGC to the GA referred to encouraging Member States to consider alternative funding arrangements. The purpose of his intervention was to provide more details and specificity on what a pathway for alternative funding could look like. He read that recommendation into the record: "Recalling the decisions of the 2018 General Assembly in this regard in affirming the particular and unique importance of the participation of representatives of indigenous peoples and local communities in sessions of the Committee and related meetings, the Committee agreed that pending the receipt of further contributions by the WIPO Voluntary Fund for accredited indigenous and local communities, the Fund up to 90,000 Swiss francs from its budget of Program 4 of the Organization be utilized to fund the participation of such representatives in sessions of the Committee and related meetings in Geneva during the 2020-2021 biennium. The Committee requested that the Secretariat fund those representatives recommended by the Fund's Advisory Board based on applications for funding received and consider according to the usual procedures and rules of the Fund. The Committee agreed that such funding would be without prejudice to the funding provided by Program 4 to fund the participation of representatives of developing and least developed countries in sessions of the Committee and related meetings in Geneva. To this end, the Committee requests that additional financial resources be provided to Program 4. The Committee also agreed that this decision is specific to the Committee and does not create a precedent for other WIPO committees."

178. The Chair closed the discussion on Agenda Item 7.

*Decisions on Agenda Item 7:*

*179. The Committee took stock of progress made during the 2018-2019 biennium, and confirmed that the texts contained in the annexes to documents WIPO/GRTKF/IC/40/6, WIPO/GRTKF/IC/40/18 and*

*WIPO/GRTKF/IC/40/19 be transmitted to the 2019 WIPO General Assembly, in accordance with the Committee's mandate for 2018-2019 and the work program for 2019, as contained in document WO/GA/49/21.*

*180. The Committee decided to transmit the Chair's Text of a Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources to the 2019 WIPO General Assembly, and to include it as a working document of the Committee as a Chair's Text.*

*181. The Committee agreed to recommend to the 2019 WIPO General Assembly that the mandate of the Committee be renewed for the 2020-2021 biennium. The Committee further agreed to recommend to the 2019 General Assembly that the terms of the mandate and work program for 2020-2021 be as follows:*

*"Bearing in mind the Development Agenda recommendations, reaffirming the importance of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Committee), noting the different nature of these issues and acknowledging the progress made, the WIPO General Assembly agrees that the mandate of the Committee be renewed, without prejudice to the work pursued in other fora, as follows:*

*(a) The Committee will, during the next budgetary biennium 2020/2021, continue to expedite its work, with the objective of finalizing an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and*

*effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).*

*(b) The Committee's work in the 2020/2021 biennium will build on the existing work carried out by the Committee, including text-based negotiations, with a primary focus on narrowing existing gaps and reaching a common understanding on core issues<sup>1</sup>.*

*(c) The Committee will follow, as set out in the table below [Annex II of this report], a work program based on open and inclusive working methods for the 2020/2021 biennium, including an evidence-based approach as set out in paragraph (d). This work program will make provision for 6 sessions of the Committee in 2020/2021, including thematic, cross-cutting and stocktaking sessions. The Committee may establish ad hoc expert group(s) to address a specific legal, policy or technical issue<sup>2</sup>. The results of the work of such group(s) will be submitted to the Committee for consideration.*

*(d) The Committee will use all WIPO working documents, including WIPO/GRTKF/IC/40/6, WIPO/GRTKF/IC/40/18 and WIPO/GRTKF/IC/40/19, and the Chair's Text on the Draft International Legal Instrument*

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<sup>1</sup> Core issues include, as applicable, inter alia, definitions, beneficiaries, subject matter, objectives, scope of protection, and what TK/TCEs are entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain.

<sup>2</sup> The expert group(s) will have a balanced regional representation and use an efficient working methodology. The expert group(s) will work during the weeks of the sessions of the IGC.

*Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, as well as any other contributions of Member States, such as conducting/updating studies covering, inter alia, examples of national experiences, including domestic legislation, impact assessments, databases, and examples of protectable subject matter and subject matter that is not intended to be protected; and outputs of any expert group(s) established by the Committee and related activities conducted under Program 4. The Secretariat is requested to continue to update studies and other materials relating to tools and activities on databases and on existing disclosure regimes relating to GRs and associated TK, with a view to identify any gaps, and continue to collect, compile and make available online information on national and regional sui generis regimes for the intellectual property protection of TK and TCEs. Studies or additional activities are not to delay progress or establish any preconditions for the negotiations.*

*(e) In 2020, the Committee is requested to provide to the General Assembly a factual report along with the most recent texts available of its work up to that time with recommendations, and in 2021, submit to the General Assembly the results of its work in accordance with the objective reflected in paragraph (a). The General Assembly in*



*2021 will take stock of progress made, and based on the maturity of the texts, including levels of agreement on objectives, scope and nature of the instrument(s), decide on whether to convene a diplomatic conference and/or continue negotiations.*

*(f) The General Assembly requests the Secretariat to continue to assist the Committee by providing Member States with necessary expertise and funding, in the most efficient manner, of the participation of experts from developing countries and LDCs, taking into account the usual formula for the IGC.*

*182. Recalling the decisions of the 2018 WIPO General Assembly in this regard, the Committee also recommended that the 2019 WIPO General Assembly recognize the importance of the participation of indigenous peoples and local communities in the work of the Committee, note that the WIPO Voluntary Fund for Accredited Indigenous and Local Communities is depleted, encourage Member States to consider contributing to the Fund, and invite Member States to consider other alternate funding arrangements.*

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

183. [Note from the Secretariat: The Vice-Chair, Mr. Jukka Liedes from Finland, was chairing the session at this point.] The Vice-Chair said that further to the 2010 WIPO GA decision to instruct the relevant WIPO bodies to include in their annual report to the Assemblies a description of their contribution to the implementation of the respective DA recommendations, he invited delegations and observers to intervene on the contribution of the IGC to the implementation of the DA recommendations. The statements made on that item would be recorded in the usual report of the IGC and would also be transmitted to the WIPO GA taking place in September/October 2019, in line with the decision taken by the 2010 WIPO GA related to the Development Agenda Coordination Mechanism.

184. The Delegation of the Islamic Republic of Iran said that DA Recommendation 18 was dedicated to the IGC's work. It proved that the work and the negotiations in the IGC to protect TK, TCEs and GRs could contribute very positively to the development of IP. It encouraged all Member States to engage more positively in the discussion and expedite the work to finalize and conclude the main issues on the IGC agenda. Furthermore, the technical assistance to Member States and capacity-building projects by the TK Division was another aspect that had a very positive impact on the DA recommendations. It encouraged and invited the TK Division to continue their support in delivering technical assistance to Member States.

185. The Delegation of Brazil said the DA was a major landmark in the history of WIPO. It recalled Recommendation 18, which explicitly concerned the IGC. Regarding the renewal of the IGC mandate, Recommendation 18 assisted the IGC in its reflection on how to accelerate the process and deliver concrete outcomes. Concerning Cluster A, the Secretariat had a very important role to play in providing assistance to Member States, including legislative assistance and capacity-building, enabling indigenous peoples and local communities (IPLCs) to enjoy the fruits of the IP system. It urged all to show a constructive spirit in contributing to the discussions in light of Recommendation 18.

186. The Delegation of Uganda, speaking on behalf of the African Group, underscored the principle underpinning the DA recommendations, i.e. to change the character of WIPO from its primary focus on protection of IP to introduce development dimensions of the programs and activities in line with the wider aspirations of the UN system. That principle reflected the strong ambition of WIPO to ensure that developing countries effectively used IP as a tool for encouraging and promoting creativity and innovation for sustainable development. As a mechanism for measuring progress made in the implementation of the DA recommendations, the WIPO GA in 2010 had directed all of the WIPO bodies, including the IGC, to include in their annual report to the GA, a description of their contribution to the implementation of the DA recommendations. The African Group commended the Secretariat for inviting Member States to provide their own assessment of the IGC's contribution. There were tangible traces of progress made thus far by the IGC in the implementation of the DA recommendations through the mainstreaming of development in its program and activities. The IGC negotiations were the subject of DA Recommendation 18. The IGC's mandate in the 2018-2019 biennium reflected the strong ambition of the IGC to continue to expedite its work with the objective of reaching an agreement on an international legal instrument(s) relating to IP, which would ensure the balanced and effective protection of GRs, TK and TCEs. However, after almost two decades of negotiations and 12 years since the DA recommendation had come into play, the IGC was yet to finalize its work. One wondered if the phrase 'expedite its work', which was always put in the mandate, had real meaning, if year after year there was no conclusion of the IGC's work. The IGC continued to be guided in its work by DA Recommendations 15, 40, and 42 respectively. With regard to the preservation of the public domain within WIPO normative processes and its implications (DA Recommendation 16), there was a significant conceptual misunderstanding of the public domain and its relationship and limits when linked with TK/TCEs. The concept of the public domain was inherent to the IP system and often reflected in the careful balancing of the interests of rights holders and users. In the IGC, there was the contention by a few Member States that large facets of TK/TCEs were in the public domain. That was a conceptual misunderstanding of the public domain. Furthermore, the DA enjoined WIPO and its bodies to take into account flexibilities in international IP agreements in line with Recommendations 12, 14 and 17, as well as the UN Sustainable Development Goals, in line with Recommendation 22. One of the relevant goals of the IGC related to the conservation of biological diversity and the work of the IGC on the international protection of GRs and TK contributed to that goal.

187. The Delegation of India said that the DA ensured that development considerations formed an integral part of WIPO's work. India, along with hundreds of other countries, was affected by misappropriation and biopiracy. Accordingly, an early finalization of an international legal instrument(s) on all three issues was highly solicited. The absence of any such legally-binding instrument would continuously allow the misappropriation and biopiracy of GRs and TK, thereby resulting in an imbalance of the global IP system. It looked forward to an early finalization of a balanced legal framework(s) on GRs, TK and TCEs through the IGC.

188. The Delegation of Nigeria aligned itself with the statement made by the Delegation of Uganda, on behalf of the African Group. It took notice of the statement made by the Delegation of Brazil, with reference to DA Recommendation 18. The IGC had to accelerate its process. It was holding down the advancement of the DA at the IGC. That was contrary to what it was expected to be doing. Negotiating ad infinitum was undermining the DA and therefore running contrary to the mandate. It called attention to the bias of impact studies and assessments in the context of the litany of one-sided industry biased and sponsored studies that had bombarded the IGC for quite a while. If Member States wanted to be very serious and sensitive to the dictates of the DA, they should be inclined toward impact studies that created balance as to the impact of lack of protection of TK, TCEs and GRs that hurt IPLCs. In order to be faithful to the DA, Member States needed to be serious with the kind of studies the IGC accepted in its deliberations and whether those studies actually created the balance required to advance the DA.

189. The Delegation of Egypt agreed with all the statements that had been made with regard to the DA, particularly Recommendation 18. It wondered why, after 20 years of work and negotiation, the IGC had not fulfilled its mandate under Recommendation 18. In the upcoming two years, the IGC should significantly accelerate its work and put aside all attempts to waste time on secondary issues that were not directly linked to the essential ones. It hoped to really commit to the DA on the ability for countries to control GRs, TK and TCEs to allow for sustainable development in those countries. That ownership had to be managed by those countries in order to accelerate the IGC's work and arrive at a binding instrument(s).

190. Vice-Chair Jukka Liedes closed the discussion on Agenda Item 8.

*Decisions on Agenda Item 8:*

*191. The Committee held a discussion on this item. The Committee decided that all statements made on this item would be recorded in the report of the Committee and that they would also be transmitted to the WIPO General Assembly taking place from September 30 to October 9, 2019, in line with the decision taken by the 2010 WIPO General Assembly related to the Development Agenda Coordination Mechanism.*

## **AGENDA ITEM 9: ANY OTHER BUSINESS**

### *Decision on Agenda Item 9:*

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

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

193. The Chair said that it was very important to recognize that the IGC had concluded all its business including its recommendation on Agenda Item 7. He reflected on the spirit of compromise among all members. He thanked the RCs as well as the Delegation of EU, the LMCs and Indigenous Caucus representatives for their efforts during the informal consultations, because it was rare to achieve that decision, particularly when dealing with the full renewal of the mandate. The IGC was building the momentum it needed to finalize its work. It might appear at times that progress was slow. Hopefully, the agreement on the renewal of the mandate improved the trust between the Member States, and built that momentum of political will because a number of members had said the mandate by itself, the texts by themselves and the working methods by themselves were not what would ultimately deliver an outcome. Political will would do so. He had great confidence that in the next biennium, the IGC would be able to achieve outcomes. He was particularly pleased that Member States considered his Chair's text on GRs and associated TK as worthwhile and had merit to be considered within the work of the IGC. It was not a perfect document but hopefully it would help make progress along with all the other materials available. He thanked the Vice-Chairs with whom he worked as a team, and he took their advice and was reflecting with them all the time. He thanked the Facilitators, to whom he did not give enough credit during the meeting. Their work was a challenge and not always an enjoyable activity, especially since every Member State had different views and perspectives. He thanked them for their tireless work and valuable contribution. He also thanked the RCs, who were critical for the IGC to operate. During the negotiations on hard issues, such as the mandate, they played a pivotal role. Within the groups, there were lots of different positions. They had to try and put those together and reflect those. He indicated his strong support for the Indigenous Caucus and its work. The indigenous representatives were critical in contributing to the discussions. He really appreciated the efforts of the Government of Canada in providing funding, which had enabled indigenous representatives to come to the IGC. He did plead, however, notwithstanding the recommendation for Agenda Item 7, and noting what the Indigenous Caucus had read into the record, for Member States to find a solution. That would have to be considered at the GA in seeking alternative mechanisms. He thanked the Secretariat, which was part of his team and which worked tirelessly. Without the Secretariat, there would not be a meeting and there would be no materials or papers. He thanked the interpreters, without whom the IGC could not make progress. He thanked the Member States for their tireless efforts. Member States were the ones that made the progress. A lot of work went on behind the scenes both in capitals and in the missions. They had made a momentous decision and that momentum would help finalize the IGC's work.

194. The Delegation of Indonesia, speaking on behalf of the APG and the LMCs, thanked the Chair, the Vice-Chairs and the Facilitators for their guidance that had allowed arriving to a successful conclusion of IGC 40. It thanked the Secretariat and the team for all the support in the deliberations that week. It thanked all Member States, observers, especially indigenous representatives, as well as all RCs for the constructive spirit shown throughout the meeting. The IGC had achieved important agreements that guided its work for the 2020-2021 biennium, including its objective, priorities, working method and program. That agreement represented the importance of the IGC as well as continued engagement and political will of Member States

towards the process within the IGC. Both the APG and the LMCs recognized that that was a significant and historic moment in the IGC, and were very appreciative of that result. It hoped that the level of mutual trust would remain in future IGC sessions. It thanked the documentation team, interpreters and everyone in the conference services for their excellent work in supporting a smooth running of the meeting throughout the week. In his personal capacity, the speaker of the Delegation of Indonesia thanked the Delegation of Samoa for the beautiful, thoughtful and appreciated gift, an example of TCEs. He announced that IGC 40 had been his last session as a coordinator of both the APG and the LMCs. He thanked the members of the APG and LMCs for their continued support and trust over three years. He thanked all delegations including all current RCs and past RCs for their cooperation and friendship that made everything he did in WIPO worthwhile. He thanked the Secretariat for the patience, support and assistance. He would continue working in Indonesia as a capital expert on IP, with WIPO as his main portfolio. All the cooperation and friendship had allowed him to grow and learn but also give a feeling of being at home that had made his tenure in Geneva the most fulfilling years of his life and career. He hoped that cooperation and friendship would remain. He would be watching the webcasts of the meetings, making sure his successors would follow up on the positions that he had prepared from Jakarta. He said he would be back at the GA as a capital-based expert.

195. The Chair thanked the speaker from the Delegation of Indonesia for his support throughout the period that they had worked together. He had contributed significantly to the outcomes of the IGC.

196. The Delegation of Croatia, speaking on behalf of the CEBS Group, thanked the Chair for his efforts in preparing the discussion papers as well as for his skillful management of IGC 40. It thanked the Government of Canada for the contribution to the Voluntary Fund and for enabling the participation of IPLCs. It thanked the Vice-Chairs, the Facilitators, the Secretariat, the conference services and the interpreters for their valuable input. It thanked the different stakeholders that had contributed to the work of the last IGC sessions within the current mandate. Indeed, the IGC had managed to reach a good compromise acceptable to all the groups as well as to the Indigenous Caucus. It had made a major concession on making a recommendation to the GA on the next mandate, with the aim of reaching the atmosphere of trust which it hoped would continue further in all the IGC's work in WIPO.

197. The Delegation of Uganda, speaking on behalf of the African Group, appreciated the Chair and the Vice-Chairs for their skillful leadership of the IGC's work during the biennium. The Chair's Information Notes and textual proposals had been very informative and a guide to many delegations. It also appreciated the significant role played by the Facilitators for reflecting in a balanced and transparent manner the views and positions of all Member States and stakeholders in revising the texts throughout the biennium. It commended the Secretariat, the Traditional Knowledge Division, interpreters and conference services for their excellent technical and logistical support to all delegates who attended the IGC sessions. It thanked all the Member States, regional groups and their experts who had taken part in the negotiations in the various frameworks (*Ad Hoc* Expert Groups, contact groups, informals as well as plenary) and their efforts to achieve the objective of the IGC mandate. The primary focus in the biennium had been to narrow gaps and reach an agreement on an international legal instrument(s), relating to IP, for the balanced and effective protection of GRs, TK and TCEs. Significant progress had been made in the three texts on GRs, TK and TCEs during the biennium. If Member States continued with the positive spirit exhibited in that biennium, the IGC would reach the finish line in the 2020-2021 biennium on one or more instruments. It urged Member States and all other stakeholders to exercise the greatest levels of political flexibility. The main objective for the IGC in the 2020-2021 biennium should be to finalize an international instrument(s) for the balanced and effective protection of GRs, TK and TCEs. The African Group was committed to that process and believed that it was achievable and should have positive impact on the beneficiaries and users of GRs, TK and TCEs. It recognized the unique

importance of IPLCs' full participation in the IGC process, and reaffirmed the decision of the 2018 GA to find alternative funding for their participation in the 2020-2021 biennium sessions. Regarding the new IGC mandate, it thanked the Chair for his skillful leadership of the negotiations for the mandate. It also thanked all Member States and stakeholders for their constructive engagement, pragmatism and exercising the maximum levels of flexibilities in negotiating and agreeing a new IGC mandate for the 2020-2021 biennium. It had not received everything it wanted in the mandate, but that was how negotiations were – give and take. The momentum generated in the past biennium, if maintained, would certainly catapult the IGC to an agreement on all outstanding technical issues and possibly recommend to the GA in 2020 or 2021 to convene a diplomatic conference to conclude a treaty on one or more international instruments for the effective protection of GRs, TK and TCEs. It paid special tribute to the outgoing coordinator of the APG and LMCs for his usual constructive engagement with the African Group. It wished him all the best in his next assignments.

198. The Delegation of Guatemala, speaking on behalf of GRULAC, expressed its thanks to the Chair for his energy, professionalism and will to lead the meeting. It thanked the Vice-Chairs as well as the Facilitators for their commitment, with which they carried out their work. It highlighted the work undertaken collectively in the informal consultations, which had allowed making progress on renewing the mandate and achieving a document to be sent to the 2019 GA. Those agreements on future work ensured that the IGC could achieve its overwhelming aim. It thanked the Secretariat for preparing the meeting, for its support throughout the meeting and for developing the materials to support the IGC's work. It thanked the conference services and the interpreters, who made it possible for the meetings to take place.

199. The Delegation of China thanked the Chair, the Vice-Chairs as well as the Facilitators and the Secretariat. It thanked the coordination and the facilitation work carried out by the RCs, allowing the IGC to finish the work within the session and to make a recommendation on the renewal of the mandate, allowing to close the gap and prepare for the next biennium. It appreciated the flexibility and the spirit of compromise demonstrated by the delegations. It could really see the trust among the Member States. It hoped all parties would carry on with that constructive spirit to focus on strategic and important issues, so as to achieve more substantive results. It thanked the conference services, the Secretariat as well as the interpreters, who ensured smooth communications.

200. The Delegation of Canada noted that June 21 is Indigenous Peoples' Day in Canada. It was a day for all Canadians to recognize and celebrate the unique heritage of diverse cultures and the outstanding contributions of First Nations and native peoples. In cooperation with indigenous organizations, the Government of Canada had chosen June 21, the summer solstice, for National Indigenous Peoples' Day, since they had celebrated their heritage on or near that day due to the significance of the summer solstice as the longest day of the year. Speaking on behalf of Group B, it thanked the Chair for his continued dedication to the IGC and his guidance that week. It thanked the Vice-Chair and the Facilitators as well as the other RCs and the Indigenous Caucus representative for their engagement that week. It thanked the Secretariat for its hard work prior to the session and during the week. It thanked the interpreters and the Conference Section for their professionalism and availability. It was pleased to support the new mandate of the IGC with the understanding that working methods would be open and inclusive and allow engagement with all texts, ideas and concepts, all in a spirit of mutual trust. It reaffirmed the importance of the consensus-based decision-making process at WIPO through which all Member States participated in order to reach a common understanding. It said the Chair could count on the full support and constructive spirit of Group B as work in the IGC continued.

201. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the Chair, the Vice-Chairs, the Facilitators and the Secretariat for guiding the IGC through its agenda successfully that week. It noted with appreciation the important results achieved at IGC 40. It welcomed the adoption of the two revised texts on TK and TCEs. It welcomed that IGC 40 had managed to reach consensus on a recommendation to the GA on the terms of the IGC mandate and work program for the 2020-2021 biennium. It aligned itself with the statement made by the Delegation of Canada, on behalf of Group B. It thanked all delegations for maintaining a positive spirit of cooperation throughout the discussions that week. It looked forward to participating constructively in the work of the IGC under the new mandate.

202. The representative of the Indigenous Information Network, speaking on behalf of the Indigenous Caucus, said that she was mindful that due to the generous contribution of the Government of Canada to the Voluntary Fund, there had been indigenous participation from Africa, Asia and Latin America at IGC 40. Support for the Voluntary Fund by Member States made indigenous peoples' participation possible. In order for the process to have legitimacy, there had to be full and effective participation of indigenous peoples. It thanked the Chair for continuing to employ a methodology that enabled the Indigenous Caucus to share its views, including participation in the informals at the IGC sessions. She looked forward to enhanced participation in the future work of the IGC. She appreciated the progress made on the TK and TCEs texts, in particular on Articles 5 and 9, and thanked the Chair and the Facilitators for their efforts to help move forward. She supported the use of the Chair's text on GRs and associated TK as a basis for future negotiations. She would continue to make specific recommendations on the texts, and she appreciated the support of Member States for their proposals that week. Indigenous peoples' innovations were being misappropriated. She recommended that at future IGCs, IPLCs be provided more space to offer specific examples that demonstrated how proposed text could either benefit or harm their lives. She appreciated the Chair's urging to reach convergence on those issues and in the Caucus' deliberations, it was agreed to consider the tiered approach as a potential way forward. However, any tiered approach had to include effective and binding mechanisms to ensure that IPLCs could effectively protect their TK and TCEs based on certain criteria, regardless of degree of control or degree of diffusion. That was an essential aspect of self-determination. She reiterated that the IGC was there to work towards instruments that respected indigenous peoples' rights and protected their GRs, TK and TCEs. Any exceptions and limitations had to be narrow and conform to indigenous peoples' customary laws and concerns. She expressed her deep appreciation for the IGC 40 decisions made regarding future work, in particular that the Secretariat conduct an indigenous expert workshop during the 2020-2021 biennium, and commission the updating of the technical review of key IP issues of the WIPO draft instruments on GRs, TK and TCEs. The Indigenous Caucus remained open to constructive dialogue with Member States. She was grateful to those Member States that had made the time to meet with the Indigenous Caucus at IGC 40. Through that type of engagement, strong protection of TK, TCEs and GRs could be mutually, respectively developed. She thanked the Secretariat for its hard work and its support for the Caucus.

203. The Delegation of India congratulated and thanked the Chair, the Vice-Chairs, the Facilitators, the Secretariat, and the interpreters for the successful conduct of the session, and hoped for a positive, constructive and conclusive discussion in the next biennium leading to a final edition of an international legal framework on GRs, TK and TCEs. India, along with many other countries, was affected by misappropriation and bio-piracy. Accordingly, an early finalization of an international legal framework instrument(s) on those three issues was highly desirable. There was a need to recognize the important role played by the national authorities as the trustees of TK where beneficiary could not be identified and in the case where beneficiaries were identified. The Chair's text on GRs would be considered as a working document, complementary to document WIPO/GRTKF/IC/40/6 and to facilitate in achieving convergence. All the Member States should engage with a more constructive approach and

open mind in good faith for mutual benefits. It would actively participate constructively in future deliberations of the IGC. June 21 was being celebrated as the international day of yoga, as declared by the GA of the UN. Yoga was a form of TK from India.

204. The Delegation of Samoa thanked the Chair, the Vice-Chairs, the Facilitators and the Secretariat for organizing the meeting. It thanked all the delegations for the very positive progress. Its second participation to the IGC had been a very wonderful experience. Guidance at the international level was very important to Samoa and the Pacific islands as a whole, given the impacts of climate change to its land-based GRs, TK and TCEs which were equally important and it would open pathways to the currently inaccessible GRs, TK, TCEs, land-based and marine-based, and prevent current beneficiaries from taking them to the grave. It thanked the RC of the APG.

205. The representative of Tupaj Amaru said that according to the Vienna Convention on the Law of Treaties (1999), all treaties or international instruments had to be adopted within three years and be decided upon in plenary. That was the supreme authority to make a decision. Regarding the participation of IPLCs, he noted that there was a report from the UNPFII.

206. The representative of ADJMOR said it was his fifth participation in the work of the IGC and he was very grateful because that had helped hone his skills in different categories. He thanked the entire team of WIPO. He commended the Chair for his ability to hear him and guide him, and thanked the Facilitators and the interpreters, and was grateful for the availability of all the Member States. He expressed his wish to have the work and the momentum continue with the aim of coming up with an instrument(s) to cover TK, TCEs and GRs. The main issue for his peoples was to meet their needs in spiritual, religious, social, cultural and economic matters. He was confident that a review, by an indigenous expert, of the consolidated documents on GRs, TCEs and TK would create a link between the human rights and local development in order to meet his peoples' expectations. As a member of the Indigenous Caucus, he believed that FPIC would continue to be the focus in those different texts, because it would help prevent unlawful appropriation of the TK of IPLCs. The process should be considered as a cross-cutting matter, to attain the Sustainable Development Goals ("SDGs"). He expressed his gratitude to the Secretariat, the interpreters, the Facilitators and DOCIP for their efforts to facilitate the Caucus's participation in the negotiations.

207. The Delegation of the Plurinational State of Bolivia was grateful to the Chair, the Vice-Chairs, the Secretariat and the Facilitators for preparing that session. The IGC had reached a consensus for a balanced decision on GRs, TK and TCEs which was crucial for IPLCs. It would not like to overlook the work carried out over the past years. The IGC had been able to work in good faith and transparency, and it hoped that it would continue in achieving its goals. At IGC 40, the Committee had moved forward, with cleaner texts for TCEs, TK and GRs. Further steps had to lead to a positive outcome. It expressed its will to participate constructively in the discussion on those documents.

208. The Assistant Director General, Mr. Minelik Alemu Getahun, speaking on behalf of the Director General, said that it had been a great pleasure to work with the Chair, the two Vice-Chairs and the Facilitators. The Chair had successfully chaired IGC 40 and managed to make recommendations to the GA on a new mandate. He was delighted with that excellent result. He hoped that that would put pressure on other committees to do likewise, which would lessen the burden on the GA. He thanked the Chair and congratulated him on that successful completion of the mandate. He was delighted to see how much the delegations were being serious in their implementation of the current mandate. It had been gratifying to see the seriousness and dedication in which all delegations had approached the three subject matters and the very significant progress made over those two years. He was convinced that the IGC would continue to make progress in the new mandate. The IGC was streamed all over the



world, which meant that a lot of people were looking for the IGC to make progress. The IGC kept on building expectations across the world. The IGC was the center of discussions. He was gratified to see how much effort had been made in the two years, not just by those who had been in the IGC, but also those who had played different roles, such as the Facilitators, and the co-Chairs and members of the *Ad Hoc* Expert Groups. He was grateful for the progress made. He expressed gratitude that participants always recognized the excellent work done by the Traditional Knowledge Division and by a number of colleagues in WIPO, including the interpreters and conference services. There were many others working behind the scenes to ensure the success of six IGC meetings per biennium. His gratitude also went to all those who were not visible. He also noted that the Traditional Knowledge Division did not only do excellent service in the IGC, but also provided capacity building work. He looked forward to receiving all participants warmly in the new year for a new mandate.

209. The Chair closed the session.

*Decision on Agenda Item 10:*

*210. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6, 7 and 8 on June 21, 2019. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated by September 6, 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 next session of the Committee.*

[Annexes follow]

**LISTE DES PARTICIPANTS/  
LIST OF PARTICIPANTS**

**I. ÉTATS/STATES**

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

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[Annex II follows]



**WORK PROGRAM – 6 SESSIONS**

Indicative Dates	Activity
February/March 2020	(IGC 41) Undertake negotiations on GRs with a focus on addressing unresolved issues and considering options for a draft legal instrument  Duration 5 days.
May/June 2020	(IGC 42) Undertake negotiations on GRs with a focus on addressing unresolved issues and considering options for a draft legal instrument.  Duration 5 days, plus, if so decided, a one day meeting of an <i>ad hoc</i> expert group.
September 2020	(IGC 43) Undertake negotiations on TK and/or TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s) Possible recommendations as mentioned in paragraph (e)  Duration 5 days.
October 2020	WIPO General Assembly Factual report and consider recommendations
November/December 2020	(IGC 44) Undertake negotiations on TK and/or TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s).  Duration 5 days, plus, if so decided, a one day meeting of an <i>ad hoc</i> expert group.
March/April 2021	(IGC 45) Undertake negotiations on TK and/or TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s)  Duration 5 days, plus, if so decided, a one day meeting of an <i>ad hoc</i> expert group.
June/July 2021	(IGC 46) Undertake negotiations on TK and/or TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s). Stocktaking on GRs/TK/TCEs and making a recommendation  Duration 5 days.
October 2021	WIPO General Assembly will take stock of the progress made, consider the text(s) and make the necessary decision(s).