4. The Pragmatics of IGC Negotiations

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The Pragmatics of IGC Negotiations

We’re just trying to make the text coherent here and will not speak about meaning.

Chair of a Drafting Meeting at IGC 17, December 2010

What communicative strategies do actors choose, in which situations and to what ends? As outlined above, strategy or the strategic use of language in the case of WIPO IGC negotiations does not necessarily coincide with intentional communicative behavior. At times, what we are dealing with is the unconscious, intuitive or habitualized use of pragmatic strategies, or in other words, of code switching. In other instances, however, the intention (and intentionality) behind thinly veiled indirect speech acts is very obvious. Furthermore, actors who use indirection are,

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68 See Brenneis 1988:228–229 for a brief discussion of the role of a speaker’s intention or how strategic behavior is conceptualized in linguistic anthropology studies about meetings and negotiations. See also Duranti 1988, 1993, 1999b, 2006 for a discussion of the notion of intentionality in linguistic anthropology.

69 See Mertz 2007 for examples of how law school students acquire communicative competence for legal argumentation: “I would argue that the invisibilities and silences that emerge during the inculcation of legal language in law school classrooms become hardened and habitual through multiple means in the administration of justice (linguistic and nonlinguistic, to be sure, but at least one of the linguistic means is the core of formal metalinguistic structuring outlined in this volume). In the process, it becomes less relevant what a student’s background is, for once someone has thoroughly internalized the metalinguistic system of legal reasoning, she or he will begin to habitually marginalize some aspects of social context and morally grounded reasoning.” (Mertz 2007:228)

70 For code switching, the unconscious or unintentional usage of a switch is an insight discussed by Blommaert and Meeuwis 1998 and Woolard 2004 in relation to Carol Myers-Scotton’s Markedness Model (Myers-Scotton 1998).
at least in some cases, very open about it and there is a shared understanding of why such indirection is chosen.\textsuperscript{71} A number of different constellations that feature the relationship between direct and indirect speech can be distinguished:

(1) The intentionality of an utterance is very obvious. Speaker and audience are mostly aware of the implications and its indexical meaning. They understand the pragmatic features of the utterance and there is thus a metapragmatic awareness. In some cases, the strategy behind a given kind of utterance in a specific context is even openly discussed and assumed to be a very common strategy. Members of the audience might even call the speaker on such an utterance or indirect speech act. Within the IGC, this constellation applies to a large set of stalling tactics that, for example, call for an extended discussion of already discussed questions in order to prevent the negotiations from proceeding. In numerous cases, both speaker and audience are fully aware of the implications of the utterances and even discuss them openly.

(2) The speaker of an utterance is aware of some or all of its pragmatic features, and knows the implications the utterance can have. The audience, on the other hand, is not necessarily completely aware of the pragmatics of the utterance. They might guess or anticipate the intended implications, they might perceive the utterance as strategy, or they might understand it largely as a semantico-referential set phrase. During an IGC session, a delegation introduced a new key phrase related to the specific mode of negotiations, and called it “outcome-oriented deliberations”. This raised many question in the audience as to the phrase’s meaning, implications, and intended consequences. The rationale behind this new phrase – to negotiate in a less binding and less telic way that differs from treaty negotiation – was later openly yet informally admitted by the delegation concerned.

(3) The speaker of an utterance is only partly aware of the indexical meaning of an utterance. The metapragmatic awareness is low and the utterance comes from a set of habitualized phrases or linguistic strategies. The audience, depending on its level of communicative competence in the specific kind of communicative event, can be aware of this and perceive it as a common strategy. Like the question of speaker intentionality, the perception of pragmatic strategies by a given audience does not necessarily need to be explication or fully conscious in the way that a strategy could be explained. Rather, metapragmatic awareness on part of the audience also expands to a more emotive or intuitive perception of strategies and their potential implications. A common example are references that function as “pivotal objects” for constructing implicit audience categories, such as specific keywords signaling a shared interest or social distinctions between the members of an audience. Alluding to specific sets of rights, such as human rights or the rights of In-
The speaker of an utterance is unaware of its pragmatic features. However, there is a reproducible effect that correlates to such utterances, be it actual or only perceived. In such constellations, if the speaker realizes the pragmatic function of this type of utterance, his or her awareness of it can rise and it can be strategically and/or intuitively deployed. This can also mean that, unlike the speaker, the audience is aware of an indexical meaning. This constellation partly overlaps with the third one, the difference being that initially the speaker of the utterance does not reflect about its pragmatic features. Thus, new participants of the IGC often lack the competence in some areas of communicative events and employ phrases or social indexes not appropriate for a given situation, such as formally addressing someone in an informal setting: in one instance, a WIPO staff member was asked to give his evaluation of the progress of a IGC meeting to be expected. Addressing him in a very formal way similar to the main plenary session – including a “thank you” at the beginning of the question, an introduction of oneself and an explication which organization or country one is speaking for –, rather than in a “small talk”-situation did have the effect that one does not get an answer, as the social role of the staff member did not permit him to answer formally. After a rephrasing of the question by a mediator – in this case the moderator of an informational session a day before the official IGC meeting – the WIPO employee was finally able to respond in an informal way with his personal evaluation of the situation. Over the course of a meeting, participants acquire the competence to choose the right type of phrases for addressing other participants in the specific situations.

Added to the speaker’s unawareness, the type of utterance is not very common, and only a small part of the audience or no audience member at all is aware of its pragmatic features. This can be the case for relatively unknown phrases, proverbs or sayings that are regional or colloquial. Their implicit allusions are thus not understood by many members of the audience.

The speaker of an utterance is unaware of its pragmatic features, and there is little to no effect observable. The indexical meaning of such an utterance is negligible.

Of course, this is an idealized typology of utterances, and in practice one finds intermediate stages with varying characteristics. In communicative events, it is of greater importance to look at the specific manifestations of the pragmatic aspects of an utterance, such as the degree of metapragmatic awareness of speaker and audience, the indexical meaning of an utterance, the ends, goals, and outcomes of that utterance, and how customary the type of utterance is.

The primary interest here are categories (1) through (4). These are communicative events that have the characteristics of communicative patterns with identifiable
intended or perceived pragmatic qualities. Moreover, (4) points to emerging patterns or communicative strategies that might evolve into habitualized and strategically deployable pragmatic tokens.\textsuperscript{72} Cases of coincidental or idiosyncratic usage of pragmatic strategies will be largely neglected, as the contextualized use and interpretation of language is of interest here. Moreover, a contextualized analysis focuses on pragmatic strategies by a speaker in relation to a specific audience or a number of audiences. There are, of course, also pragmatic strategies that are effective and frequently used in contexts other than the IGC, but they are largely irrelevant for the negotiations examined here. Of interest here is an audience-focused view of communicative events and associated pragmatic strategies that takes into account the dialectics between the speaker of an utterance and his audience.\textsuperscript{73}

The IGC as a Speech Community

The concept of speech community\textsuperscript{74} assumes the existence of a group of people “sharing a set of norms or regularities for interaction by means of language(s)” (Silverstein 1996: 285). This concept has been criticized for its presupposition of a shared set of norms, and for that reason, Duranti proposes

\begin{quote}
[…] that we take a speech community to be the product of the communicative activities engaged in by a given group of people. This definition takes the notion of speech community to be a point of view of analysis rather than an already constituted object of inquiry.
(Duranti 1997: 82)
\end{quote}

Instead of concentrating on shared norms or regularities of language use, Duranti suggests shifting the focus to the communicative activities themselves, interactive processes of communication in which “set[s] of norms or regularities for interaction by means of language(s)” (Silverstein 1996: 285) are reproduced or negotiated. This revision of the concept fits well with the characteristics of the IGC. More than one linguistic variety is represented in IGC negotiations, and the committee exists largely by virtue of its shared activities rather than by a continuous spatio-temporal coexistence, socio-political cohesion, or “culture”. Not only do actors or participants of this speech community negotiate in different official languages

\textsuperscript{72} A token is a particular instance of a concept, whereas type is the general concept. For the type-token distinction see Wetzel 2011.

\textsuperscript{73} Don Brenneis has illustrated this dialectics using the example of musical and verbal performances in an rural Fiji Indian village (Brenneis 2009).

\textsuperscript{74} See Gumperz 1972, Patrick 2008, or the chapter on language communities in Burke 2000 for an extended treatment of the concept.
(English, Spanish, French, Russian, Chinese, Arabic), requiring translation and interpretation, but they also employ different linguistic varieties or sociolects.

In its communicative activities, the IGC thus simultaneously incorporates differing linguistic communities and speech communities. There is an overlapping of multiple, segmented, sub-communities, either within the specific groups of the IGC, the IGC itself, WIPO as a whole, the diplomatic community in Geneva, or within a number of other groups in contact with the activities of the IGC. The indigenous caucus is an example of a speech community. Its activities are not limited to the committee meetings, yet these meetings constitute a frame of reference for the communicative activities and substantive debates held in this group. Then, NGOs such as the Center for International Environmental Law (CIEL) or the International Centre for Trade and Sustainable Development (ICTSD) not only attend IGC meetings but are also involved in activities of the WTO or events that address GRTKF issues. Their activities are not limited to the IGC, but it is a point of reference for their activities related to GRTKF. The same holds true for the diplomats and national delegates who either live in Geneva permanently or only come to IGC sessions: their activities are much broader than the IGC and cultural property. All these actors meet at least for the IGC sessions and for related communicative events between sessions. All these actors bring specific knowledge and “rules for the conduct and interpretation of speech and rules for the interpretation of at least one linguistic variety” (Hymes 1986: 54) to the IGC. As a result, a number of distinct speech communities are present at committee meetings and involved in the associated communicative processes.

Should we then take the IGC to be a single speech community? Or should we take the IGC to consist of various speech communities that meet and overlap as they are brought together during the activities of the committee? I would argue that, following Duranti, an analytic focus on the processes of interaction that foster a shared understanding and shared rules of interaction and interpretation allows for an understanding of the IGC as one overarching speech community, containing various sub-communities that reciprocally influence each other through

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75 See Silverstein 1996, Silverstein 1998, Morgan 1999, Burke 2000, Kamusella 2009 for discussions of the difference between speech communities and linguistic communities. The former can have more than one language, though they share norms of interpretation and interaction, and are defined by “sharing rules for the conduct and interpretation of speech and rules for the interpretation of at least one linguistic variety” (Hymes 1986: 54). In contrast, linguistic communities are understood to be “a group of people who, in their implicit sense of the regularities of linguistic usage, are united in adherence to the idea that there exists a functionally differentiated norm for using their ‘language’ denotationally (to represent or describe things), the inclusive range of which the best language users are believed to have mastered it in the appropriate way.” (Silverstein 1996: 285). Silverstein gives the example of speakers of Arabic as a single linguistic community that contains various speech communities, defined by dialects, within it. Yet, across all these Arabic speech communities, there is an idea, held in the context of the broader linguistic community, that there is a “correct” way of using the language and interpreting it.
their interaction and interpretation. The IGC constitutes a frame of reference that brings all the actors together in a shared activity, though the actors themselves have extremely different motivations, interests, and perceptions. Each group, whether the indigenous caucus, the NGOs, or the diplomats make reference to the IGC negotiations as a set of shared activities. Given their strong co-dependence and interrelation, it would make little analytical sense to view the IGC as a set of connected speech communities rather than as an “umbrella community” that is – for the purpose of IGC negotiations – the central point of reference for participants in the overarching speech community. From this viewpoint, the IGC is as a speech community the result of a dynamically constituted group of social actors from various backgrounds. All the participants contribute different sets of expectations, presuppositions and rules for linguistic conduct and interpretation. In sum, they constitute a speech community that is at the same time referring to already established rules of linguistic conduct and dynamically negotiating, contesting and changing them.

While a stable repertoire of communicative practices exists, for example in “typical expressions” (Bakhtin 2007: 87), rules of linguistic conduct, or frames, there is also a large “grey area” of contested denotations (Silverstein 2004), vagueness and ambiguity (Bhatia et al. 2003, 2005), and incomplete or non-existent formalization of language use. This provides scope for the emergence, through interaction, of rules of linguistic conduct, but also opportunities for partial “mutual intelligibility” in the communicative interaction within the IGC.

Much as in the speech community itself, the various communicative events in the committee are dynamic as to registers, norms of interpretation and instrumentalties. One might call this the emergence or nascency of a speech community, a state in which the undetermined or underdetermined communicative norms outweigh generic and structural conventions of interaction. This is, however, not only true for communicative and interactional patterns or rules, but also for the level of competence of participants. The emergent aspect is especially noteworthy considering the importance actors attribute to decisions of the committee, as they constitute a temporal, written, and thus linguistic, concretization of the dynamics of negotiation. It is safe to assume that all communicative events are to some extent always emergent and changing. But the bearing of dynamic aspects for the IGC and other international negotiations is special insofar that there are constantly new participants unaccustomed to its communicative specificities. They constitute an audience that can be critical of the statements being made during negotiations: it is, to some extent, a public sphere with changing norms of communication and interpretation. Transparency plays a big role in the making of this sphere. Both the possibility for observers to participate in meetings and the accurate documentation of negotiations makes it necessary for delegates to carefully weigh their statements.

This situation of transparency and of a dynamic speech community leaves actors with a degree of uncertainty regarding the rules that apply and to which they
can be held accountable. Large parts of the communicative conventions of IGC negotiations are stable, and actors can rely on their validity. But the inclusion of new actors, the specificities of the issues under negotiation, as well as internal and external political pressures can cause changes in the way actors negotiate. Though (or especially because) the speech community and its attendant speech events are in an emerging and constantly changing state, an inattentive use of language can turn to one's disadvantage. As Don Brenneis notes, “it is critical to suggest that, while […] social organization is seen as emerging in the course of talk, at another level it draws upon already shared notions of the structure of interactional practice” (Brenneis 1988: 228). Actors in the IGC are hence confronted with a “process-oriented” and unstable component of communicative events within the speech community that can leave them in an insecure position as to the changing conventions that are relevant to that event. Yet, they nonetheless have to take into account already established patterns.

Opening Statements

The relationship between established communicative patterns and the dynamic aspect of communicative norms and conventions can be observed especially well at the beginning of an IGC session. Here, the agenda sets aside time for “opening statements”. These are usually scheduled for the afternoon session of the first day of a committee meeting, after the session has been opened, the chair and vice-chairs elected, the agenda adopted, and an ILC panel makes presentations during the morning. In the afternoon, once the report of the previous session has been adopted and certain organizations accredited, the opening statements begin.

Looking at the agenda, one might think that these opening statements are rather short, as the time allotted to this agenda item is rather brief. Yet, taking IGC 12 in early 2008 as an example, these statements can very well last until the middle of the third day of a committee meeting. Correspondingly, the IGC 12 report includes almost 28 single-spaced pages filled with delegations’ opening statements. These are not full transcriptions of the recorded opening statements, but instead an attempt by the WIPO secretariat to render the gist of what was said in each statement contained. Thus, what appears in the report depends upon the actors of WIPO’s secretariat compiling the report. Moreover, it has been IGC

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76 See WIPO/GRTKF/IC/14/INF/3 for the agenda of the IGC’s 14th session. Since IGC 17 in late 2010, opening statements have been discontinued as a separate agenda item. Nonetheless, the interplay between established patterns and dynamic aspects of statements as well as large parts of the specific contents of opening statements continue to exist in IGC negotiations.

77 At subsequent and prior IGC meeting, the opening statements took a similar chunk of time.

78 WIPO/GRTKF/IC/12/9.
practice that after a statement is given, WIPO staff members walk through the aisles with a USB-stick in hand, collecting the electronic versions of statements from the speakers directly. Sometimes, speakers only have handwritten notes, and these are collected as well, copied and returned to the respective speaker. Some actors simply speak off the cuff, drawing on a habitualized communicative repertoire and using “boilerplate” sentences. Delegations can request amendments and changes to their statements as they appear in the report, so the final report can be considered definitive.

Yet, there are phrases and utterances that are usually – but not always – left out of the report.79 This practice differs from report to report, so that the report for IGC 1680 includes text expressing thankfulness or commendations for the work the WIPO secretariat has done, or utterances congratulating the chair and vice-chairs for their election. The reports for IGC 12, 13 and 14 do not mention such matters, even though such statements were made and observed. Members of WIPO’s staff, when interviewed, state that some parts of the opening statements are considered unimportant and hence left out of the report.

The interesting aspect here is to consider that reports that are generally viewed as “objective” in the sense that they reflect what was being said and refrain from interpretation are nonetheless influenced by who writes them (and, presumably, under what kind of circumstances). This might not have an influence on negotiations, and on a factual level it might very well be insubstantial, but it interferes with an ideology that stresses the importance of transparent documentation and its objectivity.81 After all, the linguistic phrases concerned are uttered over and over again in an IGC meeting, and so they presumably actualize a specific function or need.

Opening statements are, given their prevalence, an important communicative event in IGC negotiations. In conversational analysis, this genre would be called “greetings”, involving delegation representatives from WIPO member states, NGOs, ILCs and other observers participating in the session. Naturally, there are also countless informal greetings between delegates on the first day of an IGC session or even before that in informational meetings and other diplomatic functions. It is telling who makes an effort to approach someone for a personal handshake and an

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79 This is also mentioned in the preamble of the report of IGC 13: “This report summarizes the discussions and provides the essence of interventions, without reflecting all the observations made in detail nor necessarily following the chronological order of interventions” (WIPO/GRTKF/IC/13/11:4).

80 See WIPO/GRTKF/IC/16/8.

81 See Riles 1999. See Riles 2006 is for an excellent edited volume discussing documents from an anthropological and legal perspective. See Garsten and Lindh de Montoya 2008 for the notion of transparency in relation to transnational organizations.
exchange of a few words during the leisurely approach to the formal session opening. Opening statements are not only made during the time the agenda sets apart for them. When a delegation takes the floor for the first time during a meeting, for the most part they feel the need to start their statement like an opening statement, even if the meeting is in an advanced stage. Much of their content and many of their aspects are reproduced during the whole session, so that the analysis of opening statements also sheds light on the broader communicative conduct during an IGC meeting.

Given that so much of an IGC meeting is spent with opening statements, it is worth looking at what is being said in these statements, and why delegations take so much time in making these statements. Furthermore, it should be inquired what actors compiling the official reports of IGC sessions, including the opening statements, deem to be important enough to be included in them. Do omitted utterances really have no importance for negotiations or for the purpose of a transparent documentation, and if so, why do delegations spend so much effort when part of what they say is considered insubstantial?

At IGC 12, a typical – but not rigid – sequence of tokens could be observed during these opening statements. First, the delegates from countries representing the regional groups were given the floor by the meeting’s chairperson. They all started their opening statements with a sequence like the following:

1. Thank you Mr. Chair (sic!).
2. Country of Origin,
3. On behalf of Regional Group X,
4. Would like to congratulate you and your vice-chairs for your election;
5. Would also like to thank the former chair for his work;
6. Would like to thank the secretariat for its work
7. and for the preparation of documents.
8. Would like to express support for/appreciation of/commitment to/confidence in the IGC process;
9. Appreciates the work that has been done so far.

The exact sequence at the beginning of an opening statement varies, and not all these elements are mentioned in every statement. Yet, there is a general sequence reproduced to some degree by almost all member state delegations to the IGC.

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82 The nature of the IGC as an emergent speech community as well as decision-making body is strongly shaped by the thickness of formal and informal communicative channels and the relations formed by them. Thus, examining these different channels, stages, and meta-stages (virtual communicative spaces that are not materialized in specific settings) can also facilitate an understanding of how actors are “enculturated” into the IGC context, at a substantive but also at a linguistic level.

83 As parts of opening statements are not reproduced in the official reports, these notes draw from observations made during IGC 12 and subsequent committee meetings.
Even NGOs, ILCs, the indigenous caucus and other observers begin their interventions in this fashion, so there is an apparent convention with respect to beginning an opening statement. Some aspects of these opening statements are more prevalent than others and even expand to other communicative events. A “thank you” to the chair begins nearly every intervention or statement made during the main plenary session where the meeting’s chair is present. Sometimes there are slight modifications depending on context, such as saying “Thank you, Mr. Chair for giving me the floor” or “Thank you, Mr. Chair, I am sorry to take the floor again”. It is an acknowledgement of the chair’s authority over the meeting and of the related status difference. A simple “Thank you, Mr. Chair” can thus also be understood as a contraction of a longer form that specifies why one thanks the chair. Combined with the other aspects found in opening statements, notably items (2) and (3), it is an automatic or habitualized way of affirming the framework of the meeting that one participates in. The conventionality to thank the chair stems from the sets of communicative norms of international negotiations and is not exclusive to WIPO’s IGC. Its reason is described in WIPO’s general rules of procedure that apply to the IGC:

(1) No person may speak without having previously obtained the permission of the Chairman. (2) The Chairman shall call upon speakers in the order in which they signify their desire to speak. The Secretariat shall be responsible for drawing up a list of such speakers. (Rule 15: Right to Speak)

As the decision to give someone the floor lies with the chairman, it has become a convention for speakers to thank him for it. Such rules of procedure and corresponding communicative conventions can be found for other international bodies as well, and diplomats as well as all NGO and ILC representatives are well aware of them and reproduce them. Even in tense or critical moments in the main plenary negotiations where other norms of communicative conduct might be neglected, speakers almost never failed to address a “thank you” to the chair. This speaks for the habitualized character of such “inventory phrases” that are used over and over without having to reflect their specific meaning and function, as they are commonly understood and as there is a shared use of them. Despite the banality and “meaninglessness” of the phrase, it structures the communicative interactions significantly: speakers cannot address another delegation directly, because their intervention is always mediated by (1) the chair giving them the floor and (2) reacting to the chair for giving them the floor. A bilaterally directed exchange between two delegations thus requires an additional utterance that reestablishes the connection between speaker A and speaker B after the chair’s mediation. To some extent, this

84 These phrases have their equivalents in all the other languages used in WIPO negotiations.
phrase and its conventionality hamper direct communicative exchanges between participants.

The phatic function of utterances in diplomatic negotiations similar to the IGC therefore has to be directional on several levels. This directionality is actualized by pivotal linguistic objects such as a “Thank you, Mr. Chair” or a subsequent reference to a specific delegation. They constitute one or more communicative channels that have functions on different levels, such as creating and affirming the communicative context, directing a question or demand at somebody, conveying messages to different audiences and so forth. As an initial marker, the “thank you” phrase frames the following exchange and creates a normative space with certain expectations, such as that the statement (and speaker) pays attention to rules and obligations of the speech community, apart from the chair’s authority to regulate sequence, duration, and frequency of statements. Similarly, expressing who one speaks for or on whose behalf one speaks communicatively establishes the structural and institutional framework in which negotiations take place. The “representational complex”, meaning the ways in which delegates are able to realize a representative function for nation-states and organizations, relies on such a “perlocutionary effect” (Austin 1962) of an utterance and its context. Name plates and name tags, or official lists of participants can have such effects directly, as they are based in what can be thought of as printed forms of utterances. Featuring in the structuring of the setting as well are personal acquaintance, habitual practices, the materiality of the whole setting including the building, its rooms and their decoration, security personnel and the procedure of having to officially register for an IGC meeting in order to be admitted to the building and main plenary room do all contribute to these functions, as do the shared knowledge and presuppositions about international organizations and negotiations among participants. Yet, the formal affirmation of the setting, its norms and communicative practices is in the

86 See Yankah 1995 for an ethnographic analysis of the function of “speaking for” someone in Ghana. Yankah paid special attention to the function of the “Okyeame” in royal Ashanti oratory. An Okyeame is a mediator for the communication between the Ashanti king, chiefs or priests and a second party. There may be as many as thirteen Okyeames, but usually there are several present. Their function is to find the contextually appropriate or fitting proverbs, metaphors or words to describe what the king or chief says. This presupposes both the competence to speak appropriately and knowledge of the specific social, cultural and political constellations of a given situation. An Okyeame is supposed to know more about these aspects than the king or chief he serves. Work by Chris Shore (2000) and others (Thedvall 2006) argues for a similar distinction in the EU: civil servants (or “Eurocrats”) regularly surmise what the decisions of their superiors would be even in the absence of direct instructions. They thus at times also know more about the constellations of interests, motivations, goals, and power than their “chiefs”. Initial inquiries at WIPO indicate this is partly true for negotiations the international level in at least some member states, yet “centralized” countries like France are said to consult back with the “capital” more often than others. Additional research on these issues in international negotiations is necessary to grasp their subtleties and contradictions that Aberbach, Putnam and Rockbach (1981) worked out for bureaucrats and politicians in Western Europe.
end contingent on the open display of shared, sometimes even “ritualized” invocations that signal a common understanding of rules and structures that frame the discourse. Communicative conventions of IGC and WIPO negotiations are not formally fixed or documented. What is formally required is to signal one wishes to speak and then to wait for the session’s chair to offer an invitation to make an intervention (see Fig. 6). Communicative conventions mainly stem from the interrelations of interactional practice in a specific field – the way things are done in IGC negotiations – and its historical dimension – the way things have been done in IGC negotiations.

The initial sequence of an opening statement is ritualized communicative behavior. The initial marker “Thank you, Mr. Chair” is so habitual that omitting it would be noted by IGC participants as something odd that requires attention. This gets very obvious when over the course of almost two whole days, delegation after delegation reiterates these tokens before seguing into more substantial parts of opening statements that differ from this sequence and include specific concerns, questions, and claims. At IGC 14 in June 2009, a representative of an indigenous organization in an informal setting jokingly proposed attaching two buttons to the doors of the main plenary room. The left button one would press if one would like to congratulate the chair and thank the secretariat, the right button one would press if one would not like to do that. By largely omitting these stock phrases from the official documentation, the WIPO secretariat signals, as do many IGC participants, that a “thank you” to the chair does not constitute progress in negotiations.

That may appear to deny the agenda item “opening statements” much weight in the IGC process, and certainly the initial formalities are of little consequence. But this genre goes beyond the scope of mere greeting formulas, both as it is not restricted to the contents of the initial sequence and as a contextualized analysis of the initial sequence shows that some phrases used by delegations in these initial sequences function as indexical tokens. What appears insubstantial is embedded in the opening of an IGC session, and foreshadows or signals positions actors will take subsequently. This argument is not meant to hypostatize the function of ritualized and marginally significant semantico-referential linguistic tokens, or see them as a functional necessity that establishes a discursive space that would otherwise be dysfunctional. The existence and persistence of opening statements is brought about by three other factors other than the conventions of formal international negotiations. The first is that of legitimation, as “habit” and traditions of structuring a meeting play a large role in evoking the sense that the proceedings are right and proper as studies from linguistic and legal anthropology have repeatedly
shown. The second is that the progress of a given committee determines its meeting agendas. Relatively new international fora depend on opening statements to work out different perspectives and interests, while more seasoned committees are more “saturated” and do not need such drawn out coordinative measures. The third factor is that extending opening statements over several days also slows the process of reaching consensus or a decision. Spending much time on opening statements, or with insubstantial interventions, is not always counterproductive for all participants. Even delegations interested in speeding up the negotiations can use the long opening statements to their advantage by utilizing them to frame subsequent negotiations in a broad manner that allows connections to other issues and fora to be made, which can be to their advantage.

The initial sequence of opening statements should not be reduced to a semantically and pragmatically irrelevant feature of IGC negotiations. It can rather be viewed as a phatic device constituting the social frame of the meeting. It functions as a communicative introduction of participants making the statements, their delegations and the regional groups they might speak on behalf of. It also functions to prefigure the position a given delegation will take and the alliances it may form. In this respect, the initial sequences of opening statements function as orientation both with regard to structure, meaning the communicative norms and conventions, and content, meaning the documents a delegation wishes to highlight and the prospects a delegation sees for the session.

The opening and closing of communicative events sets the tone for a given sequence. In Erving Goffman’s terms, the greeting is a crucial component in establishing the stage on which the assembled actors will play (Goffman 1959). They are indicative of what is to be expected from subsequent interactions, and hence they are social “framing” devices (Goffman 1974) in the sense of “schemata of interpretation” that make it possible for participants “to locate, perceive, identify, and label” communicative events (1974: 21). Thus, greetings contribute to the way that things are understood and categorized as well as to the way that interactions are structured (e.g. turn-taking sequences). Ritualized linguistic tokens fulfill the task of framing interactions that are repeated over a given course of time and within spatial boundaries. Given the historical dimension of international negotiations within WIPO and other international fora, the communicative conventions have been actualized before their specific instantiation in a specific context, such as a session of the IGC. Moreover, aspects of communicative behavior specific to the IGC have been perpetuated within the IGC in its prior sessions, so that there is a

87 See Richards and Kuper 1971, Sherzer 1983, Brenneis and Myers 1984, Schwartzman 1989, and Richland 2008. All these studies acknowledge there is a constant negotiation between a given interactional structural and the process of interaction that actualizes the specific conventions. The same, I argue, holds true for WIPO’s IGC.

88 Note the similarities between Goffman’s frame analysis and Myers-Scotton’s markedness model (1998) concerning the role of expectations and obligations in a given communicative event.
generalized understanding of how negotiations work as well as a shared set of expectations of what communicative rules participants are going to adhere to. A “new” negotiation of communicative conduct is thus not necessary because of this structural and interactional implicitness that reproduces schemata of interpretation and patterns of interaction. In this respect, the initial sequence of opening statements contributes to the reproduction of interactional frames, to the acknowledgment of already given interactional patterns and to the acknowledgement of the speaker’s participatory status within the committee: the structuring of opening statements with its implicit assumptions about hierarchical (the chair’s authority) and interactional features of the committee as well as the speaker’s subscription to these conventions and his or her perception that other participants share these conventions – all these aspects are part of the initial sequence of opening statements.

Roman Jakobson has argued that the functional hierarchy of greetings places the phatic function first while other functions – referential, emotive, conative, metalingual, and poetic – are activated to a lesser degree (Jakobson 1960: 356). This supposition, that greetings are primarily “empty formulas” might explain the ease with which certain utterances are left out of the official report, while others are regarded as more important.

The two facets of greetings as – for the speech community – functionally efficient and semantically irrelevant communicative events do not contradict one another. A communicative event such as a greeting can frame an interaction while primarily actualizing a phatic function, and subordinate other functions. Michael Silverstein points to the existence of “shifters” as “pure indexical tokens” or “non-referential pragmatic tokens that serve as social indexes and make the social parameters of speaker and hearer explicit” (Silverstein 1976: 34). They have little to no semantico-referential meaning and at the same time realize a pragmatic function. A “Thank you, Mr. Chair” following this would be a deference index that points to the difference in power between the chair and a given participant, the social difference being that the chair has the authority to invite a delegation to speak, while the delegation speaking has only a proxy authority bestowed upon it by a national or regional body, or some other organized institution. As a courtesy token or honorific, the social dimension of the utterance is of greater importance than its semantico-referential content. Viewing the initial sequence from this perspective makes clear that the utterance depends on its context and that an analysis of this utterance needs to take its broader context into account. The initial sequences of opening statements are thus indexical tokens that implicitly and explicitly validate both the work of the committee and the rules and conventions of speaking established in the IGC, while differentiating social roles within the committee and its shared communicative activity.

Yet, there is more to opening statements than this initial sequence. It is telling that the Peruvian delegate at IGC 13 made an explicit distinction between the for-
mal part and the substantive aspects of his opening statement, proceeding, after the initial sequence, on to note a proposal by the African Group that suggested implementing inter-sessional expert working groups. The report of IGC 13 does not mention the distinction he made. The formal aspects are reproduced in the report as follows:

The Delegation of Peru noted that it was not a coincidence that the Committee was the first meeting that the Director General was participating in as Director General. Indeed, he had contributed greatly to the work of the Committee, he was committed to its work and the work that was ahead and, as he had clearly said when he took up his functions as Director General, the need to have a specific outcome after so many years working on this matter in the Committee. The work the Secretariat had carried out in producing the gap analyses documents was fairly positive. These documents would enable the Committee to find common ground and be able to make progress in the work.

After these aspects that fit the initial sequence, he continued with more specific comments with regard to substantive and procedural issues as well as the mode of work of the committee:

[…] Peru supported the holding of inter-sessional meetings as long as they were geared towards speeding up the work in accordance with the mandate of the Committee. […] The African proposal, as far as Peru understood it, sought to focus the work of the Committee through the creation of a group of experts, which would meet between the sessions. The proposal was, in principle, a positive proposal, which in all likelihood would have to be refined, but was an important proposal to make progress between the sessions and to achieve a final and concrete result before the General Assembly of next year when the mandate of the Committee ended. (ibid.)

Thus, after a thank you to the chairman for being given the floor, a congratulatory statement to the chairman to his election, and a (positive) assessment of the work done by the committee so far, opening statements are used by participants of the IGC to furthermore initially frame their intentions and strategies for the subsequent meeting. While the structural elements of these opening interventions appear to be nearly identical, their verbal content and their performative contours express a great deal about the level of engagement and approval as well as the in-

89 Author’s note from IGC 13.
90 WIPO/GRTKF/IC/13/11:8.
tent (or lack thereof) to work by a particular delegation in a given session. There are numerous delegations who simply use the “thank you” and “congratulations” part of the greeting, in some cases because a mere spectator role is intended.

**Language Politics in International Negotiations**

Some delegations, however, use the opening comments to signal goals beyond conducting a courteous debate. Thus the Chinese delegate’s opening statement in December 2006, in Chinese and simultaneously translated, began with a profuse thank you followed by a request to broaden the language base of the committee. English, she said, was not anyone’s native language in her delegation, hence working through the written papers in preparation for the meeting was very time-consuming. In order to be able to fully participate, preparatory papers in Chinese were requested. Such requests for additional translation of working documents are numerous in the IGC, but also in other international fora where English-based documentation and negotiations are standard. Yet, many delegations do not have the competence to express their views and to realize their pragmatic strategies adequately and in a manner also conducive to their interests. During the IGC sessions observed, the main claims were for Arabic, Chinese, and Russian to be considered as working languages. For some IGC participants, issues of translation and interpretation play a large role in negotiations and can have implications for how well a delegation’s perspective can be communicated. Moreover, the contingencies and ambiguities in texts are multiplied if the negotiated text is available in many languages simultaneously. One might argue that this is also a reason for the relationship between nouns and verbs in international negotiation texts, where nouns are relatively stable as they are repeatedly used and take on the form of “typical expressions” (Bakhtin 2007) in various languages, whereas the negotiation of meaning and implications of texts largely centers around verbs and their specific grammatical modes (subjunctive, imperative, etc.). Of course, this question concerns pragmatic strategies as well, as these depend on a shared understanding or a shared negotiation about the consequences of communicative action.

Issues of language use are illustrated in what follows by several cases, though the last is of somewhat lesser importance in the context of IGC negotiations.

(1) The first case asks whether an interpreted statement by a delegation really does reflect what that delegation wants to express. Several delegations, but most

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91 The issues of translation and interpretation within the IGC are manifold. A B.A. thesis on the role of interpreters in IGC negotiations has been written by Verena Pöhl, a research assistant of the DFG Research Unit on Cultural Property; she covers some aspects of this issue.
notably China, have developed the habit of having one member of the delegation read out a statement sentence by sentence in Chinese, while a second delegate listens to what is being translated. The speaker only proceeds if he is given a signal that the translation is accurate. Another way to try to ensure accuracy is to hand in a written version prior to making the verbal statement, so that the interpreters have more than simply verbal utterances to translate and are able to translate a statement more accurately. Fig. 6 shows a leaflet that encourages delegates to follow this practice, along with the suggestion to read out statements slowly. In a number of cases, statements were read out too fast so that the interpreter had to stop the speaker. This almost always had the effect that the content of the statement was not understood by delegates dependent on the translation.

Related to this is the question of legal certainty of translated statements or documents that are not available in a specific language. The main concern here is that by translating quasi-legal negotiation text, the intended meaning may change in the target language and the text can have unintended implications. Similarly, text only available in English poses the difficulty of translating terms and concepts to other languages and legal frameworks, creating uncertainty for negotiations. At IGC 15, reflecting these issues the delegation from Spain stated:

[01] The Delegation of Spain referred to Circular 7767 prepared by the Secretariat, concerning the translation of Member States’ contributions into different languages. It added that this was contrary, ipso
jure, to the standards and practices of the United Nations. It stated
that it was not able to consent to any potentially-binding document
which had not been translated into Spanish and distributed with suf-
ficient time for its analysis.92

After a clarification by WIPO’s Director-General “that the Secretariat would do its
best to make them available in the official working languages, but with no guaran-
tee” (7), this statement was endorsed by the delegations of Portugal and Algeria.
To give their argument more weight, the Portuguese delegate, in particular, referred
to the broader issues of language and highlighted that “the languages and cultural
diversity were very important values in the United Nations system” (ibid.).

(2) The second case concerns misunderstandings due to translations. A vivid
example is a joke made by a delegate from Peru that referred to “la maca”, an An-
dean plant said to have aphrodisiacal properties. Spanish-speaking delegates under-
stood the joke and its innuendo and laughed accordingly. Yet, the interpreter trans-
lated “la maca” as “la hamaca” – “hammock” – whose short colloquial form is also
“la maca”. Those listening to the English translation were left baffled. This transla-
tion error was not corrected until the Peruvian delegate was approached by an-
other delegate after the session and asked to clarify the mistake. The number of
such errors is high, especially in the context of jokes, proverbs, or sayings (such as
the Latin American colloquialism “¿De qué color es el caballo blanco?” that was
translated in one IGC session as “What color is the green horse?”), though the
implications of such errors are hard to assess. One can assume that in relation to
more typical phrases there are less errors as those are also habitualized to some
extent by interpreters, but such cases have still to be considered.

(3) The third case relates to the immediate effects of speech and its presenta-
tion. Statements can be read out very monotonously and soberly, which is often
the case in interventions in IGC negotiations. Yet, there are also delegates from
WIPO member states, NGOs, IGOs and ILCs and even the meeting’s chair that
act differently. In numerous instances, statements were performed passionately,
furiously, desperately, sarcastically, ironically, metaphorically and jokingly, some-
times following drafts and sometimes enacted without notes. These performances
and their subtleties require considerable competence on the part of IGC partici-
pants to decipher, even without translation. Delegates who are generally competent
in English might not get all the nuances. Much may be lost when such emotive
statements are interpreted, and it largely depends on who is interpreting.

There are substantial differences between the interpreters. Some of them –
unseen from the plenary room – “reenact” emotional statements, even with ges-
tures and a similar intonation. Others take a more sober approach and mainly re-
produce the contents of a given statement without paying much attention to into-

92 WIPO/GRTKF/IC/15/7:6.
nation, emphasis or rhetorical devices. This can also be due to the technical and natural problems of interpretation, including volume or tempo. Some delegations are well aware and self-reflexive about the difficulties of translation and interpretation.

At IGC 14, a Swiss delegate chose to make a statement in Spanish rather than in French or English. In a conversation after his statement, he argued that the hegemony of English in this setting was disadvantageous for non-native English speakers, and that the large number of Spanish-speaking delegates called for strengthening language diversity. Untranslated statements in the IGC and other international fora were better received, he argued, and a speaker could have a much larger impact on his audience in terms of attention, comprehension, and empathy if he spoke in their native tongue rather than making them rely on a translation. Similarly, a multilingual Peruvian delegate at IGC 14 chose to make several statements in English rather than in Spanish. Several sentences into his first statement, he switched to English, making a reference to the Swiss delegate who spoke Spanish, whereupon many IGC participants paid noticeably more attention to what he said. He argued in a private conversation afterwards that it was much easier to gain the attention of the audience when speaking in their respective mother tongues, and that many substantive as well as rhetorical aspects were lost in translation.93

The implications and problems of interpretation and translation are an important issue in IGC negotiations that expands from oral to written statements as well as to the drafting of text.

The performative aspect of speech94 in negotiations mainly depends on written decisions and has considerable influence on them. It creates powerful dynamics that can change the course and outcome of a meeting. The creation of such dynamics is to a large part also contingent on questions of translation and (foreign) language competence, which – together with other factors – might help to explain the reflexivity about them as well as calls for the inclusion of additional working languages.

93 The representative of the indigenous group Tupaj Amaru concluded his opening statement (one interrupted by the chair calling him to order) with the words: “I could speak French or Russian but I notice that there will still be no progress” (author’s field-notes from IGC 13). This shows that such language issues are of importance, but yet they should not be overestimated. National and commercial interests as well as strategies play a much more important role in WIPO negotiations than the language used.

94 See Richard Bauman “Verbal Art as Performance” (Bauman 1977) for an analysis of the performative aspects of speech; Briggs 1988 for a reflection on the interrelation between competence and performance in Mexicano verbal art; Bauman and Briggs 1990 for an overview of studies of poetics and performance from the perspective of linguistic anthropology and folkloristics; and Kapchan 1995 for an article on performance from the perspective of folkloristics. The ethnography of speaking has adopted many of these methodological and theoretical considerations. In its early stages, some aspects of verbal performance were taken into account in Hymes’ SPEAKING model (Hymes 1986), mainly as part of the factors act sequence, keys, instrumentalities, and genre.
Finally, the fourth case is about the translatability of concepts in intercultural settings. In WIPO’s IGC, concepts like tradition, property and ownership, community or law are central. These might be understood as universal concepts with equivalents in each specific society or community. Some WIPO staff members argue this is the case. Yet, one can also argue that some concepts, such as intellectual property, knowledge or individual creativity, stem specifically from the tradition of the European Enlightenment and cannot be simply applied to other cultures. This second view has been argued by folklorists and anthropologists for some time. They question the assumed universality of central categories in the intellectual property system, mainly of individual creativity, possessive individualism, the incentive structure of property rights, and the authenticity of cultural creations. The gist of these discussions is that sometimes there is no “structural fit” between the categories used in international fora and the local realities (CIEL 2008, Shand 2002); that complex adaptation measures may be needed to mediate between different levels (Pfaff-Czarnecka 2005); and that such processes can have negative and unintended consequences for the social groups involved (Noyes 2003, Tauschek 2010).

Three of many examples from the IGC are especially noteworthy in this regard. The first refers to two different meanings of the word “tradition” in Arabic.

95 See Sarat Maharaj’s work on difference and untranslatability (Hall and Maharaj 2001) for a discussion.
96 The concepts of heritage play a role here, too, as the issues negotiated in the IGC overlap with those discussed in the various UNESCO fora and conventions on World Heritage and tangible or intangible culture. See Bendix 2009b for an examination of the semantics of heritage and inheriting that addresses the implications of different semantic approaches to these issues.
97 See Marceau 2007 on the question of universality of collecting cultural artefacts. This discussion ties into the larger anthropological debates on cultural relativism (Spiro 1986 for an overview, Dundes-Renteln 1988 for the connection to human rights, Geertz 1984, Brown 2008) and linguistic relativism (Duranti 1999c for an overview, Kay and Kempton 1984, Martin 1986). Put simply, the relevance to the IGC are the questions whether there can be, are, or should be shared norms, practices, and understandings across different “cultures”, meaning in relation to concepts and institutions of property or tradition.
98 Interview with a member of the IGC secretariat, October 2008.
99 See Nadasdy 2003 for different conceptualizations of “knowledge” in First Nation contexts that conflict with the notion of knowledge as used in national bureaucracies; Yarrow 2008 for a case study from Ghana; and Strang 2006 on the differences between anthropological and indigenous knowledge. See also Raven 2006 for an article on “protocols” as a way to regulate relations between bureaucracies and indigenous communities.
One meaning connotes a rather static and fixed form, the other implies it is dynamic and evolves:

[There are sometimes errors ... that creep in – difficult terms like “tradition”, “folklore”, “culture”. Sometimes these difficult terms – we've had ... complaints. ... Not very often but now and again we've had a delegation saying that it wasn't translated perfectly correctly. There's one issue that is interesting, and that is the word “tradition” in Arabic. ... I've heard several times ... the Arabic, the Egyptian delegation complaining [about how] ... we use “traditional” or “tradition”. In Arabic, there's more than one word that one can use for that. One of those Arabic words emphasizes “tradition” as being old, something of the past, and another word emphasizes that it's also something that's renewable, something that can also be new. And if I remember correctly, the delegate from Egypt prefers the second version of the word and our [translation] unit insists upon using the first meaning. Now this is all subject to correction. I don't speak Arabic and I don't know what the discussion's about, but that's a good example ... of whether there is a real linguistic difference which has a substantial bearing.]

The question then was to figure out which one of the two terms was (more) in accordance with the term “tradition” as used in IGC negotiations, and which one could be translated to be in compliance with the underlying concept.

The second example concerns the translation of WIPO documents into kweyol, a version of Antillean Creole spoken in Saint Lucia. The sociolinguist involved argued that many concepts used in negotiations and IGC texts had no counterpart in kweyol, and it was thus necessary to translate the meaning of concepts such as individual creativity or knowledge in order to facilitate an understanding of key issues for local communities.

The third example is the frequent claim by ILCs and other IGC participants that culture or tradition cannot be viewed as a separate sphere of social life. Rather, they argue that a holistic view is necessary to understand the complex relationships between people, their land, their knowledge, and their tradition. The separation of TK from TCEs, for example, would thus inevitably violate the claimed cultural holism. Thus it would be extremely difficult to translate this ho-

101 Interview with a member of the IGC secretariat, October 2008.
102 Conversation with the representative of the Bethechilokono of Saint Lucia Governing Council, BGC, at IGC 12, March 2008. The BGC is only one of several ILCs and NGOs that works towards facilitating the exchange of information, in particular to educate local communities and groups about the work of the IGC. WIPO also undertakes “capacity-building” programmes with the same intention.
lism into the concepts used in the IGC process or other arenas dealing with cultural property.\footnote{See Blakeney 1999, Marinova and Raven 2006, Graber 2007.}

While there are such examples for the difficulties of conceptual translations between different languages and social contexts, I would argue that they are only marginally relevant for the IGC negotiations. First and foremost, this is because almost all IGC delegates have some prior experience and are educated professionals with competence in intellectual property matters. It can be assumed they all grasp the gist of core concepts relevant for the IGC, and can evaluate specific commonalities and differences. Added to this, the documentation is so dense that finer points concerning the understanding of concepts are explained and are furthermore explicated numerous times during the meetings, such as during sessions of the indigenous panel. The issue of translatability of concepts is thus largely negligible.

Still, there are of course ideological, substantive, and technical differences in the use of concepts and associated terms. The questions about the commensurability of concepts and ideas cannot be solved through the IGC, and a legal instrument cannot fully take these different conceptualizations into account. Instead, differences can be viewed as differentiating perspectives on specific aspects rather than as fundamental, unresolvable distinctions that hinder shared understanding. There is enough knowledge, competence, and willingness to understand differing positions with respect, for example to cultural holism on the one hand and the concept of the individual creator on the other. Whether such differing perspectives are recognized or included in decisions is something else, but it does not depend on a lack of basic understanding or an untranslatability of concepts.

Assertions about language politics are an aspect of opening statements that expand into “substantial” questions raised in the ensuing negotiations. Referring to such issues of language is a way a delegation’s interest in having a specific language be revalued can be fostered, and opening statements are a way to voice such claims in a formal and documented way. Language politics are moreover not confined to the IGC, but need to be analyzed in the larger context of the UN system. Efforts to make working documents available in Chinese or Arabic must also be understood as attempts to strengthen the position of national or regional groups within the entire UN system. Repeated references to claims for the inclusion of a specific language in various fora increases the pressure on other delegations to consent to them, and such pressures can be transformed and added to other arguments or disputes as bargaining tokens.\footnote{See Schiffman 1996, Mar-Molinero 2000, Castiglione and Longman 2007, Nic Craith 2007 and Kamusella 2009 on language politics that are relevant for this question; see Gad 2006 for a discussion of representational fairness in WTO rule-making that also addresses some language-related issues of negotiations. The body of literature on language ideology, mainly from linguistic anthropology, is also worth noting. See Errington 2001 or Kroskrity 2004 for introductory papers on this issue.}
Opening Statements as Framing Devices

One can examine a number of exemplary opening statements in more detail and as framing devices in order to distill other substantive aspects from them. Language politics are only one aspect that is referred to in such statements, and there are other patterns that can be found that have a bigger influence on the specific negotiations. The statements chosen here serve as examples and as a synopsis of the main aspects of opening statements.

At IGC 12 in early 2008, the agenda item “opening statements” took up nearly two full days of session, thus had more than marginal substantive value. Taking the statement by the delegation of Algeria on behalf of the African Group – the first opening statement made during IGC 12 – as an example, one can recognize a number of specific aspects:

[02] The Delegation of Algeria on behalf of the African Group reiterated the importance it attached to the work of the Committee and the issue of genetic resources (GR), traditional knowledge (TK), and expressions of folklore (EoF), and its desire to contribute in a positive and constructive fashion to the negotiation process which was under way. TK and GR had played and still played a vital role in the day to day life of the bearers and beneficiaries of such rights or knowledge. The interest in their protection rested not only in their attachment to the traditional cultural and scientific heritage but also the benefits arising from this TK as a source of well-being and cultural scientific and economic development. Indeed they were key to food security and key to the health of millions of people in the developing world. In many developing countries a great part of the population depended on traditional medicine. Modern medicine being inaccessible, traditional medicine remained the only way for affordable care for the less well-off. Yet the traditional methods and medicinal plants were tested and exploited without the knowledge and consent of indigenous communities by third parties to develop medicines and other products which then themselves benefit from protection.

Beginning with a rather general appreciation of the negotiation process (items eight and nine in the initial sequence, noted above), the statement goes on to note the relevance and urgency of issues related to GRTKF. Individuals and groups

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105 The statements analyzed hereafter are largely reproduced from the official meeting reports produced by the WIPO secretariat on the basis of the written statements collected by WIPO staff during the session. They are thus not verbatim but – apart from parts of the initial sequence – nonetheless reflect quite accurately what was said by delegations. They are complemented by fieldnotes by the author.

106 WIPO/GRTKF/IC/12/9:9–10.
affected by the lack of protection of TK and GR – “bearers and beneficiaries”107 – are particularly emphasized, and the statement elaborates on issues of food security and health. There is also the assessment that due to “piracy”108 the situation is getting worse:

[03] At the same time as this meeting, TK, GR and TCEs of entire peoples were being pirated and the rights of local communities were being infringed. This led to a serious situation which was getting worse without any definitive and acceptable solution for all being found, despite the efforts deployed over the last two decades.

Framing the issues as not only synchronous but also causally connected to poverty, food shortages, and misappropriation creates a reference point outside the IGC, that can nonetheless be influenced by the course of the subsequent meeting, thus from within the IGC. This reference simultaneously locates the issues being negotiated as taking place outside the IGC, in the specific local contexts and processes, as well as inside the IGC, which makes them less abstract at both levels.

The statement refers not only to the general issue of the misappropriation and lack of protection for GRTKF but also to the potential direct influence IGC participants can have. The moral dimension created here is – even if it is mainly a discursive construction – strategically advantageous for the claims of the African Group. It postulates an underlying imperative or guideline differentiating between a good course of action, namely acting against the misappropriation of GRTKF, the bad course of action implied by doing nothing. The statement introduces several differing actor categories: (1) “entire peoples” and “local communities” as “bearers and beneficiaries” of TK and TCEs. Their rights are being infringed upon, and they suffer from poverty, bad health care, and food insecurity; (2) actors who speak on behalf of them in a representative capacity, such as the African Group and its member states109 or organizational actors such as OAPI and ARIPO

107 The terms by which “holders” of TK and TCEs are named play an important role in negotiations as well as in the drafting of specific legal text. Among them are “holders”, “bearers”, “guardians”, and – as a more technical term that denotes a group of actors within an access and benefit sharing (ABS) system – “beneficiaries”.

108 The notion of piracy in the context of the IGC mainly stems from discussions in the realm of GR, bioprospecting and biopiracy; see Peterson 2001, Hayden 2003a, 2005 for an anthropological discussion, and Mgbeoji 2006 for a legal perspective with a specific focus on indigenous communities and bioprospecting. In the context of WIPO, the term “piracy” is mainly used by ILCs and NGOs while the term “bioprospecting” is rather uncommon, perhaps because genetic resource issues are addressed less than issues of TK and TCEs in the IGC.

109 The statement by Algeria includes the phrase “most indigenous local and traditional communities of the Member States”, which hints at the conceptualization of the nation-state as the guardian of both ILCs and GRTKF. This view of indigenous communities as subordinate and non-autonomous entities is frequently held by African countries and other member states.
that adopt legal instruments to actively protect the TK and TCEs of actors in category (1); (3) “third parties”, meaning “research institutions and companies” which actively misappropriate or “pirate” the traditional knowledge of ILCs and infringe their rights; and (4) the implicit category of actors that neglect or do not understand the urgency of the issues and hinder substantial progress in the IGC.

This categorization is similar to the “membership categorization devices” described by Sacks. The best-known example is the sentence “The baby cried, the mommy picked it up” (Sacks 1972a), where the relationship between the two actors referred to in the sentence is inferred by contextual social knowledge. Sacks argues that due to social categories assumed by the recipient, the mommy in this example is automatically understood to be the mommy of the baby, with membership categories grouped as “standard relational pairs” that constitute the frame for the interaction and its interpretation. These include rules and obligations of the communicative exchange, here the mother’s obligation and right to attend to the needs of the baby.

In the case of the IGC, the Algerian categorization creates an opposition between groups (1) and (2) and groups (3) and (4). It positions the speaker on the morally “good” side of the two sides and vests authority in the speaker to perform a representational function for this “good” side. For the other side, meaning group (4), which in the IGC context largely means the Group B countries, an opportunity is opened to change this situation as it provides two possible ways to frame a position. On the one hand, they can distance themselves from the implicit reproach by supporting ILCs and thus the African group. On the other hand, if they fail to do so, they risk being accused of directly supporting the misappropriation and piracy of TK and TCEs. However, this setting up of opposites is only partial. Further differentiation of actor categories is possible, and the diplomatic setting itself does not allow for too direct accusations. Nevertheless, it creates a referential space in which differentiated positions and perspectives have to be mediated between the polar opposition of “good” and “bad” categories of actors, even if they are only constructions.

The Algerian delegate accordingly continues:

[04] The African Group encouraged the Committee to speed up its work in order to find specific and tangible results that would meet the expectations of most indigenous local and traditional communities of the Member States. They hoped the process under way would lead in a speedy fashion to the adoption of a legally binding international instrument to counter the misappropriation and misuse of TK committed every day to the detriment of their heritage.

Again, this passage illustrates a differentiation between groups of actors, partly as participants of the IGC, and partly as outsiders. Particular local actors – “indige-
nous local and traditional communities of the Member States” – are referred to in conjunction with the African Group, which is portrayed as representing their interests in the committee. On the other hand, acts of misappropriation and misuse are mentioned that require an immediate response by the committee, as they are committed on a daily basis. This construction of urgency claims complicity in misuse and “piracy” on the part of actors who could do something about it but choose not to. The plea to draft and adopt a legally binding international agreement for the protection of GRTKF is complemented by the construction of a dichotomy of actors, indicating possible ways a delegation can position itself in the negotiations. In this, the speaker’s position is portrayed as the only viable or “good” way to act. As concerns time, the situation ILCs are facing is portrayed as urgent, and thus the IGC’s actions are constructed as urgently necessary as well. Two different but interconnected spheres are framed in a specific “temporal mode” suggesting the subsequent session should prioritize concrete results over drawn-out discussions.

The statement continues on, outlining possible scenarios for legal regimes and mechanisms at the international level, and drawing on specific national experiences in GRTKF protection. The form is that of an authoritative discourse as to substantive questions and specificities, which not only evaluates the situation, but projects the image of a speaker who is objectively capable of assessing the various legal instruments available and their implications. This signals that outstanding problems have already been solved by a competent authority (the speaker) and that there is already a factual basis for answering specific questions in a brief amount of time. The Algerian delegate states:

[05] Indeed, the African instruments proposed constructive solutions to questions that continue to be controversial within the committee. Among these were the issues of the beneficiaries of such protection, as well as the objectives of protection, the exceptions or limitations to the rights linked to cultural expressions and TK which are eligible for protection and the duration of the protection that they are to be granted. The difficulties met in the area of a definition of certain concepts should not serve as an alibi or a subterfuge to delay further this process globally. The contributions made by Member States on the basis of the twenty issues previously identified and the discussions on the questions of substance debated in the Committee’s recent sessions should enable progress on the substantive issues.

According to this way of framing the issues, the onus of proof that there is an alternative solution lies with the opposing parties in the negotiations. As the matter is of urgency in local contexts, and as the implicit question of morally “good” and “bad” actors is answered, and as the factual base on which the rest of negotiations can take place has already been established, the burden to follow suit and act is
placed on the “other” side of the dualism of actors. Preemptively, the statement declares that questions of “definition of certain concepts” are, due to the already established factual base, merely an alibi and do not constitute a real problem.

Framing IGC issues like this has both advantages and disadvantages. Moral aspects can be strategically harnessed to bolster arguments of the African Group. Even if they are contradictory and inconsistent with policies on the national level – e.g. regarding the legal status of indigenous groups –, it is hard to argue against them in diplomatic settings. They require an reaction by opposing delegations, and this reaction cannot simply rebut the claim, but needs to reframe the issue to argue against it. However, such a strategy can also be problematic as it creates a situation of conflict potentially hindering consensus.

Taking the statement by Slovenia (on behalf of the European Union) during this IGC as a second example, one can see how this “other” side reacts. The statement starts with the common initial sequence and a general expression of appreciation for the work and progress of the committee since its creation. It continues:

[06] The EU continued to believe that one of the most important achievements of the Committee had been to recognize the importance of TK, TCEs and GR to traditional and indigenous cultures worldwide. [...] It continued to support the Committee’s spirit of open and responsible collaboration, and looked forward to further progress in the form of consensus solutions. However, the EU also recognized the inherent difficulty that had been encountered by the Committee in defining the essence of TK and TCEs, and the methods that could be used in protecting them. It was not enough to create a definition of what was obviously TK or TCE. The line between what was TK or TCE, and what was not, had to be identified. The European Community and its Member States recognized that some Members of the Committee might wish to reach a practical conclusion of its work within a certain time, for example, during the current mandate of the Committee for the biennium 2008 to 2009. Such a timely result for the work could be achieved in areas where a consensus had already been reached or nearly reached and only if flexible solutions were considered that would not bind individual countries to commitments that did not necessarily meet their needs. With respect to the schedule of the meeting, the EU insisted that sufficient time should be reserved for discussing GR as the last item on the agenda. The Committee now had a great deal of information before it. Therefore, the Delegation encouraged the Committee to focus primarily on the areas where consensus was possible in the short term,
in order to achieve a practical result that could be accepted by all Members.\textsuperscript{110}

This intervention was made immediately after the statement by Algeria on behalf of the African Group. For this reason it cannot be viewed as an immediate reaction to the first statement. Rather, the specific aspects that make reference to the points taken up in the prior statement can be understood as having been drafted in anticipation of the position the African Group would take. Similarly, the African Group statement anticipated the issues of definition taken up in the statement by the EU. The two opening statements thus hint at the history of the IGC and delegates’ knowledge thereof, thus allowing for an evaluation of how delegations will behave during subsequent meetings. Both prior meetings and documents preform the content and structure of an IGC session, as do inter-sessional communication processes between regional groups, member states, individual delegates based in Geneva and the WIPO secretariat.\textsuperscript{111} Furthermore, the aforementioned habitualized aspects – stock phrases, formulations, and the modality of arguments – of speech play a role in the way that statements are drafted in anticipation of a specific audience. This aspect is of much importance for the analysis of IGC negotiations, and is part of what constitutes the IGC as a speech community.

Slovenia’s statement on behalf of the EU begins with a very abstract and short reference to the subject matter:

\[07\] to recognize the importance of TK, TCEs and GR to traditional and indigenous cultures worldwide.

In contrast to the statement by the African Group, no specific actors or issues are mentioned. While the Algerian delegate talks about very specific problems – the misuse and misappropriation of GRTKF, food security, health, poverty – in a graphic way that includes groups of social actors that suffer from the current situation, analogous references are missing from the European statement. Instead, it focusses on “recognition”, in the context of international negotiations a very weak expression that does not include proposing any specific action. The specificities of this recognition are neither explained nor are reasons given why one should recognize (such as the misuse the African Group alludes to). “To recognize”, in contrast

\textsuperscript{110}WIPO/GRTKF/IC/12/9:10–11.

\textsuperscript{111} In the case of the question of definitions, documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 on “revised objectives and principles” for the protection of TK and TCEs foreshadow the development, as do documents from IGC 11 in July 2008 where comments on these two documents are collated that partly address the problem of defining TK and TCEs as well. Specifically the revised objectives and principles and the lists of issues (WIPO/GRTKF/IC/11/4(A), WIPO/GRTKF/IC/11/4(B) and addenda for TCEs, and WIPO/GRTKF/IC/11/5(A), WIPO/GRTKF/IC/11/5(B) and addenda for TK) have to be mentioned here.
with “to counter” (see [04]), is a weak and non-materialized process with a vague content and vague implications.

One could argue here with Austin (1962) that distinguishing whether an utterance is locutionary or illocutionary is difficult in the context of diplomatic negotiations, when it contains as a verb “to recognize”. The aspect of “doing” something material, in the contextual sense of the verb “to recognize”, is liminal and mainly defined by its negation, meaning by the absence of any particular actions apart from the ideational level. Furthermore, it is a very common phrasal expression in legal texts as well as international conventions and treaties,\(^{112}\) and one usually used in preambles to express the ideational foundations of a normative text, but lacking any legally binding force.\(^{113}\) “Recognizing” has a soft and flexible quality, and a lack of specificity to its associated actions. Coupled with the object of recognition (the “importance of TK, TCEs and GR to traditional and indigenous cultures worldwide”), there is no reference either to a specific set of situations or to specific groups of actors.

While the statement by Algeria mentions social inequalities and injustices that call for immediate action, the EU statement does not.\(^ {114}\) Moreover, the Slovenian statement claims that recognition has already been achieved by the committee, meaning no element in the EU's intervention points to further goals to be achieved by the IGC. There is an allusion to the protection of TK and TCEs (see [06]), but it is defined \textit{ex negativo} by the doubt expressed that the methods needed can be consensually agreed upon, or whether they have been yet identified. While the first statement highlights very specific actors that are represented and advocated by the personae of the speaker, the second statement remains largely abstract with regard to this aspect. The reference to “traditional and indigenous cultures worldwide” can in this sense be understood as a way to depersonalize the negotiated issues and to remove them from the level of individual suffering and moral imperatives. While this formalization of legal issues is common or even necessary for the legal

\(^{112}\) See Bhatia et al. 2005 for an edited volume on vagueness in legal texts (especially the contributions by Williams or Giannoni) for discussions of auxiliary verbs and their function in normative texts.

\(^{113}\) The United Nations Declaration on the Rights of Indigenous Peoples (UN 2008) uses the expression “recognizing” six times in its preamble, complemented by verbs such as “affirming”, “welcoming”, “convinced”, “emphasizing”, “considering”, “encouraging” and “believing”. The UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (UNESCO 2003) uses “recognizing” twice as well as “considering”, “noting”, “referring” and “recalling”. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UNESCO 2005) as well as the expressions “emphasizing”, “recalling”, “taking into account” and “celebrating”. The UNESCO World Heritage Convention (UNESCO 1972) does not use “recognizing” but does use the verbs “considering”, “noting” and “recalling”. Expressions used in the articles of these conventions are equally “soft”, because they are “soft law” with few tools to sanction breaches of convention provisions.

\(^{114}\) This is no normative evaluation of the EU’s position, but only the description of communicative strategies.
and political process, in the the IGC and in other contexts it is also useful to weaken moralized rhetorics.\textsuperscript{115}

In the EU’s statement, this goes along with a conception of culture as something that is primarily ideational, which neglects its social implications, functions and the material forms it is expressed in. The substantive matter discussed in the IGC is framed as less urgent and as less problematic and grave than claimed by the African Group. The way it is framed is an abstraction of specific problems repeatedly illustrated by the indigenous panel, fact-finding reports and ILCs since 2001. The EU’s statement accordingly provides different categorizations of actors than the African statement, as seen by framing the actors concerned as “cultures” and not as individuals or groups of social actors. Thus, it both depersonalizes and technicalizes the discussions of the IGC. This differentiation of actor categories in the EU’s statement takes place at two different levels. On the one hand, there is the realm of GRTKF to be recognized by the international community and the traditional and indigenous cultures associated with it. According to the EU’s statement, this level is of lesser importance to the tasks of the IGC. On the other hand, there is the IGC with two main sets of actors: those represented by the speaker and affiliated member states (in this case, the EU and Group B), and the rest of the committee. By limiting the scope of discussions to the latter level of the IGC, the main issues and problems to be discussed are not related to the aforementioned social inequalities and injustices, but rather to the interrelations between participants of the committee who seek a “consensus” and “short-term results”. Questions related to the representation of ILCs or other social actors are left out, and in contrast to the categories of actors introduced by the statement of the African Group, the focus is put on actors within the IGC.

The speaker in this instance represents the member states he is speaking for, and other member states usually associated with the speaker, which is related to the habitualized and patterned aspects of alliances of actors in IGC negotiations. These groups are relatively stable and only change due to external influences rather than being persuaded or convinced during the course of negotiations. It is thus possible for delegations to anticipate such alliances (though they might vary from forum to forum), and utterances such as those cited above accordingly imply alliances without having to be explicit.\textsuperscript{116} Substantially, the discussions are limited to an abstract level of negotiations and thus to an exchange between member states.

\textsuperscript{115} Similarly, moralized rhetorics can be understood as a useful strategy for member states.

\textsuperscript{116} An exemplary case of external influence changing the usual position of a delegation was related to me by the representative of Peru at IGC 13 (October 2008). He had wanted to make a statement in support of Chile, but was reminded by a superior that he could not do so because Peru was in bilateral negotiations with the U.S. over an issue which conflicted with the position he wanted to take. It is not easy to measure the influence of such external influences and processes. Putnam (1988) has noted the complex interrelations between domestic policy and diplomacy and they are reflected in cases such as this.
Moreover, the focus of the Slovenian statement is on technical questions: it is argued that while there are areas where a consensus has already formed, the “essence of TK and TCEs” was inherently hard to define, and the methods to protect them were hard to find. By framing difficulties as inherent to the subject matter, the issues are projected away from the committee, its deliberations, and the motivations and interests of member states. Instead, difficulties are said to be part of the subject matter itself. According to this rationale, the reason why there are neither definitions of TK and TCEs nor solutions to the problems of the committee is not that there are delegations that stall the negotiations. Rather, the argument is that what hinders the IGC process is the abstract and complex “nature” of cultural property. This conceptualization allows one to see the failure of the IGC to reach consensus not as a question of blame or moral wrongdoing, but as a question of expertise, existing classification schemes and rationality.\textsuperscript{117}

The technicalization also neutralizes ethical aspects of the debate and it, too, takes place at two different levels, as can be shown by the following sentences of the EU statement:

\textsuperscript{08} It was not enough to create a definition of what was obviously TK or TCE. The line between what was TK or TCE, and what was not, had to be identified.

On the one hand, defining TK and TCEs is portrayed as inherently difficult. It depends on abstracting from social and cultural situations, which must be reduced to their main aspects and specificities so as to generalize them for inclusion in a typology of TK and TCEs cases. On the other hand, these definitions and the elicited typologies need to fit into existing legal mechanisms and frameworks. Thus, a definition of “what was obviously TK or TCE” is not sufficient as it does not meet the requirements of a legal definition.

So in addition to the description of substantive aspects of TK and TCEs, a legal definition is needed so it can be put in the context of existing legal frameworks. These frameworks exist at national, regional and international levels with regard to cultural property, as well as with respect to allied intellectual property issues. The specific legal instrument used carries its own requirements. Examples of these requirements can be the clarity of a definition, setting the object of definition apart from other objects, or by contrast, its ambiguity or vagueness if it includes a relatively large number of phenomena. The requirements are for that reason contingent on their context of use, and terms like TK and TCEs are accord-

\textsuperscript{117} The question Marshall Sahlins raised in 1976, one that has also been part of the cultural relativism debates, is to what conceptualizations of rationality and logic do we subscribe, especially in the context of intercultural research (Sahlins 1976)? Max Horkheimer’s “Eclipse of Reason” (Horkheimer 1947), in a similar vein, differentiated two main understandings of reason in Western societies.
ingly _termini ad quem_ that are constructed with specific goals and uses already in mind.

The task of the committee is then seen as clarifying these technical aspects in a process that mainly relies on relevant “neutral” facts and structures of TK, TCEs and the intellectual property systems at national and international levels. Social actors only play a subordinated role in this constellation, and the factual level is highlighted.¹¹⁸ The “essence” of TK and TCEs ([06]) according to this conceptualization primarily consists of characteristics of certain kinds of knowledge and expression that can be isolated rather than complex social constellations and interrelations. The EU statement accordingly continues:

[09] […] that some Members of the Committee might wish to reach a practical conclusion of its work within a certain time, for example, during the current mandate of the Committee for the biennium 2008 to 2009. Such a timely result for the work could be achieved in areas where a consensus had already been reached or nearly reached and only if flexible solutions were considered that would not bind individual countries to commitments that did not necessarily meet their needs.

The main problem diagnosed is that due to time pressures, a practical solution to some of the committee’s issues could only be found in areas where a consensus had already formed. The temporal aspect, also taken up in the statement from the African Group, is modified to fit the strategy of delegations not interested in wide-reaching legal protection measures for GRTKF. Instead, the issue of time is used as leverage to limit the scope of “a practical conclusion” to a small number of areas the committee works on. It is not the claimed injustices and inequalities arising from the misuse and misappropriation of TK, GR and TCEs at the local and national level that cause problems for ILCs. It is the institutional time pressure caused by the IGC’s status that is used as an argument for a specific mode of speeding the IGC negotiations.

Ultimately, the EU’s statement proposes an alternate mode of resolving issues discussed in the IGC by moving away from the idea of a legal instrument as demanded by the African Group. This alternative as proposed by the EU’s statement

¹¹⁸ The notion of “facticity” that is used in processes such as “fact-finding missions” and “factual extractions” is worth analyzing further. It goes along with a specific perception of what facts can be and what not. The debate on positivism and especially the contributions to it by critical theorists are helpful for understanding the difference between what is judged a fact and what is a non-fact. Briefly, the positivist stance, criticized among others by Habermas (1971), claims that the only relevant data are positive facts, and metaphysics are dismissed as irrelevant. This notion is shared by many IGC participants, influencing how indigenous perceptions of culture as holistic and spiritual (as communicated by some ILC representatives in the IGC) are addressed and dealt with in the context of a positivist and fact-based intellectual property system.
would include an instrument that was not legally binding and flexible, covering only partial aspects of GRTKF: a legally binding international instrument would “not necessarily meet [the] needs” of some member states. Put differently, in the eyes of the EU it would be counterproductive for countries benefiting from the current status of the intellectual property system and not interested in a substantial change in relation to GRTKF. Moreover, the alternative instrument would have to be decided on consensually. Given that at the time this statement was delivered, there was virtually no consensus on central questions, this would have meant a very weak instrument, presumably in the form of a non-binding convention with no measures against violations against it.

By stressing a practical solution for the committee’s problems, the differences that exist on substantive levels, or with regard to ethical questions, are subordinated under procedural issues. While the statement expresses that the EU wants a conclusion or a result from the IGC's work, it asks for a flexible solution. In doing so, it places the burden to compromise on the African Group asking for more binding commitments: as the EU is willing to take a decision under certain conditions that are portrayed as primarily being of a technical nature, or that are subject to factual and practical constraints, the African Group has to move away from their demands that go further. This is underlined by the end of the EU's statement:

[10] The Committee now had a great deal of information before it. Therefore, the Delegation encouraged the Committee to focus primarily on the areas where consensus was possible in the short term, in order to achieve a practical result that could be accepted by all Members.

On the basis of facts and information gathered during the IGC process, the task for the committee is portrayed as trying to elicit a possible consensus, one limited by various constraints and time pressures. Calling for a practical result on the basis of a consensus between member states implicitly argues against the far-reaching demands by the African Group. As these demands are against the interests of the EU and Group B, this call to speed up negotiations and come to specific results can be viewed as an attempt to counter the value-laden statement of the African Group without arguing against the ethical problems outlined in it: while denying the implications of the current situation for the bearers of TK, TCEs and GR would be problematic for the EU, pointing to the limits and differences in a more procedural and technical manner is possible. The call for specific results is thus a way to limit the work of the committee to a result acceptable to both stalling and speeding up delegations without arguing against the African Group as to the ethical problems of the intellectual property system.

The EU statement also includes a reference to time allotted to the three substantive items of the IGC process. An equal amount of time should be allotted to
the discussions on GR (cf. [06]). In the context of IGC 12, as well as other IGC sessions, the focus of discussions was mainly on TK and TCEs. The call to put more effort into the discussions on GR can thus be understood as a way to limit the time for discussing the aspects of the IGC where more results have been achieved, for example in the form of lists of objectives.

The statement by the EU reaffirms the assumption that TK, TCEs and GR are important, and that the status quo has to be changed, but perhaps only by further “recognizing” their importance to indigenous cultures. The EU statement does not contradict IGC principles, but points to specific problems and constraints that restrict the possibilities of the IGC to achieve closure. It is a way both to make clear that one is not keen on extensively changing the existing intellectual property system – as delegates are eager to admit – and to say it in a way that makes it hard to be blamed for this, as it is achieved by conversational implicature that retains full deniability for the underlying strategy. This does not mean, however, that the EU’s or Group B’s strategy is not legitimate and only the proposal by the African Group is morally viable. Rather, it illustrates a situation in negotiations where one party constructs its interests as being the only legitimate position by making reference to moral aspects. Arguing against this position would imply a dismissal of these moral aspects as well, and thus it has to be countered in a different way. The EU can in this case always revert to saying that what they meant was an honest attempt at making progress, and not an attempt to argue against human rights and stall the negotiations.

In a negotiating situation where issues of intellectual property are framed as human rights issues by one party, such implicature is a possibility to counter claims construed as being primarily about morality without having to downplay human rights aspects of the debate.

The examples examined above are only a small fragment of opening statements given during the IGC sessions since 2001. Yet, a study of the WIPO documentation, the fieldwork at IGC sessions as well as interviews with participants of the IGC have shown that the aspects outlined here are part of communicative patterns that are reproduced from session to session. The statements by the African Group

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119 In a statement by Japan at IGC 13 in October 2008, the delegation said equal time should be given to all three substantive items. This claim refers back to the decisions on future work from IGC 12 that states: “At its thirteenth and subsequent sessions, including any intersessional sessions, all three substantive items of the Committee’s mandate should be discussed in depth and that the time allotted to each item should be balanced.” (WIPO/GRTKF/IC/12/Decisions).

120 The reasons for neglecting GR are manifold but in part are due to existing, active discussions elsewhere, such as in the WTO or the CBD.

121 A proposal by the EU, issued as WIPO/GRTKF/IC/14/11 at IGC 14 in 2009, illustrates both continuity and change with regard to this question: while it is more specific in its proposed process, it is still vague as to the actual mechanism to be installed.

122 Michael Silverstein calls this pragmatic strategic “diplomatic non-indexicality” (Silverstein 1976).
and by the EU are two cases illustrating specific communicative forms and perspectives. The mode of reproduction of these patterns and perspectives is special insofar as it can be described as a process of instantiations. Prior utterances are not exactly reproduced modified in ways that that draw from habitualized and structural features of discourse. This modification is contingent on the context of the instantiation of an utterance, taking into account personal, strategic, temporal and structural factors that constitute the context. Other actors, strategic considerations in external fora, time pressure or constraints of the organizational frame of a meeting all contribute. One does not see a mere repetition of the same arguments and strategies, but a context-aware (not necessarily metapragmatically-aware) modification and progression influenced by idiosyncrasies, coincidences and mistakes on the part of IGC participants. This instantiation can take the form of simple repetition, but framing it only as a reproduction would miss the fact that simple repetition also implies reflexive or non-reflexive cognitive processes that result in the sameness of utterances.

The particular aspect of instantiations that reacts to or anticipates the presence of other participants in a communicative event has been termed “recipient design” in conversation analysis:

By “recipient design” we refer to a multitude of respects in which the talk by a party in a conversation is constructed or designed in ways which display an orientation and sensitivity to the particular other(s) who are the co-participants. In our work we have found recipient design to operate with regard to word selection, topic selection, admissibility and ordering of sequences, options and obligations for starting and terminating conversations etc. (Sacks et al. 1974: 272)

What Sacks et al. describe for turn-taking in conversations holds true for the drafting of IGC opening statements as well. Speakers anticipate the stance an opposing party is going to take using already available information. This can be in the form of prior statements, comments or proposals by a delegation, personal and professional experience and knowledge in diplomacy and the subject matter, or the broader position of a country in international processes and politics. Also, it is tied to the specificities and characteristics of the IGC as a speech community, taking into account communicative patterns, conventions, structures and dynamics that

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123 See Fox 2008 for a discussion of dynamic features in accommodating to a recipient in discourse: “While, at a particular moment in an interaction, the pressures of crafting an utterance for a particular recipient, doing particular work, may seem daunting when looked at from the outside by an analyst, it is clear from research in this area that for participants this work can be accomplished, and in the speed of real-time interaction, and made to appear ‘natural’, ‘normal’, and even ‘effortless’.” (Fox 2008: 255)
can have a significant influence on negotiations.\textsuperscript{124} It is similar to the anticipation of alliances and actor stances mentioned above, and it has the effect that statements are given already accommodating the assumed positions and the assumed strategies of the recipients of an utterance. For this reason, opening statements and other interventions are drafted dynamically and are the result of a multi-layered process of recipient design, including the patterned instantiations of strategies, alliances, communicative conventions and other aspects.

A number of instantiations of communicative patterns and perspectives can be identified in many opening statements.\textsuperscript{125} The statements of the African Group and the EU are specific illustrations of more general patterns and found in the majority of statements. These can be grouped according to the specific aspects they relate to. What results is not to be understood as a typology that differentiates bounded categories, but rather as a set of generalizations that can help in the analysis of the instantiations.

These generalizations include: the technicalization of a discourse that obscures the ethical dimensions of the debate on cultural property. This is in contrast to the use of heavily value-laden references, such as to exploitation, poverty, sickness or food shortages. Accompanying this contrast, one finds either the exclusion of social actors as irrelevant for the negotiations, and as isolatable from the substantive issues or the inclusion of the bearers or holders of GRTKF as social actors, portrayed as being represented by a given speaker at the IGC. Added to this, there is a focus on facts claimed to be neutral, creating the image that negotiations are not about politics but about the objective reconciliation of interests on the basis of existing structures, such as the intellectual property system, national legislation or other legal regimes related to the substantive issues of the IGC. In contrast, there is the argument that the substantive issues discussed in the IGC heavily relate to questions of justice, fairness and morality, and that the existing legal frameworks should accommodate these principles. Time constraints are either displayed as the reason why a quick and extensive solution should be drafted in the form of a legally binding agreement and on the basis of already existing work of the committee, or as the reason why practical and consensual solutions should be found in the form of a flexible legal instrument, such as a convention that has few practical implications for member states. Two overarching strategies result: the first is speed-

\textsuperscript{124} Aspects of language policy such as translation or interpretation can also be considered part of these characteristics. Switching from one language to another during a statement is a reflexive instance of recipient design that, based on assumptions about communicability and attention, tries to elicit a non-typical reaction from the audience.

\textsuperscript{125} Moreover, they can also be found in other more specific statements during IGC sessions. The distinction between opening statements and other inventions made here is due to the organizational separation. However, the expression and placement of interests are very fluid and flexible with regard to communicative patterns and conventions, as will be shown below.
ing towards an agreement to change the current intellectual property system, and the second is stalling the negotiations in such a manner as to retain the status quo.

These last two aspects are not limited to the IGC or the question discussed therein. They exist in other fora and are closely linked to broader policy issues at the national, regional and international level. As the two main identifiable positions that actors take in negotiations, they are abstractions of a dynamic relationship between different member states and other participants of the IGC. They are subject to change and constitute a space within which member states position themselves: at times, some aspects might change while other stay the same. As such, the specific stance of actors is not fixed in every aspect, but may be progressively adjusted according to the changing context. For example, while stalling delegations might not agree to “text-based negotiations” in one session, they might accept it during the next session. However, their fundamental stance stays the same. A last factor, with the meta-quality of being explicitly metaprategmatically aware, are the direct reproaches made of actors for their assumed strategies, in most cases for stalling the negotiations. These are rather infrequent and did not factor in the two statements examined above.

To look at these aspects in more detail, it is helpful to examine further examples from IGC opening statements. This shows both their diffusion as well as their dynamic and contextual modification. As these aspects are intertwined with one another, it makes more sense to group them according to their overall mood. Proceeding like this also prevents the methodological mistake of hypostatizing the various aspects as fixed tokens, when one of the important characteristics of them is their flexibility and variability, e.g. with regard to their recipient design. Taking the two overarching strategies that also distinguish the statements by the EU and the African Group as a starting point, the following illustrates how speeding up delegations and stalling delegations use opening statements to frame negotiations. The statement by Senegal on behalf of the African Group at IGC 14 in October 2009 nicely illustrates the position of speeding delegates and features many of the aforementioned aspects that contribute to the overall tone of the intervention:

[11] The Delegation of Senegal added that the other delegations were convinced that the background work already carried out as well as increased participation and dialogue would lead to tangible results. The Delegation had stated that the comparison between those expectations and the results obtained were an indication of the disappointment of the African Group as regards the outcome of the work of the Committee on the eve of the expiration of its mandate in September 2009. The Delegation stated that the African Group remained hopeful and that its interest in the issues under discussion remained high. [It] believed that the Committee could not renew the same
terms of reference for its mandate which had led to stalemate. The Delegation underscored the holistic approach which was to lead to the effective protection of genetic resources, traditional knowledge and traditional cultural expressions, and noted the African Group had made proposals, inter alia, on the renewal of the mandate of the Committee along with a work program with a timetable for, in particular, intersession meetings as a means of accelerating the work of the Committee. The Delegation noted that the proposal of the Group referred to the negotiations based on texts […]. The Delegation reaffirmed that only the adoption of a legally binding international instrument could guarantee the effective protection of folklore and traditional knowledge as well as genetic resources of indigenous and local communities of Member States. It expressed the wish that its proposals would, in the context of future work of the Committee, serve to correct the imbalance inherent in intellectual property at the international level with on the one hand individual property well protected by various rights (patents, copyright, related rights, …) and on the other community-based assets at the mercy of piracy, illicit use, misappropriations or other prejudicial actions. The Delegation expressed the wish that the Committee could put a stop to that situation.126

Referring both to specific documents and methods of work on the one hand and the specific situation of GRTKF as a matter of urgency, the statement frames the upcoming negotiations as important and necessary. It pressures member states to act in a way that results in a legal instrument to change the current intellectual property system for the benefit of ILCs. The statement by the Sri Lankan delegation, speaking on behalf of the Asian Group, similarly urges the committee to move forward:

[12] It hoped that the Committee would revitalize its mandate towards a tangible result, including the possible development of an international instrument for the protection of GR, TK and TCEs. The Group expressed its ongoing concern for the misappropriation of TCEs, TK and GRs. The fundamental objective of the Committee’s work was the protection and preservation of indigenous peoples’ knowledge and resources. The sharing of benefits from GR, TK and TCEs should also be a guiding objective, and it was time for the Committee to have a more focused work program.127

126 WIPO/GRTKF/IC/14/12:5.
127 ibid.
What can be observed here is a general tone constituted by the composition of several aspects common to speeding delegation. This does not mean that interventions of this type always include all aspects. Rather, they are a composition influenced by the position of the speaker as well as the context of the meeting. As instantiations of the abstraction of one of two main positions, they contribute to the number of participants interested in progress of IGC negotiations.

Along with the stress on the urgency of the discussed issues, it is common for stalling delegations to highlight the time pressure that the committee is subjected to. In the opening statement of Zimbabwe at IGC 13, the delegate noted “with agony” the slow pace of negotiations. African countries were marginalized and the exploitation of TK, TCEs and GR as “our indigenous knowledge” had to be prevented. He argued with the legal maxim that “justice delayed is justice denied”, and that in face of the urgency of issues and the sometimes relaxed atmosphere of the IGC, “seven years without an agreement are no joke”. In a similar vein, the Nigerian delegate referred to the “urgency” of the committee’s tasks due to the “exploitation” of GRTKF. According to his statement, the IGC was at a crossroads, and that a proposal by the African Group that outlined specific options for the “Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources” was the only way to move forward.

The dynamic and context-bound character of opening statements and the specific aspects they include can be further illustrated by the interventions of speeding delegations beginning at IGC 14 in June and July 2009. Delegations from Indonesia, Zimbabwe, Iran, Egypt, Brazil, Senegal, Ecuador and Yemen mentioned the term [13] text-based negotiations in their opening statements as a signifier for an advanced stage of negotiations. According to them, the IGC was at a point where the non-committal exchange of views was not enough anymore and more tangible results had to be produced. This term was used in prior IGC sessions, but its use increased significantly beginning with the fourteenth session, subsequent to its use in a passage on the future work of the IGC that read:

128 Author’s field-notes from IGC 13.
129 WIPO/GRTKF/IC/13/9.
130 See WIPO/GRTKF/IC/14/12 and WIPO/GRTKF/IC/15/7.
131 The official reports for IGC 13 (WIPO/GRTKF/IC/13/11) in April 2009, IGC 12 (WIPO/GRTKF/IC/12/9) in February 2009, IGC 10 in April 2007 (WIPO/GRTKF/IC/10/7 Prov 2) show no results for the phrase; the report for IGC 11 (WIPO/GRTKF/IC/11/15) shows two results for “text-based approach”, both by the delegation of South Africa.
The Committee will undertake during the next budgetary biennium (2010/2011) text-based negotiations on genetic resources, traditional knowledge and traditional cultural expressions. It will adopt, as set out in the Annex, a clearly defined work program and timeframe, including the holding of inter-sessional work sessions. The focus of its work, without prejudice to the work pursued in other fora, will build on the existing work carried out by the Committee and use WIPO documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8A (TCE, TK, and GR) which is to constitute the basis of the Committee’s work on text-based negotiations. The Committee is requested to submit to the 2011 GA a text for an internationally legally binding instrument/instruments on TCEs, TK and GR and recommend a date for the Diplomatic Conference as agreed in its work program.132

As a change of the committee’s context, the new proposal influenced delegations in the way they drafted their opening statements. It was made available to some delegations prior to the beginning of the session, and it can also be assumed that most other member states also knew about it by word of mouth or rumor. The new phrase that had been only sporadically used in prior sessions now not only redefined the tone of IGC negotiations but came to be included in the final version of the new mandate for 2010/2011.

Speeding up delegations thus used the term to frame the work done in the meetings as being primarily about deciding on text-based negotiations as a mode of work, though the term “internationally legally-binding agreement” was also used to specify the desired legal character of the outcome. The dynamic character of the aspects used in such utterances is illustrated by this example, inasmuch as the term only gained significance and a specific meaning due to the introduction of a new proposal expressing a new strategy of the African Group and other speeding up delegations.

The opening statement by Senegal on behalf of the African Group at IGC 15 in Dec. 2009 goes so far as to claim the conversational genre itself has become obsolete due to the advanced stage of negotiations. The delegate said the Group

[15] had no intention of making an opening statement in the customary sense of the term as the Group had prepared a statement focusing on what it believed to be the most salient point, namely Agenda Item 10, which was scheduled for the end of the meeting. Wishing to explain the lack of a general statement, the Delegation of Senegal declared

132 WIPO/GRTKF/IC/14/8 Rev.
that Agenda Item 7 immediately placed the Committee at the negotiation stage, which exempted it from such statements.\textsuperscript{133}

In a similar vein, the Nigerian delegate at IGC 14 noted that “we have spent the last years to congratulate the chair, then elect another chair and congratulate him again. This time I will spare this tradition”.\textsuperscript{134}

In conclusion, a relatively new term (at least for the IGC) was introduced and used by many delegations to frame the negotiations and set a new tone. It gained its force in the dynamic conversational interrelation between various delegations of the IGC. This example of the introduction and adoption of a specific term shows that the IGC setting can lead to specific and flexible instantiations of underlying communicative patterns and strategies rather than only reproducing existing structures. The procedural seizing of such patterns and strategies is for that reason not necessarily contingent on explicit strategic arrangement between delegations, but the result of communicative processes such as anticipation or recipient design by which alliances are formed dynamically and utterance fragments with pragmatic quality are instantiated across actors.

Direct reproaches, by contrast, are rarely used as they violate the communicative conventions and rules of conduct in the IGC. These are not documented or explicitly agreed upon, but do proliferate through the personal sanctioning of actors. One example, related in an interview, was given of a relatively young diplomat who was extremely rude in a statement and verbally attacked the delegate of another member state. After the meeting, the chairperson contacted the diplomat’s superior, who had not been present during the statement, and told him about the incident. The young diplomat was subsequently admonished by his superior for his rude behavior and told to abstain from making statements for some time.

This example is presumably the exception, as communicative norms for the most part are internalized and there are other ways of expressing critique. However, various transgressions of interactional conventions do take place during IGC sessions. At IGC 13, for example, the representative of the indigenous group Tupaj Amaru directly addressed an intervention at the German delegation, claiming theirs was one of many “rhetorical statements” without much substance. Earlier during that session, he had complained about the “double standards” in the IGC, as the representative of the secretariat of the CBD spoke for almost 30 minutes whereas he had been called to order after only a couple of minutes.

His critique was understandable, as the influence of ILCs and NGOs was minimal, especially at IGC 13. As a result, and in response to the lack of possibili-

\textsuperscript{133} WIPO/GRTKF/IC/15/7:7.
\textsuperscript{134} Author’s field-notes from IGC 13.
ties for ILC involvement, many indigenous representatives left the session early. The statement by the indigenous caucus announcing this boycott reads as follows:

[16] [W]e are cognizant of the difficult task that you have taken on in leading this committee in its work to fulfill its revised mandate to accelerate its work. However, we must express our severe disappointment that in your haste to move into regional consultations you did not afford an opportunity to the WIPO Indigenous Caucus to express its positions on future work which could have fed into the informal discussions. This negates the very purpose of having a voluntary fund which supports indigenous participation in this committee. As you may be able to tell, some of our colleagues have already left, seeing no further purpose in simply rubber-stamping the decisions already taken. This may have been corrected by the inclusion of the elected representative of the WIPO Indigenous Caucus in the informal consultations, something which, in any case, would be required by Articles 18 and 19 of the UN Declaration on the Rights of Indigenous Peoples. […] We will, of course, submit our now obsolete, prepared statement for inclusion in the records of the committee, and sincerely hope that the future operation of this committee will more properly reflect the rights of participation of indigenous peoples. Having not participated in the deliberations and decisions on future work, the WIPO Indigenous Caucus regrets that its inputs may not be reflected in the decisions taken by the IGC. Mr Chairman, thank you again for this opportunity to voice our concerns, and we look forward to continuing to work with you and the member states in ensuring respect and protection for the rights of indigenous peoples and local communities (reproduced from a hard copy of the statement from IGC 13).

In other cases, particular member states were directly addressed and critiqued for acts of misuse or misappropriation of TK and TCEs by commercial organizations. Such transgressions are not limited to IGCs – delegates of member states also act against communicative conventions. However, they are rare and they are, for the most part, not sanctioned but instead ignored.

Another far more frequent way of expressing critique is by way of conversational implicature. At IGC 13, the ILC Ethio Africa Union Millenium Council used the phrase “politricks” to express their view that international politics consist in large part of trickery. The Peruvian delegate made the indirect accusation that there had been “five years with no progress”, and that the committee was losing time with the “same chit-chatting as always”. The delegate from South Africa noted that one cannot just “come home with outcome-oriented deliberations”.

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This manner of criticizing other delegations, groups of delegations or specific strategies by implying something without explicitly saying it is quite common in the IGC. It is also part of the aforementioned statements by the African Group who referred to the "stalemate" of negotiations (see [11]). The speaker and associated participants were portrayed as active, implying others were being passive, and the misuse and misappropriation of TK and TCEs were criticized with the implication that those who do not act against this are complicit in the misuse. Reproaches, either in the direct form or by conversational implicature, frame negotiations and are contingent on having a recipient in mind.

The position of stalling delegations can be exemplified by a number of opening statements along the lines of those already outlined above. Similar to the interventions by speeding delegations, one can find instantiations of communicative patterns and strategies adjusted to their specific context. They contain the framing of the subsequent meeting and foreshadow the position a delegation is going to take. At IGC 14, for example, the delegation of Germany, speaking on behalf of Group B, and following a typical initial sequence stated that

[17] TK and TCEs had taken on new economic and cultural significance within the globalized information society. GRs had assumed increasing economic, scientific, and commercial value to a wide range of stakeholders with the emergence of modern biotechnologies. The conservation, sustainable utilization, and benefit sharing were already being addressed within a range of different policy areas and forums, including food and agriculture, biological diversity, biotechnology, public health, and economic development. The Delegation said that the contribution of TK and GRs to tackling global challenges would be reflected in discussions during the WIPO Conference on Intellectual Property and Public Policy, which would take place in July 2009. The Committee had a leadership role to play in addressing the IP aspects of the protection, promotion, and preservation of TK, TCEs, and GRs. In particular, Group B hoped for progress in identifying the policy objectives and principles for protection of TK and TCEs. It wanted to deepen its understanding of the issues related to TK and TCEs, and of the possible gaps in TK and TCE protection. [...] It agreed with other Delegations that the Committee could assist in bridging gaps in protection by producing tangible outcomes, such as guidelines and recommendations. Group B also hoped that the Committee would enhance its work on GRs. Concerning the international dimension of protection, it said that it was looking forward to discussions on the IP aspects of GR, TK and TCEs. The Committee should focus its discussion on the IP aspects, as a common understanding of these as-
pects would substantially advance the international dimension of the Committee’s work.¹³⁵

Included in this statement are aspects typical of stalling delegations. Among them are shades of an generalized affirmation of the process and a valuation of GRTKF as instrumental for various processes.¹³⁶ The statement mentions “a wide range of stakeholders” as the relevant social actors for the process. This implies that the construction of TK and TCEs as belonging to ILCs who are represented by some of the member states is contested. In conjunction with the reference to the various fora already discussing cultural property issues, the statement also delimits the scope of WIPO deliberations solely to intellectual property aspects. By using unspecific and pragmatically weak phrases such as “to deepen the understanding”, “could assist”, or “addressing the IP aspects”, the statement expresses a general willingness to participate in the work of the committee, but abstains from making concessions to the demands of the African Group, most notably the demand for a legally-binding international instrument. The flexibility or softness of verbs reveals the speaker’s position for the subsequent negotiations: he is unwilling to concede to claims by speeding up delegations, but does so without being too open and direct about it. Here, the non-pragmatic character of the statement with regard to progress of the committee is contrasted by a highly pragmatic conversational implicature clarifying the stalling stance of the delegation. Finally, by implying that a “common understanding” is lacking as of this session, the speaker justifies his stance: the understanding has to be deepened by further discussions, as a consensus cannot be found. This is complemented by the expression “the possible gaps in TK and TCE protection” that questions the existence of such gaps until they are proven by the technical work of the committee. The non-specificity of the statement as to the specific steps to be taken by the IGC can thus be understood is a way of stalling the negotiations. It is an example of recipient design and the instantiation of underlying communicative strategies and patterns, related to the statements of speeding up delegations by affirming some aspects of them, such as the general appreciation of TK, TCEs, and GRs and the possibility of gaps in their protection, while contesting others, meaning a shared understanding of intellectual property aspects.

With regard to text-based negotiations, the statement by the Singapore delegation at IGC 14 illustrates how stalling delegations justify their reservations against this specific mode of work:

¹³⁵ WIPO/GRTKF/IC/14/12:6, my italics.

¹³⁶ This conceptualization of TK and TCEs as resources for modern technology is noteworthy and one possible perspective on the substantive issues discussed in the IGC.
However, it expressed concerns with some elements in the proposal, such as moving to text-based negotiations given the present lack of consensus on many fundamental concepts, the limited range of issues for discussion, the proposed timelines, and the use of a restricted range of documents for the Committee’s work.\footnote{WIPO/GRTKF/IC/14/12:20.}

It is argued that this approach would have negative influences on the work of the IGC as it was too early to proceed with a more focused method of work. However, the reason given is not a lack of motivation or willingness to move forward, but a lack of consensus and understanding. In a similar vein, the U.S. delegation at IGC 14 argued that

[...] much work remained to be done at the international level including the unfinished analytical work of the current biennium. [T]he Delegation believed that the acceleration of the substantive work of the Committee held the greatest promise of reaching the consensus that was necessary to advance its work. [N]o outcome of the Committee, including the adoption of an international instrument or instruments addressing the preservation, protection and promotion of TK, TCEs and GR, should be excluded and, similarly, no outcome should be prejudged. [...] The African Group was thanked for tabling its thoughtful proposal for the renewal of the mandate and the Delegation was reviewing it closely under the general positions and principles that have informed its participation in the Committee. It was interested in learning more about the proposal from its proponents, about the views of other delegations, and about the financial and administrative implications of the proposal from the Secretariat. [...] The list of ten issues on both TK and TCEs provided a useful framework for facilitating the kind of sustained and focused discussion of these issues needed to reach a consensus on these important issues. The Delegation continued to believe that the Committee had begun to make some progress in identifying the possible gaps in the existing framework for the protection of TK and TCEs, including identifying certain options that the Committee might wish to consider addressing any such identified gaps. At its last session, however, the Committee barely scratched the surface of its deliberations on this important topic. Much work remained to be done. Against a background of high expectations, the Delegation shared the frustration of many other Delegations with the slow progress of the Committee over the last two years. Nonetheless it looked forward to a positive outcome at the fourteenth session and would be willing to support a
recommendation to the General Assembly to renew the mandate for another two year period.\textsuperscript{138}

The typical aspects outlined above are included in this statement. However, the most interesting aspect is the framing of stalling delegations as unsatisfied with the situation as well. The reasons for the slow progress are said to be the nature of the substantial issues as well as analytical work that has to be done in order to proceed to the next stage of negotiations. The argument is that technical issues hinder the adoption of a legal instrument, and that the U.S. delegation and other Group B states are as interested in finding a way to protect the TK and TCEs of ILCs as the typical speeding delegations.

Yet, implied in phrases like “being interested in learning more” and “looking forward to a positive outcome” is the rejection of the demands of other delegations and their demands: Group B is critical of a new international legally-binding agreement, but openly telling the African Group their demands will not be met would likely result in more direct confrontation. Using implicature is thus a way to convey this position more subtly and less confrontational. The combination of portraying the work of the IGC as unfinished (“barely scratched the surface of its deliberations on this important topic”, “much work remained to be done”) on the one hand, and expressing the hope of making substantial progress on the other is indicative of such a strategy. Judging from the reactions by other delegations to such statements and drawing from conversations and interviews with participants, most delegates are aware of this strategy. Yet, it constitutes a documented position of the specific delegation that is hard to contest. On the surface, delegations in this manner do offer a positive evaluation and an expression of willingness to achieve progress. This is the advantage of conversational implicature or “diplomatic non-indexicality” (Silverstein 1976): the assumed indexical meaning of the statement is only that, assumed. The speaker of an utterance can thus not be held directly accountable for its implied pragmatic aspect, as the actual semantico-referential meaning is hard to criticize.

At IGC 15 the Swedish delegation, speaking on behalf of the European Union and its member states, was confronted with having the term “text-based negotiations” included in the new mandate. The delegation expressed that it

\[20\] [...] looked forward to a constructive, efficient and fruitful meeting.

It said that it remained committed to making progress in the important issues under the Committee’s agenda and attached great importance to its work. It acknowledged that the Committee had a leading role in addressing the IP aspects of protecting, promoting and preserving TK, TCEs and GRs, and strongly welcomed the decision of

\textsuperscript{138} WIPO/GRTKF/IC/14/12:19–20.
the General Assembly to renew its mandate. It hoped that the re-
newed mandate would imply an accelerated and more construct ive
work within the Committee. It recalled that the discussions had for
some time focused on the issue whether the outcome of the Com-
mittee’s work should be legally binding or not and stated that the re-
newed mandate allowed for both options. It added that the Commit-
tee’s work needed to get some positive momentum by constructive
discussions on basic substantive issues. It said that once a broad
agreement in substance would be reached, the Committee could
come back to the issue of the legal character of the legal instrument
or instruments that the Committee was requested to submit to the
2011 General Assembly. […] It recalled that the Committee had
worked on the interplay between intellectual property and TK, TCEs
and GRs for more than eight years and that significant achievements
had been made during this time. It was however of the view that a lot
of work was still to be carried out. Many difficult questions regarding
the essence of the sought protection and its interplay with existing
intellectual property rights needed to be analyzed and answered.139

Again, this statement shows common aspects for stalling. It also highlights the sig-
nificance of a contextual analysis of these aspects, as it makes reference to the new
situation by modifying the instantiation of an underlying stalling strategy: given
that the mandate for the IGC was renewed by WIPO’s GA prior to the meeting
and that the new mandate included “text-based negotiations” as a mode and that
work on drafting an “international legal instrument”140 was necessary, stalling delega-
tions had to adapt to this new situation. Stalling tactics used at prior IGC meet-
ings would not have been sufficient to counter this strong mandate. What can be
observed then are attempts to reframe the wording of the new mandate in order to
make it less binding and more favorable for stalling delegations. This is achieved by
arguing that the question about the specific legal nature of a possible instrument
would hinder a quick agreement in the IGC, and that this question could be settled
at a later point of time. Moreover, it is stressed that the committee has already
achieved a lot of substantial results, thus taking away some of the pressure.

139 WIPO/GRTKF/IC/15/7:10.
140 The final text of the renewed mandate is similar to the proposal by the African Group at IGC 14
(14]). It includes the main aspects of this proposal by keeping the phrases “text-based negotiations”
and “international legal instrument” with some modifications that can be described as the result of a
micro-editing process: “The Committee will, during the next budgetary biennium (2010/2011), and
without prejudice to the work pursued in other fora, continue its work and undertake text-based ne-
gotiations with the objective of reaching agreement on a text of an international legal instrument (or
instruments) which will ensure the effective protection of GRs, TK and TCEs.” (WIPO/GRTKF/
IC/15/Ref. Decision 28)
In conclusion, opening statements consist of a variety of different aspects reaching beyond the initial sequences. They are both a possibility for the speaker to pave the way for subsequent negotiations, and for the listeners to gain insight into the position and strategies the delegation will follow. It appears that uttering the greeting has become a sign of accepting the nature of the speech community’s rules, a signal that one is willing to play by those rules, as well as a speech genre that allows one to express attitudes toward potential results or even just the generating of results without having to be specific.

Aside from the functions of initial sequences, opening statements contribute to framing different positions and strategies at the beginning of a session. By stressing terms such as “practical”, “effective”, “comprehensive”, and “harmonious” in their greetings, some delegations signal their interest in making progress, others go further and demand more speed through “improved results” or “tenable progress”. Yet others are more interested in stalling, such as Group B who during the February 2008 meeting included in their opening intervention the phrase that it was important to them “to continue the discussion and learn more” – that is, a leaning back and waiting approach. Opening statements thus consist of recurring and flexible patterns and strategies contingent on their specific context, usually drafted in anticipation of a recipient’s position and reaction. During IGC meetings, the dialogic quality of opening statements results in the construction of oppositions, primarily between member states interested in progress and others not interested in changing the status quo. This construction is the result of communicative interaction and opposing interests of state actors rather than a planned and intentional process. These oppositional perspectives are framed in the process of statements by instantiations of superordinated communicative patterns and strategies, adapted to the specific needs and configurations of a situation.

Part of this framing process are “shifters” (Silverstein 1976:24), referential indexes whose reference shifts regularly, depending on the contextual variables of a communicative event. According to Silverstein, the referential value of a shifter “depends on the presupposition of its pragmatic value”. That one is interested in learning more about some specific issue, for example, includes the presupposition that one has already learned about this issue before. The dependence on contextual information and presuppositions by many participants of a communicative event thus causes uncertainty as to the specific pragmatic and referential meaning of an utterance. This is because the meaning of shifters changes from context to context, but also from recipient to recipient. “Interested to learn more” can mean that

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141 Aside from the implicature of such an expression, it is of course a legitimate argument to request extensive discussions and to try to reach a consensus on many levels. Likewise, “stalling” the IGC process is not to be understood as a normative evaluation, but it is – just as “speeding up” – a legitimate position for state actors to take.

142 Silverstein notes that these shifters are called “duplex signs” by Jakobson (1971).
the speaker really wants to learn more, but at the same time a contextual analysis of this utterance elicits its pragmatic value that the speaker wants to stall the negotiations. Yet, on the semantic level this pragmatic value can be denied. The indeterminacy and variability of shifters makes it possible to use them as part of pragmatic strategies for opening statements, for example allowing a signaling of position to the recipients of a communicative event without explicating the implications and presuppositions of an utterance.

This can be illustrated by two examples based on the diverging interests of delegations. First, speeding up delegations often refer to indigenous and local communities as social actors suffering from the misuse and misappropriation of their TK, GR and TCEs. In opening statements, this is one of the key arguments of speeding up delegations for the validity of their demands, as well as for the urgency and importance of a legally-binding instrument. Yet, this position is accompanied by the presupposed view – at least for many African countries – that in the last instance there are no specific indigenous groups in their countries because the majority of Africans are indigenous. Accordingly, cultural property was to be held and managed by the “competent national authorities” and not by autonomous indigenous organizations. This position was heavily criticized both by ILCs and Group B member states holding the view that indigenous groups should be the main beneficiaries of a potential legal instrument. The proxy-representation of ILCs by member states, including the pragmatic value of the state as the quasi-beneficiary, was to some extent veiled by the referential value of the statement that urgently called for the adoption of a legal instrument to benefit ILCs.

Second, stalling delegations frequently stress their willingness to contribute to the discussions and achieve progress. These utterances are in most cases accompanied by reservations as to the specific approach and technical possibility of coming to a quick conclusion. A lack of shared understanding, outstanding analytical work or other constraints are cited making it problematic to come to an immediate consensus. Again, these utterances function as shifters that have different contextual meanings on the pragmatic and referential level, as well as the capability to veil the strategic dimension of an utterance to some extent.

How can the function of such shifters in international negotiations such as WIPO’s IGC be best explained? I argue that what Urciuoli calls “strategically deployable shifters” is a useful concept for understanding these processes. Using the example of specific terms such as “multiculturalism” in college marketing, she examines their pragmatic quality in relation to the specific contexts they are used in:

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143 This phrase is part of the “Draft Articles on the Protection of Traditional Cultural Expressions Prepared at IWG 1” (WIPO/GRTKF/IC/17/9) from September, 2010. The document was discussed in depth at IGC 17 in December 2010. The phrase “the competent authority” was part of the section on the management of rights and was mainly defended by African delegations with the rationale that GRTKF was to be managed by the state. However, this was not argued openly.
In these institutional registers and discursive fields, terms like skills, communication, leadership, citizenship, multicultural and diversity can serve as strategically deployable shifters, or SDSs. By this I mean a lexical item or expression deployed in different discursive fields so that, in effect, people using term X in a referring expression in field A are engaged in a different pragmatic activity from those using the formally identical term X in a referring expression in field B. The salient interpretation of the term depends on the relation of its user to its audience and so shifts with context; in that sense SDSs have shifter-like qualities. These qualities are most evident in the differential deployments of multiculturalism in various education-associated fields […]. (Urciuoli 2000: n. pag.)

The strategic dimension to these shifters is of importance to specific terms and utterance fragments in the IGC as well. Their distinctiveness in this context lies not only in “shifting” between contextualized referential and the pragmatic meaning of an utterance, but also in the strategic use and conscious choice to employ these terms. Thus, the phrase “text-based negotiations” is contingent on the context of its use and the speaker who uses it. It can mean various things, but used by a speeding up delegation at a specific point of time, it refers to a very specific presupposition that implies the drafting of a treaty or convention. Similarly, phrases like “to deepen the understanding”, or more generally the use of “soft” verbs with little pragmatic implication (“to recognize”; “to consider”) reflect certain strategies of stalling delegations. However, their specific meaning and interpretation by recipients depends on the context of the utterance or “the relation of its user to its audience” (Urciuoli 2000: n. pag). They are strategically deployed in negotiations, e.g. in order to establish certain frames, to rebut the arguments of opposing parties, to doubt the willingness of other delegations to achieve progress, or to question the saturation of negotiations. Such shifters realize a contextualized signaling function that hints at realms of shared understanding between groups of participants or alliances. Aside from their semantico-referential meaning that is, as Urciuoli argues, often denotatively empty, there is a two-fold indexical meaning. Terms like “text-based negotiations” are powerful not only because they denote a specific concept, but because of their indexical and pragmatic values. An affirmative use of the term highlights the strategic position of actors who want to exert pressure and it signals this position to other delegations. The substantive framing in terms of general position of a delegation is thus accompanied by a strategic framing outlining possible actor positions to be taken in negotiations. The substantive framing in terms of general position of a delegation is thus accompanied by a strategic framing outlining possible actor positions to be taken in negotiations.

Strategically deployable shifters are not limited to separate terms. They also include specific phrases and expressions and even syntactical constellations such as “analytical work”, “exploitation” and “piracy”, “to continue the discussions and
learn more” as well as the combination of soft verbs with relatively strong nouns (as in “to recognize the importance”). Their meaning is contingent on their specific context which includes substance, strategy, as well as the relation of a given speaker to his audience. They establish different referential frames and discursive fields that allow for pragmatic strategies often only thinly veiled, such as expressing commitment for the process while arguing for the impracticality of an agreement. Shifters are embedded in opening statements drafted in anticipation of a specific audience that consists of possible allies and opponents. When pointing to a shared understanding of substantive questions and shared strategic positions they index possible alliances. As such, shifters can be described as “pivotal devices” within these statements, realizing different indexical functions. By indexing negotiating positions, they differentiate between actors and interests and refer to perspectives with regard to the substantive issues negotiated in the IGC. As they are shifting depending on context, it is necessary to reflect this flexibility and resulting ambiguity at the analytical level. From the perspective of IGC participants, it is necessary for the speaker of an utterance to take the context into close consideration, as a shifter is only conducive to one’s interests if it is used in the “right” way.

The specificity of shifters for opening statements adds to the overall importance of this conversational genre. Not only does it function to acknowledge and accept norms, conventions and organizational constraints, give insight into a delegations’ position, and to prepare strategies and legitimate them. It can also – depending on the shifter or the composition of shifters that is used – signal general or specific actor group positions. Shifters not only differentiate between positions, they also map commonalities and common ground between actors who otherwise hold incommensurable positions. They also mediate between different actors, contribute to the cohesion of the committee and allow for the expression of fundamentally different viewpoints – and this is the foundation of the possibility to negotiate. This is of course not to say that they enable progress in international negotiations. However, they are a way for actors to exchange highly divergent views while at the same time creating a discursive space that allows this exchange.

Utterances recognizing the importance of TK, TCEs and GR exemplify this, and both representatives of stalling and speeding up delegations use them. Looking at them in context and in relation to the speaker, the first group of actors makes use of them to create a basis for stalling. As they affirm the general goal of the committee and highlight the importance of their work, stalling strategies can be legitimated by a technicalized discourse that projects the reason for stalling onto procedural and technical questions such as a lack of analytical work. Those who wish to see more rapid progress use these utterances and the ideational foundation they create to argue for a quick agreement and the implementation of their claims. Even the use of IGC terminology such as “traditional knowledge”, “traditional cultural expressions”, “genetic resources” and “indigenous and local communities”, – contributes to the creation of common ground and a degree of shared
understanding. While there is thus the expression of commonalities implied in these utterances, they also include a more specific reference that differentiates between groups of actors, strategies and goals. How opening statements are composed leads to this situation that both stresses basic commonalities and emphasizes nuanced distinctions. Situated at the beginning of an IGC session, they establish different referential frames as well as an underlying sphere that is agreed on and enables the discussions to proceed. Furthermore, they signal alliances and create opposing actor positions by including strategically deployable shifters.

For this reason, opening statements can be conceptualized as “boundary objects”. The term stems from the work of Susan Leigh Star and James R. Griesemer (1989) who analyzed communicative processes among actors connected to Berkeley’s museum of vertebrate zoology. Their question was how social cohesion could be maintained, given the wide variety of actors and viewpoints. They found the situation was managed by using boundary objects:

Boundary objects are objects which are both plastic enough to adapt to local needs and constraints of the several parties employing them, yet robust enough to maintain a common identity across sites. They are weakly structured in common use, and become strongly structured in individual-site use. They may be abstract or concrete. They have different meanings in different social worlds but their structure is common enough to more than one world to make them recognizable means of translation. The creation and management of boundary objects is key in developing and maintaining coherence across intersecting social worlds. (Star and Griesemer 1989: 393)

The combination of opening statements that include shifters and other instantiations of communicative patterns and strategies also features in the construction of such boundary objects. They enable actors from “intersecting social worlds” to maintain a coherent and stable identity, in this case of the IGC as a speech community, while encompassing diverging and incommensurable viewpoints. The resulting speech community is flexible enough to include these different perspectives as it draws from a coherence established by common factors, terms and viewpoints. Boundary objects, in the context of the IGC, mediate between the two main positions of stalling and speeding delegations.

Neither boundary objects nor strategically deployable shifters and the recipient design of opening statements are static, but are subject to dynamic processes influenced by the composition of actors and strategies. Boundary objects and shifters can signal a specific stage in negotiations, as illustrated by the phrase “text-based negotiations”. This flexibility is also the result of how young the IGC is. If the speech community cannot draw from an longer history and stable communicative conventions, shifts in meanings and understandings are more likely to happen. At the same time, it is part of the nature of international negotiations that continual
attempts are made to redefine and reframe the context to gain an advantage in position.

A counter-proposal by the European Union illustrates this point. It was formulated in reaction to a proposal by the African Group\textsuperscript{144} at IGC 13 in October 2008. The proposal was referred to in the EU’s opening statement and included a relatively strongly-worded preamble uncommon for stalling delegations:

[21] The IGC acknowledges the intrinsic value of these issues which are also important in global trade and economic development. Indigenous and local communities have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural heritage. In this respect, the IGC will prepare a declaration on the value of traditional knowledge, traditional cultural expressions and genetic resources and their protection against misappropriation to be adopted by the WIPO General Assembly.\textsuperscript{145}

The relative clarity and openness of this preamble, including an uncommon reference to the misappropriation of GRTKF, is primarily possible because the beginning of the proposal is followed by rather weak paragraphs that do not mention text-based negotiations and use the phrase “outcome-oriented deliberations” instead. They also do not make any larger concessions to demands by the African Group.

However, the shift from phrases like “to recognize the importance” to a critique of misappropriation is noteworthy, as it illustrates the awareness of stalling delegations that the specific context of IGC 13 called for a different manner of framing the subsequent negotiations. Using less strong wording would have led to a lack of boundary objects constituting a shared sphere mediating between stalling and speeding delegations. As a strategically deployable shifter, this wording is still mostly semantically empty.

By modifying the text of an opening statement, the EU was able to provide an instantiation of an underlying communicative strategy that fit the specific context of negotiations. For that reason opening statements contribute to the processes of negotiating cultural property within the IGC in a significant way. Their analysis reveals communicative patterns, conventions and strategies that are valid for other communicative events of the IGC and other international fora.

The 16\textsuperscript{th} session of the IGC was the last to include opening statements on its agenda. Since IGC 17 in December 2010, the procedure of these long-drawn initial

\textsuperscript{144} WIPO/GRTKF/IC/14/8 Rev.
\textsuperscript{145} WIPO/GRTKF/IC/14/11.
statements has been abandoned.\textsuperscript{146} This was part of a larger attempt by the chair of the 2010-2011 biennium, Ambassador Philip Richard Owade of Kenya, to move negotiations ahead. In his opening remarks of IGC 17, he announced that he would put more stress on the observation of time allotted to agenda items and be very punctual about keeping to this schedule. He hoped “to continue with the journey” and the “course we have set”, that there was a “momentum to be maintained” and a “chartered out course with time-lines” for this “working meeting”. The “positive dynamism” of the first inter-sessional working group (IWG 1) and its great success should be maintained by “making the most effective use of time”:

Focus was therefore required and any attempts to detract or sidetrack the Committee had to be resisted. He implored the Committee to collectively chart out the most direct path to its destination. As Chairman, he would help to steer the process and, in doing so, endeavor to exercise fairness and impartiality. However, coming from a developing country in Africa, he could not be oblivious to the desires of millions of people from his continent and other developing countries for whom a legally binding instrument for the protection of GRs, TK and TCEs should already have been concluded. There was no doubt that the Committee had exhausted the preliminary deliberations and needed to move straight to the norm-setting mode. A legally binding instrument was long overdue to combat bio-piracy that had proceeded unchecked for decades.\textsuperscript{147}

Thus, there were “no opening or general statements”, the sessions would continue during regional meetings, and there were no official tea or coffee breaks. A “precise working methodology” and a focus on the “substantive work of the meeting” were to achieve tangible results (author’s notes, IGC 17).\textsuperscript{148}

Though opening statements have been abandoned, the associated communicative patterns and strategies are still present. Indeed, an earlier attempt to change communicative habits, namely during the IGC 12 in early 2008 was not notably successful. After more than two days of opening statements, the chair of the session decided to switch into an “informal mode” of negotiations. Yet, subsequent statements did not differ significantly from previous ones, with parts of the initial sequence reproduced by delegates, though by that point, most member states had already made their statements.

\textsuperscript{146}See WIPO/GRTKF/IC/17/INF/3 for the agenda of IGC 17.

\textsuperscript{147}WIPO/GRTKF/IC/16/8: 4.

\textsuperscript{148}In an interview with the delegates of Switzerland, they stated that the chair’s influence can be significant in negotiations, both in formal and informal sessions, but that this was also contingent on the chair’s competence and way of chairing the session.
When asked, the chair said the “informal mode” was chosen to encourage national delegations to engage in “a more flexible and vivid discussion”. Delegates were not to repeat themselves and limit themselves to “new” statements, though this, too, was not adhered to.

In the EU’s internal consultation, delegates were baffled as to what the chair wanted, nor did most of them understand what this “informal mode” entailed. However, some delegates did note that it was common to switch to an informal mode to speed up negotiations with regard to coming to a decision about future work to be done. Both delegates and the chair thus were (and are) cognizant of the inefficiency of the conversational genre being used. The underlying communicative patterns are found in other communicative events as well. One reason for this clearly is that some delegations do not mind this inefficiency, or even deem it helpful for their interests. Patterns and strategies of opening statements therefore are both common and significant for the IGC in its entirety, and they persist although the conversational genre as such does not exist anymore.

**Referential Frames in the IGC**

Actors in the IGC face a process-oriented component of communicative events within the speech community that leaves them partly unsure about the events’ conventions. They nonetheless have to take in account already established patterns, both in opening statements they make and in other conversational genres. The indexical features of specific utterances are thus only in part collectively understood and hence viewed as binding. The committee itself, however, produces text, including written decisions on future work the committee is to undertake, proposals for the wording of future agreements, or definitions of the core items under negotiation. There are also written reports of the sessions that reproduce, almost verbatim, statements that are made during the meetings. The written documentation, in particular, gives the language used in the IGC its binding character.

Committing to a specific phrase in official decisions taken by the IGC creates a fixed point of reference. Participants in the speech community who are opposed can use it to their advantage or disadvantage during subsequent meetings, for example to speed up or stall the proceedings. A number of such indexical markers can be heard during the sessions, including:

[22] taking into account the previous work of the IGC

[23] without prejudice to any outcome

[24] text-based negotiations
These devices blur and burden any future work of the committee by making reference to existing yet not adopted and thus controversial texts [22], by not making concessions to any form of potential legal instrument [23], or by making a commitment to a specific kind of negotiation procedure that can lead to a binding agreement [24].

What they share is that they are based on the contingencies of linguistic rules of interaction and interpretation. Analyzed without knowledge of the context, these examples appear to be “neutral” phrases without much impact. Of course a committee in existence since 2001 should, seven years later, not have forgotten all the substantive work it has carried out. Of course, negotiations should remain open, avoid lock-in effects and consider different outcomes. Of course, text-based negotiations have the advantage of being more transparent, open to scrutiny and reflecting the opinions of all participants. Yet, these phrases have indexical meaning and pragmatic implications that can make them – depending on what one’s stakes and interest in the IGC process are – less desirable for participants in speech acts than they appear to be at first sight. Bakhtin uses the notion of “typical expressions” to describe a patterned form of the recurrence of certain phrases in speech genres that during the course of repeated communicative interaction have taken on a specific semantic or pragmatic meaning:

When we select words in the process of constructing an utterance, we by no means always take them from the system of language in their neutral, dictionary form. We usually take them from other utterances, and mainly from utterances that are kindred to ours in genre, that is, in theme, composition, or style. Consequently, we choose words according to their generic specifications. A speech genre is not a form of language, but a typical form of utterance; as such the genre also includes a certain typical kind of expression that inheres in it. In the genre the word acquires a typical expression. Genres correspond to typical situations of speech communication, typical themes, and, consequently, also to particular contacts between the meanings of words and actual concrete reality under certain typical circumstances. Hence also the possibility of typical expressions that seem to adhere to words. This typical expression (and the typical intonation that corresponds to it) does not have that force of compulsoriness that language forms have. The generic normative quality is freer. (Bakhtin 2007:87)

This holds especially for phrases such as “text-based negotiations”, which after repeated use take on the character of typical expressions. At the same time, these expressions and their meaning depend on a shared understanding and shared norms of interaction and interpretation.
In situations of contingency, such as in a relatively new speech community that brings together diverse actors, the interpretation of the semantic and pragmatic meanings of such expressions is unstable. It can vary depending on context, speaker and recipient, and its meaning can be contested by various actors. This instability or indeterminacy of meaning can be both advantageous and disadvantageous for actors. On the one hand, if the utterance of a typical expression has the desired effect, the speaker can affirm the prescribed meaning. An example can be seen in the following statement by Zimbabwe that was made in the context of discussions on the future mandate of the committee for the 2010/2011 biennium at IGC 14:

[25] My limited knowledge would only confine me to refer those delegations who have concerns with the term text-based negotiations to review or revisit UN language. It is a common terminology. Right now what we are doing, we have a text in front of us – that’s text-based negotiation what we are doing. There’s a text in front of us we are negotiating to improve the text that is there. And paragraph 3 clearly spells out the recommendations that we will be looking at. So if delegations have problems with the documents cited, they should not hide behind the finger, pretending not to understand the term, a UN terminology, text-based negotiations. For me it’s ironical and it’s unacceptable. It’s difficult to understand what we are doing here if certain delegations think that they don’t understand whilst they understand a UN terminology which is commonly used everywhere.149

Here, the repeated usage of the term “text-based negotiations” in UN negotiations is used to bolster the argument that it is indeed a fixed term with clear implications as to the procedures of such negotiations, and that deliberations about the specific meaning of the term are primarily efforts to sabotage the work of the committee. According to an Egyptian diplomat based in Geneva, the concept of text-based negotiations unambiguously denotes the drafting of a text as the basis for a treaty or a convention; the term signals an advanced stage of negotiations with available documents that can function as reference texts for a draft text.150 Instead of a non-committal exchange of opinions and positions on the substantive issues under negotiations, in text-based negotiations text is actually drafted and agreed upon.

149 Statement on WIPO/GRTKF/IC/14/8 Rev. by the Zimbabwean delegate at IGC 14, 1 July 2009.
In [25], the delegate from Zimbabwe is referring to documents (“recommendations”) proposed by the African Group to be the basis of negotiations.151 The indexical meaning of the term “text-based negotiations” within the UN system is both emphasized and is claimed to be commonly used. The delegate argues that “text-based negotiations” means, as a matter of course, negotiations based on a given text, and that is what a committee working towards an agreement should do. Pointing out the shared use of the phrase and its conventionality is a means for participants of the speech community who want to speed the proceedings and reach an agreement to put pressure on delegations who are unwilling to agree on this specific method of negotiation. Having an exchange of opinions, commissioning fact-finding missions and gap analyses, or deciding what should be done during the next committee meeting is far less binding than actually working on specific paragraphs of a potential legal instrument. “Continuing the discussion” and “learning more about the issue” are the corresponding phrases that signal a stalling position, where advancing to the next stage of negotiations – towards some sort of agreement – is not wanted.

Arguing that “text-based negotiations” are a common term and a common approach in international negotiations is a way to impose, or foster, a process on other participants. It is a communicative strategy used by the African Group to strengthen their demand for a legally binding instrument: if the ordinary sequence in committees like the IGC is to proceed on to text-based negotiations after extensive phases of fact-finding, analysis and oral negotiations, then rejecting this phase of doing so can be discursively portrayed as a refusal to move forward, and thus to stall the process. To “continue discussing” and “learn more” would in this context not primarily be viewed as interest and willingness to broaden the knowledge-base of the committee, but rather as a signal that one does not concur with the demands of the opposing party. In this specific case, it is a way for Group B and the EU to say that they are not willing to give in to the African Group’s demands and commit to a legally binding agreement.

In the context of the specific example given, the discussions were about the text for the new IGC mandate to be decided by WIPO’s general assembly. It was thus of considerable relevance that what would be included in the text had to be agreed upon by the committee, as this would determine the work to be done by the IGC during the next two years. If “text-based negotiations” can be framed as a “natural” subsequent step in committee meetings, the rejection of such negotia-
tions would thus not only be associated with a position of seeking clarity on issues, but also with blocking the decision about the new IGC mandate.\textsuperscript{152}

A way to establish the conventionality of a term or a phrase when it is being contested by some participants in the speech community is to underline its previous use by the opposing party. If they used the term in the past, arguing it was common to international negotiations, asking for clarification of its exact use appears misleading and spurious:

[26] As to my colleague who wanted to know what we meant by text-based negotiations: I would remind you that in other fora the EU has proposed text-based negotiations as a phrase. And in many negotiations this phrase is used, text-based negotiations, and now we are being asked to define it when it is in common use.\textsuperscript{153}

Here, the Angolan representative, as a member of a speeding up delegation, responds to a question by the EU and other delegations as to what the phrase “text-based negotiations” means and what it specifically implies. He argues that the phrase is common in international negotiations and suggests that the question by the EU was mainly used as a way to stall the process, in this case the discussion on the future work of the committee as well as the new mandate for the IGC outlining the subsequent work programme. For parties cautious of the practice of text-based negotiations, it is risky to openly and directly contest the concept behind the term and the implied procedure, as this could be viewed as a refusal to commit to progress in the IGC in the form of a legally binding instrument. As some members of the African Group have stressed in the course of negotiations, such a refusal could be the reason for some delegations to leave the negotiation table. It is thus more conducive for stalling parties to ask for clarification on what the proposed approach of “text-based negotiations” entails than to state an obvious direct opposition:

[27] Our comment in relation to the term text-based negotiations in paragraph 2\textsuperscript{154} was more specifically around the fact that we asked questions of clarification yesterday afternoon in relation to what is meant by that term. And that pending a response to our question in relation to that we like the term to be bracketed and that pending a response

\textsuperscript{152} This is one reason for the “micro-editing” of texts (Groth 2010a). Stalling participants edit decisions about future work to keep the balance between showing a willingness to advance negotiations and not committing to too much.

\textsuperscript{153} Interpreted statement on WIPO/GRTKF/IC/14/8 Rev. by the delegation of Angola, 03.07.2009.

\textsuperscript{154} WIPO/GRTKF/IC/14/8 Rev., para. 2: “The Committee will undertake during the next budgetary biennium (2010/2011) text-based negotiations on genetic resources, traditional knowledge and traditional cultural expressions.”
we would also like to propose an alternative wording, so we are not proposing that it be deleted at this stage.\textsuperscript{155}

In response to the delegate of Zimbabwe, the representative of New Zealand – despite the open and direct accusation that they are only “pretending not to understand the term” – continues to ask for clarification of the term “text-based negotiations”. This is possible because stalling delegations can argue that the explanations given as to what the term implies were not sufficient.

Another statement by the representative from Zimbabwe went even further, talking about “usual tricks” and the “questioning of simple terms and concepts”. According to him, “even UN standard terms have been questioned, so maybe next time we should use a dictionary”. He concluded with the analogy that he had “realized that the mother can not take care of its child”, and that thus speeding up delegations could pursue the issues outside the IGC. However, his statement remained unanswered, and stalling delegations continued to ask for clarification and eventually introduced an alternative phrase. IGC negotiations are slow. Especially in the plenary session, in most cases there is no direct communication, meaning there is no immediate response by an addressee to a speaker’s question. Even though a number of African Group delegations already explained the intentions and implications of WIPO/GRTKF/IC/14/8 Rev. and especially the approach behind text-based negotiations openly and directly, it is nonetheless possible, meaning not sanctioned, to ask for clarification and express reservations about a term’s vagueness. Participants arguing for the inclusion of the phrase in most cases cannot respond directly to these reservations, as there is a list of speakers managed by the chair of the meeting. Hence it is “safer” for stalling parties to contest a phrase as being too vague or ambiguous – denying the possibility that it is a typical expression – than to openly state that one does not want to proceed to new and advanced stage of negotiations. Directly denying one’s willingness to further the negotiation process would be unfavorable for a variety of reasons.

The reason why such indirection with regard to phrases like “text-based negotiations” is chosen is that even stalling delegations are interested in the continued stability of the committee, and one can assume they are aware of the implications and indexical meaning of the phrase to mean drafting text that will be the foundation for an international treaty or convention. It is, however, not in their interest to work toward a situation where a decision on adopting a text is imminent and their rejection of such a text would have to be made explicit.\textsuperscript{156} Indirect communicative

\textsuperscript{155} Statement on WIPO/GRTKF/IC/14/8 Rev. by the delegation of New Zealand at IGC 14, 01.07.2009.

\textsuperscript{156} The IGC’s mandate for the 2010/2011 biennium called for a diplomatic conference at the end of the biennium that was to decide on such a text. Presumably, a conference would include a vote on a legal instrument where delegations would have to consent or dissent, thus making their position explicit.
acts – such as asking to clarify a common term instead of overtly dissenting with the practice of text-based negotiations – are ways to maintain the committee’s stability, even if this stability only entails that member states do not walk away from the negotiation table and continue the discussions. In this sense, maintaining stability is also a strategy of containment, limiting the discussions about the relation between GRTKF issues and intellectual property to the IGC and keeping them out of other fora like the WTO.

Another aspect of indirection in international negotiations is what can be termed the saturation of the negotiation process. Here, stalling actors doubt that enough information has been gathered or that enough analytic work has been done, and the opposite is true of speeding up delegations. By questioning the saturation of the process, the basic goals of the committee can be affirmed while the actual process is stalled. Both aspects – the construction of stability and the construction of saturation – will be illustrated in the following.

Regarding the aspect of stability, sustaining the “discursive illusion” of a shared venture to do good and protect cultural property from misappropriation is achieved by pragmatic strategies that contest denotationality. These strategies thus also contest a shared understanding of certain phrases that are inopportune to one’s interests and goals. If an utterance has an undesired effect, the speaker can deny the prescribed meaning, and ask for clarification as to the specific implications. This entails a construction of the speech community both as a rather unstable entity with contesting denotations and presuppositions and a cohesive group of political actors all ascribing to universalistic values relating to cultural property. The basic motivations, principles and goals of the committee are reaffirmed, yet at the same time more specific aspects of communicative events are being displayed as vague and in need of clarification. This is a common practice in political contestation, and pragmatic terms like “text-based negotiations” (as a mode of negotiation) are just one example of such simultaneity of stability of ideology and instability of practice.

Showing a commitment to the core issues of negotiations can be accomplished using abstract wording as the following proposal by the European Community from IGC 14 shows:

[28] The IGC reaffirms its belief that traditional knowledge and other tradition-based creations, such as traditional cultural expressions, have taken on new economic and cultural significance within a globalized information society and that genetic resources have assumed increasing economic, scientific and commercial value to a wide range of stakeholders with the emergence of modern biotechnologies. The IGC acknowledges the intrinsic value of these issues which are also important in global trade and economic development. Indigenous and local communities have the right to maintain, control, protect
and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural heritage. In this respect, the IGC will prepare a *declaration* on the value of traditional knowledge, traditional cultural expressions and genetic resources and their protection against misappropriation to be adopted by the WIPO General Assembly.\(^{157}\)

The broader ideational frame of reference for negotiations on cultural property entails that indigenous and local communities should have the rights to control, protect and develop their intellectual property, which is reflected in their cultural knowledge and expressions. This frame of reference implies an intrinsic value of cultural resources and speaks against their misappropriation. This connects the community of states and NGOs in international processes and creates the image of shared interests and motivations. Yet, this frame of reference has an only weak indexical meaning, meaning the specific pragmatic consequences of such generalized statements and sentiments are few. In the specific situation of \(^{28}\), tabling such a proposal was a possibility to foil a much stronger proposal that included more concrete and binding wording as referred to in \(^{25}\), \(^{26}\) and \(^{27}\). The European proposal accordingly goes on to propose

\[29\] *outcome oriented deliberations* on genetic resources, traditional knowledge and traditional cultural expressions, based on their impartial treatment and noting the different levels of development in the texts.

While one frame of reference with weak indexical meaning – here, the allegedly shared presupposition that the committee has to act in favor of ILCs – is affirmed, another frame of reference with stronger indexical meaning is contested. An agreement on “text-based negotiations” as a mode of work would entail more specific mechanisms\(^{158}\) than, for example, “outcome oriented deliberations”. The former would effectively speed up the proceedings considerably, whereas the latter would mean a continuation of non-committal negotiations.

\(^{157}\) WIPO/GRTKF/IC/14/11, Elements for the new mandate – Proposal by the European Community and its member states presented at IGC 14, my italics.

\(^{158}\) IGC 14 in 2009 failed to compromise on a decision on future work (“The Committee did not reach an agreement on this agenda item”, WIPO/GRTKF/IC/14 Decisions), largely due to the fact that Group B was not willing to accept the term “text-based negotiation”. WIPO’s GA later that year, however, decided to renew the IGC’s mandate for the 2010-2011 biennium in favor of wording proposed by the African Group at IGC 14 (WIPO/GRTKF/IC/14/8 Rev): “The Committee will, during the next budgetary biennium (2010/2011), and without prejudice to the work pursued in other fora, continue its work and undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs” (WIPO/GRTKF/IC/15/REF-DECISION 28).
Thus, two types of referential frames can be distinguished for communicative events like this (Fig. 7). While the first (RF\textsubscript{1}) has strong indexical meaning and entails the proposal of specific actions as well as pragmatic markers, the second referential frame (RF\textsubscript{2}) has only weak indexical meaning, few to no pragmatic implications and mainly generalized statements.

In the discussions on “text-based negotiations”, RF\textsubscript{1} refers to the assumption of a high degree of shared denotationality as to specific terms which signify different stages of negotiation and their implications. In RF\textsubscript{1}, the conventional nature of the terms as well as their implications are established, constructing the image of a natural and common sequence of negotiation phases. This frame is partly exclusive as it points out the conventionality of denotations and indexical meanings by excluding contesting meanings. The stability of the speech community in this case is constructed by pointing to semantic and indexical patterns that have emerged over the course of time in various fora, shared by opposing actors as well. Using RF\textsubscript{1} is a very direct way to signal and invoke frames with rules and obligations that require specific actions.

Using RF\textsubscript{1} invokes certain rules and obligations for the communicative event. In the case of “text-based negotiations”, one of those actions required would be the drafting of text as a basis for an international legal instrument, and thus a different stage of negotiations than exchanging views or creating gap analyses. This presupposes and at the same time discursively reproduces a high degree of stability of the speech community as it only makes sense to move forward in negotiations if there is common ground and a shared understanding about what the problems are and what the solutions might be. The process of gathering information during fact-finding missions, questionnaires, professional expertise and extended discussions in the IGC is thus the groundwork for this advanced stage that delegations
eager to speed the proceedings can refer to. Invoking this referential frame at an earlier point of time would have been counterproductive as the parties in opposition would have pointed out the lack of information and discussion, and it does thus presuppose a certain degree of stability in terms of prior work and documentation. Requesting to move on to text-based negotiations is therefore also the attempt to discursively reproduce already given stability: if opposing delegations agree to this step, they also admit to a certain degree of stability in the form of already achieved work.

The “discursive illusion” of a shared venture to find ways to protect cultural property is vital for stalling parties as well. For them, proposals like WIPO/GRTKF/IC/14/8 Rev. pose the problem that the invocation of RF\textsubscript{1} (as well as the corresponding rules and obligations) by speeding up delegations requires maintaining a constructed stability while not being able to concede to the proposed new mode of negotiation. Openly contesting such proposals would result in an instability that could be blamed on the refusing party: simply rejecting “text-based negotiations” as an advanced stage of negotiations could be portrayed as a rejection of the whole process. In such cases, switching to the second frame of reference (RF\textsubscript{2}) is a possibility to maintain stability while not making substantial concessions.\textsuperscript{160} RF\textsubscript{2} in this case has weaker indexical meaning and its implications are – compared to RF\textsubscript{1} – only minor (cf. [28] and [29]). A generalized affirmation of shared basic values – see example [28] – is also a strategy to maintain the image of shared interest, thus reaffirming the grounds on which negotiations take place, without necessarily achieving substantive progress and committing to a schedule of future work. Shifting to a different referential frame with less specific indexical meaning (RF\textsubscript{2}) on the surface achieves the same result, in this case the discursive construction of stability, as a reference to a more pragmatic referential frame (RF\textsubscript{1}).

Nonetheless, even if the result is the same, the function that a given referential frame realizes is a different one. RF\textsubscript{1} is invoked to build pressure on the opposing parties. In the case of a refusal to agree, the stalling actors can be blamed directly for obstructing the negotiation process, or more strongly, for neglecting and violating universal human or cultural rights. The claims made in RF\textsubscript{1} are portrayed as the ideal solution, one without any alternatives. RF\textsubscript{2}, on the other hand, has the compensatory function to divert blame and to stabilize the illusion of a shared venture while expressing “technical” objections. The claims made in RF\textsubscript{1} are refuted in so far as they go beyond abstract motivations, and pragmatic stalling mechanisms

\textsuperscript{159} However, it has to be noted that these factual documents are not discussed very often, at least not in detail. They are referred to from time to time, but their content or the arguments they contain are not made explicit.

\textsuperscript{160} It should be noted that switching referential frames is different from switching code. The meta-pragmatic awareness involved in the strategic and conscious usage of such a pragmatic strategy is one major difference between code and frame switching. Another specificity of such switching of referential frames is that it does not necessarily involve or require code switching.
such as filibustering, calling for more fact-finding and discussion, and so forth are used to endorse these abstract values, thus creating stability while not conceding to the demands of opposing delegations.

The basic functions of references to RF$_2$ are to stall the proceedings while maintaining the illusion that one wants to speed up the proceedings and find a solution for the problems at hand. Openly stalling, stating that one is not interested in any progress during the main session and that one only participates in the IGC in order to keep the issues from being discussed in other fora, would inevitably lead to conflicts and instability that could cause the IGC negotiations to come to an end without any results. As this is not in the interest of Group B or other stalling parties, stalling mechanisms have to be “veiled” or compensated for by maintaining the possibility of a consensual decision that would benefit parties interested in implementing an international legally-binding agreement on intellectual property and TK, TCEs, and GR. The stability of the process needs to be maintained. In this case, keeping the process stable and the participants of the speech community at the negotiation table does not mean only to maintain the status quo. Rather, it includes the need to move forward and to achieve progress in negotiations.$^{161}$ An example for this is the following statement by the United States of America at IGC 14:

[30] During the next day or two, we are interested in learning more about the proposal from its proponents, we are interested in learning more about the view of other delegations, and learning more about the financial and administrative implications of the proposal from the secretariat.$^{162}$

Embedded in other statements that reaffirm the shared goals and motivations of the IGC, utterances like this unite different pragmatic functions. On the one hand, they establish the argumentative groundwork for keeping negotiations going without making to many concessions by asking for extended clarifications on items such as “financial and administrative implications” or by asking for a continuation of discussions rather than proceeding to the next stage of negotiations. On the other hand, they express an interest in moving forward by “learning more” about the issues under negotiation, thus creating the foundation on which a convention could be drafted.

The combination of these two functions bypasses the highly indexical referential frame RF$_1$ and at the same time contributes to the discursive construction of stability. No specific commitments or concessions are being made, and yet the in-

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$^{161}$ A basic mechanism for this is “micro-editing” written decisions on future work or the drafting of text.

$^{162}$ Opening statement by the delegation of the United States of America at IGC 14, 29.06.2009.
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vocation of RF \textsubscript{2} still entails an abstract affirmation of the process. Stalling parties using a referential frame, with its abstract affirmative value and low indexical meaning can, if pressed, argue they too want the process to continue. The functional difference is that their construction of stability proposes a vague and slow process rather than specific steps that would speed up the proceedings. Both include some sort of moving forward, they differ in the degree.

This invocation as well as the shifting of referential frames is contingent on context. Shifting frames presupposes realizing several contextual variables, for without them, shifting as a pragmatic strategy may not be conducive to one’s interests. The invocation of RF \textsubscript{1} requires a certain amount of saturation, i.e. whether enough work to be built on has been already done, or progress in negotiations. If this condition is not met, the indexical meaning of RF \textsubscript{1} can easily be countered by referring to the incipient nature of the process and how premature the proposed measures are. In the case of the IGC, this saturation concerns among other things the availability of various texts.\textsuperscript{163} Furthermore, the expression of national positions, the inclusion of comments by ILCs, NGOs and related IGOs during the IGC process as documented in the extensive meeting reports can be considered to be a prerequisite for the invocation of a referential frame that calls for advanced work or the drafting of a treaty or convention.

The question whether the degree of saturation is sufficient is, of course, subject to negotiation. The ability to refer to RF \textsubscript{1} is thus contingent upon the ability of actors to agree the work done to date is sufficient to build upon. The construction of saturation differs from the construction of stability in that the latter construes the IGC as a speech community with shared interests and denotations, while the former denotes a specific stage within the communicative activities that looks back at what has or has not been achieved. There is a simultaneity of stability and instability at different levels, the most fundamental being the perceived or actual commonality of abstract values associated with human rights, cultural rights, indigenous rights, and authors’ rights.

\textsuperscript{163} Among those texts are the compilation of gap analyses on the protection of TCEs/EoF and on the protection of TK (WIPO/GRTKF/13/4(b) Rev. and WIPO/GRTKF/13/5(b) Rev.), questionnaires on national experiences with the legal protection of TCEs (WIPO/GRTKF/IC/2/7) and on existing forms of IP protection for TK (WIPO/GRTKF/IC/2/5 – see http://www.wipo.int/tk/en/consultations/archive.html, accessed 27 April 2012, for a list of questionnaires and comments gathered during the IGC process), case studies and fact-finding reports (See http://www.wipo.int/tk/en/resources/ (accessed 27. April 2012) for an overview of case studies and reports) as well as draft provisions and articles (WIPO/GRTKF/IC/18/4 on TCEs/EoF, WIPO/GRTKF/IC/18/5 and WIPO/GRTKF/18/7 on TK). The case study edited by Terry Janke (2003) and the fact-finding missions carried out in 1998 and 1999 (see http://www.wipo.int/tk/en/tk/ffm/report/index.html. accessed 27. April 2012) should be noted in particular.
On the basis of these values and by way of pragmatic strategies, stalling and speeding actors IGC actors can reaffirm their commitment to the process. Openly dismissing or neglecting these values would not benefit their interests, and could have repercussions in diplomatic or civil society discourses.

There is also the matter of a shared understanding of terms and issues. These are quite specific concepts and their implications, such as the meaning of “text-based negotiations” or what “traditional knowledge” is. While stability can exist at the underlying level of generalized affirmation of the IGC process, the level of shared meaning can be unstable. Yet, by referring to the stable level of generalized affirmation as well as taking a historical perspective at the practical level, the stability of one level can be mapped onto the other. By making reference to preceding work and texts, shared values are projected onto the level of shared understanding. As a result, stability is reproduced in the process of moving forward by looking at past work and perceived shared values.

The construction of saturation therefore bolsters the argument of speeding up parties by connecting these different levels. Stalling or opposing parties do not have to target the layer of stability related to the generalized affirmation of the IGC’s objectives, but can concentrate both on the construction of saturation and on the construction of the stability of shared understanding. If the committee has not done enough work, meaning not collected and analyzed enough data to make an informed decision, and if, therefore, participants do not share an understanding of basic terminology and concepts, then moving forward does not make sense, regardless of the degree of stability on the level of generalized affirmation.

The discussions about the definitions of TK and TCEs during the twelfth session of the IGC in early 2008 are a prime example for this discursive construction of saturation. The main positions during these discussions were that definitions of TK and TCEs are a prerequisite for moving forward in negotiating an agreement (bottom-up approach), and that there was sufficient shared understanding of what TK and TCEs are to proceed with broad working definitions and refine them during the course of negotiations (top-down approach). As summarized in this statement by Pakistan from the report of IGC 12:

[31] [t]here were two options. The first option was a bottom-up approach that was to continue these discussions, see more and more clarity and develop consensus on these issues. This approach might help to improve the comfort level of different countries, but it would be long and that too without any surety to see light at the end of the tunnel. The second option was a top-down approach that was to take a decision to start discussions on any international instrument. Pakistan understood that a majority of countries was in favor of this approach, whereas others felt that time was yet not ripe for such discus-
sions. Taking this approach was neither new to the UN system nor to the WIPO itself, as was done in case of a Broadcasting Treaty.\textsuperscript{164}

The communicated fault-lines in this discussion were thus whether there were or were not enough data or consensus on the ground of which it was possible to advance negotiations. Various countries of Group B generally considered to be stalling WIPO IGC negotiations – for example Canada, Japan, the United States of America, and the European Union – voiced their concerns that there was “a lack of concurrence and consensus” about the essence of TK and TCEs.\textsuperscript{165} Their line of argument was that a “common understanding was needed” for clear definitions of TK and TCEs, and that the “depth of understanding” concerning terms and perceptions achieved so far was “insufficient for a decision on the international level.” (ibid.) Due to these claimed insufficiencies, for those countries drafting a formal definition was not considered to be a viable option, and furthermore all of the IGC’s work was portrayed as having been fruitful, but not sufficient, as this statement by the Canadian delegation shows:

\textsuperscript{32} A great deal of very useful work had been accomplished by the Committee to date. The issues at stake were complex and extremely challenging and further discussions were required to identify what concrete steps could be taken with regard to the IP-related aspects of TCEs and TK. Canada was committed to deepening the discussions with a view of reaching a common understanding of these multidimensional subject matters, bearing in mind the considerable amount of work Member States and observers had undertaken in refining the draft policy objectives and general guiding principles on TCEs and TK. […] Canada looked forward to engaging constructively in discussions, making progress this week on all core agenda items, and working towards defining a practical and concrete path forward for the work to be undertaken by the Committee for the present biennium.\textsuperscript{166}

Note that there is on the one hand a generalized appreciation of the IGC’s previous work that is bolstered by a description of the subject matter as “complex and extremely challenging”, and on the other hand a specific reference to problems

\textsuperscript{164}WIPO/GRTKF/IC/12/9:21. Analogously to establishing the conventionality of a term or a phrase (see example [03] – “text-based negotiations”), delegations wanting to speed negotiations up can try to establish that a procedure is conventional, as with the reference to the UN system in general and to a specific WIPO treaty here. Such references are used frequently in IGC negotiations to portray specific approaches as inherent to and common within UN structures, rather than as procedural anomalies (author’s notes from February 2008, October 2008, June 2009, and December 2010). This can be termed a “contestation of conventionality” and builds on contextual contingencies.

\textsuperscript{165}Author’s notes, IGC 12

\textsuperscript{166}WIPO/GRTKF/IC/12/9: 17.
that one is not able to solve due to external circumstances, and not due to a lack of willingness. According to this conceptualization, the reason why Canada and other Group B countries oppose formal definitions is not because they do not want them, but because there are technical and structural impediments that make them objectively impracticable:

[33] At the most fundamental, the factual extraction demonstrated that there was as of yet no consensus as to a definition of TCEs. It also showed that there continued to be a lack of concurrence as to the scope of other terms such as “community” and “beneficiaries”. As noted in the 1998-1999 WIPO Fact-Finding Mission (at p. 211), “Lack of terminological clarity can confuse and obscure what is already, terminology aside, a complex inquiry.” Canada supported engaging in focused, in-depth analysis of these fundamental issues in order to achieve greater consensus and to move the work of the Committee forward. […] It was hoped that the Committee would continue to engage in an in-depth, step by step analysis of these important over-arching issues in order to achieve greater understanding of the definition of “TCEs”, “communities” and “beneficiaries”. This would help Member States in reaching further consensus on the matters before the Committee.167

This combination of positive acknowledgement of previous work, articulation of eagerness to deepen a “common understanding”, and pointing to substantial and procedural insufficiencies is a common pattern in IGC negotiations. It is used especially in the so-called “opening statements” (see above). Similarly, this statement by the delegation of the United States of America can be read as an attempt to legitimate the declination of formal definitions:

[34] The Delegation of the United States of America thanked the Secretariat for its work on the preparation of the “factual extraction” on TCEs, which captured the richness and diversity of the views of the Committee and which should prove to be an invaluable tool as the Committee moved forward to deepen its discussion of these complex questions, with a view toward gaining a shared understanding of these difficult issues. The record of work of the Committee was indeed extensive. In the view of the Delegation, however, the extensiveness of the record of the discussions, along with the extremely useful documents and studies produced by the Secretariat, was not a cause for alarm or apology, and certainly not a reason to depart from the tradition, within this Committee, of Member State-driven delib-

167 WIPO/GRTKF/IC/12/9:39.
erations. Rather, the rich record of work, not unlike a traditional tapestry, reflected the differing views and underlying values of the Member States that had produced it. The Delegation would view with considerable skepticism any attempt to substitute the actual views of Member States with distillation of those views in a document produced by the Secretariat.\footnote{WIPO/GRTKF/IC/12/9:37.}

Again, what can be observed from this statement from the report of IGC 12 is that an abstract commitment to the process coupled with a high evaluation of the progress the committee has achieved so far (cf. \cite{30}) is “countered” by the regret that due to the complexities of the subject matter and the diverse points of view, a formalization of this progress (for example in the form of definitions of TCEs and TK) cannot be attained. This process can be described as the argued causality in the shifting of referential frames: because – so the argument goes – there is not enough saturation in negotiations, one has to switch from specific methods of formalization like definitions – RF\textsubscript{1} – to an unspecified mode of work without immediate outcomes – RF\textsubscript{2}. The decision to do so can thus be portrayed as the result of procedural and technical conditions, rather than as the result of specific constellations of interest.

In the discussions about a top-down or a bottom-up approach for definitions of TK and TCEs, speeding countries referred to the set of “factual extractions”\footnote{WIPO/GRTKF/IC/12/4(b) for TCEs and WIPO/GRTKF/IC/12/5(b) for TK.} prepared by the WIPO secretariat for IGC 12 as a valuable resource and a point of reference for drafting definitions. Proponents of this top-down approach (the African Group, India, Brazil) voiced their demand for formalized working definitions. This formalization would have entailed a written definition which IGC member states would need to agree about. These definitions would have – and that was one of the concerns of stalling delegations – established a precedent and formal point of reference for all subsequent negotiations. The formulations could easily have taken on the character of “typical expressions” and thereby restricted the room for maneuver of delegations not interested in progress of IGC negotiations.

The general argument of those delegations in favor of formalized working definitions was that they “are not complete, but sufficient as a base for progress”.\footnote{Statement of the American Folklore Society at IGC 12, 26 February 2008.} In their view, focusing on a working definition would allow the IGC to move ahead and achieve progress. The definitions would not need to be perfect, as they could be revised at a later point of time.

The problems of definitions – their static nature, vis-à-vis a dynamic object as well as a multitude of differing national, regional, and cultural specifics – were acknowledged by various delegations. Yet countries such as India, Brazil, or Algeria
argued that to make headway, drafting a working definition was a prerequisite. It could be accomplished with relative ease by taking the IGC’s “Revised Objectives and Principles” for TK and TCEs as a point of reference. Such documents drafted by the WIPO secretariat had distilled “in coherent and focused form the kind of specific questions that may need to be weighed by policymakers at the national, regional and international level, when considering the appropriate form and means of protection of TCEs/EoF” and TK. “Without prejudging [their] status or legal implications”, these texts included working definitions of TK and TCEs. For TCEs this definition read:

[35] TCEs/EoF include tangible and intangible forms in which traditional culture and knowledge are expressed, communicated, appear or are manifested. They may be verbal expressions or symbols, musical expressions, expressions by action, such as dances and other performances, and tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms. […] To be eligible for specific protection, TCEs/EoF would need to meet three criteria. They should be: the products of creative intellectual activity, including individual and communal creativity; characteristic of a community’s cultural and social identity and cultural heritage; and, maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

For TK the proposed definition was:

[36] TK is defined in general, indicative terms as the content or substance of knowledge resulting from intellectual activity in a traditional context, and is not limited to any specific field, extending to agricultural, environmental and medicinal knowledge, and knowledge associated

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171 These documents were originally drafted for the IGC’s seventh session in November 2004 and have been reproduced for IGC 9 in April 2006 after a first review process; they have been reproduced for IGC 12 as WIPO/GRTKF/IC/12/4(c) for TCEs and WIPO/GRTKF/IC/12/5(c) for TK. They were complemented both with an overview over the current work on TCEs (WIPO/GRTKF/IC/12/4(a)) and TK (WIPO/GRTKF/IC/12/5(a)) prepared by the secretariat as well as with two sets of “factual extractions” (WIPO/GRTKF/IC/12/4(b) and WIPO/GRTKF/IC/12/5(b)) including comments from delegations and observers on the original documents from IGC 7 and pointing to points of convergence and differences between the positions of WIPO member states.

172 WIPO/GRTKF/IC/12/4(c):4.

173 WIPO/GRTKF/IC/12/4(c):7.
with genetic resources. [...] However, the draft suggests that to be eligible for specific protection against misuse or misappropriation, more precision is needed, and that TK should (i) exist in a traditional and intergenerational context; (ii) be distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and (iii) be integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.\footnote{WIPO/GRTKF/IC/12/5(c):7.}

In the view of speeding up parties, this was an adequate basis for the committee to move on to the substantive issues that needed to be resolved. The delegate from Nigeria urged the committee to establish “clear guidelines for work”,\footnote{Author’s notes from IGC 12.} and that there had to be more results than just an exchange of statements.\footnote{This exchange about a top-down or bottom-up approach to definitions on TK and TCEs was part of the opening statements of IGC 12 that lasted until the late afternoon of the third day of this session (see the beginning of this chapter for a more detailed view on these opening statements).} At IGC 13, the African Group tabled a proposal on the “Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources”\footnote{WIPO/GRTKF/IC/13/9.} that collected the views of delegations on ten central issues discussed in the IGC.\footnote{The number and content of the issues refers back to a list of issues that was prepared by the secretariat following a decision at IGC 10. These lists on TK and TCEs are reproduced as annex I in the report of IGC 11 (WIPO/GRTKF/IC/11/15).} It included as issues the “Definition of Traditional Cultural Expressions that should be protected” and the “Definition of Traditional Knowledge”.

The proposal for the definition of TK (see Fig. 8) states that

\begin{quote}
[37] [t]he general consensus is that a working definition of Traditional Knowledge (TK) is important. The views vary from a broad definition to a more concise and narrower definition.
\end{quote}

It continues by listing three views on the issue of definition said to be extracted from various documents and discussions of the IGC. By outlining these views as well the separate aspects they contain and by framing them as compatible with each other after minor adjustments (e.g. by phrasing the third view in a way that can be complemented by the “way forward”), the proposal implies that there is enough information available and therefore enough saturation. The differences

\begin{itemize}
\item [174] WIPO/GRTKF/IC/12/5(c):7.
\item [175] Author’s notes from IGC 12.
\item [176] This exchange about a top-down or bottom-up approach to definitions on TK and TCEs was part of the opening statements of IGC 12 that lasted until the late afternoon of the third day of this session (see the beginning of this chapter for a more detailed view on these opening statements).
\item [177] WIPO/GRTKF/IC/13/9.
\item [178] The number and content of the issues refers back to a list of issues that was prepared by the secretariat following a decision at IGC 10. These lists on TK and TCEs are reproduced as annex I in the report of IGC 11 (WIPO/GRTKF/IC/11/15).
\end{itemize}
between speeding up and stalling, according to this perspective, can be resolved by the outlined proposal. As it would take into account all difficulties, a top-down approach was for that reason portrayed as being suitable for the concerns voiced

*Figure 8. African Group Proposal on the Protection of GRTKF (WIPO/GRTKF/IC/13/9).*
by Group B countries in favor of a bottom-up approach. On the terminological level, speeding up delegations argued that the available documentation and expertise are sufficient for formulating a working definition as a step forward. Stalling delegations, on the other hand, argued there was neither enough clarity nor sufficient consensus on substantive questions, such as over the elements of a definition of TK and TCEs.

It is important to note this difference between the conventionality of procedure (as in discussions about text-based negotiations) and the conventionality of terminology (as in discussions of top-down versus bottom-up approaches to defining TK and TCEs). They relate to different pragmatic dimensions. The first asks whether a procedural approach (denoted by a term) is common and whether there is a shared understanding of the factors involved in a specific approach. By focusing on procedure, stalling delegations can bypass substantive questions, for example about the specific contents of a text as the basis for negotiations. The arguments against text-based negotiations are thus not that there is a lack of shared understanding as to the importance of an instrument for the protection of TK and TCEs, but that the proposed procedure is unclear. On the other hand, the discussions on the way to move forward with regard to definitions primarily focus on substantive debates, arguments and views denoted by a term. “Text-based negotiations” thus point to procedural issues, “traditional knowledge” to substantive discussions. In both cases, stalling delegations can, by employing a contextualized instantiation of a communicative strategy, use an indexically weak referential frame. They can either argue that the procedure is not common and needs to be explained, or they can argue that the available documentation and information is not sufficient to make decisions about substantive questions.

In certain situations, references to RF2 do not have the ability to maintain the “illusion of stability” that is mediated by the construction of shared goals and motivations. There are situations where invoking abstract motivations, to avoid highly indexical speech, is not enough and concessions have to be made. In such instances, an imbalance between a high level of assumed stability, meaning a high degree of shared motivations, openly expressed, and a contested degree of saturation, meaning divergent views on the quality and sufficiency of work carried out by the committee so far, can be observed. Assertions of commitment are not sufficient, and a frame of reference of generalized affirmation cannot compensate for the lack of progress on a pragmatic level.

Such situations are usually enunciated by speeding up delegations. At IGC 14, the discussions about the new mandate lead to a number of delegates openly criticizing stalling delegations, with the speaker of the African Group complaining that “all we do is talk, talk, talk”, the Peruvian delegate describing the session as the “same chit-chatting as always”, the Egyptian delegate comparing the IGC to a “talk-shop”, or the delegate from South Africa arguing that it was mostly “talking for the sake of talking”. The delegate from Angola in a very figurative statement
used the metaphor of the IGC as an “aircraft with no destination”, and the Brazilian diplomat described the approach taken by stalling delegations as “socratic” in that “it does not seek results, but wisdom”. Yet, he argued that “we need courage now to take hard decisions” and not “act like philosophers”.

These examples illustrate the contextual dependency of referential frames. They were all uttered in a rather intense moment of IGC negotiations: IGC 14 was the last meeting before WIPO’s General Assembly would decide on the committee’s new mandate. Taking a decision to move forward was thus viewed by many delegates as essential. Without an agreement on the new mandate, the discussions would have to be continued in the General Assembly, with an unclear outcome. By referring to this situation, speeding up delegations were able to dismiss RF2 as insufficient and to establish RF1 as the only way forward to ensure the future existence of the committee.

The effectiveness and potency of shifting frames is thus connected to specific situations that link pragmatic strategies, referential frames, and the socially perceived and mediated positions in negotiations: there is a dialectical relationship between different desires and restrictions to these desires at a distinct moment that creates the possibility of the realization of a strategy. These desires and restrictions are differentiated among actors or groups of actors, either as the speakers of utterances or only as receivers and observers of communicative events. For the IGC as a speech community – a dynamically constituted group of social actors from various backgrounds – this means that at any given point in negotiations, there is more than one “frame” and thus also multiple sets of desires and restrictions.

The success of invoking referential frames as a pragmatic function with strong (RF1) or weak (RF2) indexical meaning is contingent on “targeting” powerful sets, i.e. framing one’s interest or strategy in a way that is convincing to groups of actors that matter. As outlined above, this concerns both questions of terminology and questions of procedure. This “twofold nature” of saturation creates ambiguity and thus a lot of leeway for both stalling and speeding delegations. If one of the two aspects is covered, e.g. if there is a consensual definition of property rights (to take one of the terms that can seemingly be translated a lot easier than TK or TCEs), stalling actors can refer to a lack of procedural clarity, e.g. by pointing to the need to examine existing intellectual property legislation on national, regional, and international levels in order to achieve an overview about possible gaps (cf. the IGC’s two gap analyses for TCEs and TK). The other way round, speeding delegations can point out procedural saturation, for instance long-drawn prior negotiations and existing working documents, in order to claim stability that allows for the drafting of definitions or of an agreement.

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179 Author’s notes from IGC 14.
The group of relevant social actors that matter for the invocation of frames or sets is constituted dynamically and differs from communicative event to communicative event. Civil society organizations can for example at times be important to build pressure while they are utterly neglected in the consultation of regional group coordinators. Similarly, ILCs are usually paid more attention at the beginning of an IGC meeting, while they are predominantly neglected at the end of a session where member states often seclude themselves to internal negotiations such as consultations between the chair and regional group coordinators. Even some member states become less relevant in the course of a meeting, as they either hold no stake in the negotiations or they simply have no interest in the substantive questions discussed. The instantiations of communicative patterns and strategies are for that reason contingent on the specific context constituted by, among other factors, relevant social actors that need to be addressed.

Referential frames thus correspond with and depend on specific groups of recipients as audiences that determine the suitability of referential frames. These groups are part of the specific context of an utterance. They are constructed in communicative events, and at the same time have a social materialization in the form of NGOs, ILCs, member states, and other observers and participants of the IGC process. Three main dimensions of these audiences can be distinguished: (1) their competence, including what the specific audience understands (or wants to understand) on what level. The various levels relate to semantic and pragmatic meaning, meta-pragmatic awareness, the ability to differentiate various functions of utterances and to weigh technical, legal and ethical implications. The second dimension is (2) time as the perceived and mediated sense of what is an adequate span of time after which decisions should be taken, and it is influence by external factors (such as domestic policy pressures) and internal factors. A third dimension consists of (3) the interests and motivations of actors as the various stakes of the specific audience. Referential frames are partly determined by relevant audiences and their dimensions have thus to be taken into consideration when analyzing negotiations. As concerns the question of blame for failed or stalled negotiations, the shifting of referential frames needs to take into account these different audiences as well as the dynamic relationship between referential frames: RF₂ implies a shared understanding and interest that is reinforced by the involvement and appreciation of civil society and pressure stemming from other fora and institutions. These specific audiences require the acknowledgement of RF₂ as an ideational foundation of negotiations. If stalling delegations would not use RF₂ and basically dismiss the calls for a legal instrument, direct reproaches as well as a additional pressure by audiences interested in the protection of GRTKF would be the consequence. There is thus a “back and forth” between the expression of commitment and the dismissal of concrete procedure. However, this back and forth must move forward as the excuses to stall the procedures proposed by speeding delegations in RF₁ get subsequently weaker: at some point of time, RF₂ is overburdened and not able to
compensate and create stability anymore. Then, concessions in RF\textsubscript{1} need to be made (for example the introduction of inter-sessional working groups and text-based negotiations that was, in the last instance, agreed to by stalling delegations as well). However, such concessions are able to make RF\textsubscript{2} viable again and to stall negotiations by dismiss demands in RF\textsubscript{1}. This does not necessarily mean that at some point, all RF\textsubscript{1} demands are fulfilled as a result of the progression of concessions, as other compensatory mechanisms can be installed (for example bi-lateral agreements or national legislation). In conclusion the shifting of referential frames can be viewed as an instability that produces stability and instability at the same time, and therefore allows for pragmatic strategies as outlined above. It is a productive “dialectical movement” that lacks the capacity to relapse behind its thesis, as relapsing would imply a rejection of the process.

Silverstein introduces four categories of pragmatic strategies that are all based on such contingencies or instabilities of context, meaning a lack or incompleteness of shared pragmatic norms or contextualization (Silverstein 1976:47–48): Pragmatic contradiction is a strategy where “two or more communicative media” signal “contradictory indexical meanings”, or “contradictory highly presupposing indexes within the same medium” are employed. Here, the speaker of an utterance simultaneously signals two meanings, as is common for the shifting of referential frames as outlined above where utterances signal a commitment to the process and a simultaneous rejection of the specific procedures suitable to achieve results. Residual semanticity refers to the semantico-referential meaning which “a speaker can claim after the fact for potentially highly pragmatically charged speech” (47). Similarly, stalling delegations can claim their reservations are caused by technical questions or a lack of understanding, and not by their interest in stalling.

The third strategy, imputed indexicality, denotes the strategy where “a speaker can create a social persona for himself, playing upon the hearer’s perspective of imputed indexicality, where the speaker has characteristics attributed to him on the basis of the rules of use for certain utterance fractions” (47). As a way to veil controversial motivations, communicative strategies can contribute to the representation of a speaker as uncontroversial, for example by heavily stressing the presumably shared ideational foundations. Diplomatic non-indexicality as the fourth strategy (making an analogy with diplomatic non-recognition in foreign policy) “allows the hearer to respond to speech as though it constituted a semantico-referential event, all the while understanding completely the distinct function of the indexes which overlap in surface form” (48). This last strategy is common in IGC negotiations, especially with regard to the cases where speeding up delegations overtly critique the stalling tactics. Responses to such utterances usually fail to materialize or only refer to the aspects of the utterances that can be reduced to their semantico-referential meaning. The four strategies that Silverstein outlines can thus be found in WIPO IGC negotiations.
In all of these cases the ability to strategically employ language depends on a kind of uncertainty (or diversity) of context that allows for a pragmatic operation, be it signaling the affiliation to a certain social group, the denial of a certain intention, the coding of an event according to certain perspectives, or the invocation of specific frames. However, as instantiations of communicative patterns and strategies, these pragmatic strategies need to be examined in context of specific referential frames and audiences – otherwise, neither their function nor their indexical meaning in relation to their referential meaning can be elicited. An example for this contextualization concerns the question of metapragmatic awareness: who understands these strategies to the desired effect? It can only be answered by taking into account the broader context and history of the committee, cultural property negotiations, communicative patterns, referential frames and audiences. This concerns not only the analytical level, but mainly the level of participation, that is the specific communicative practices. The knowledge of context (and thus also of the participants partaking in a communicative event) is essential to choose a way conducive to mediating one’s perspective on an event (for example to convince other participants of the advantages of one’s strategy or position), to choose a coding scheme that fits bureaucratic systems, or to shift to a referential frame.

Yet, on the other hand this knowledge of context is also vital when analyzing such communicative events. In order to understand the perspectives taken, the coding schemes applied, or the referential frames invoked, it is important to distinguish between semantics, pragmatics and metapragmatics (by way of linguistic analyses) and to carry out the necessary contextualization. As Silverstein puts it, “the use of some particular word or expression at a moment in denotational text-time […] comes differentially to invoke – to summon to the here-and-now – some specific cultural concept in a schema of such” (Silverstein 2004:634), and thus, an analysis of only text and talk would inevitably fall short of taking into account contextual features that link to embedded normative concepts.

A combination of the micro-linguistic analysis of discourse, ethnographic contextualization, and ideological concepts about larger processes is needed for a complete analysis of speech events and their contexts. Goodwin’s study of courtroom negotiations (1994) illustrates that a pure linguistic (semantic) analysis of talk negotiations would miss indexical (pragmatic) features that point to social features of the event (such as the speaker’s affiliation to a stigmatized social group, invoking frames including ethical arguments). The communicative event can in turn only be adequately understood by looking at its context before linking it to broader normative systems and perspectives. I propose that a methodological and theoretical triad of pragmatic-linguistic analysis, ethnographic contextualization and theorizing on the macro-level is needed for studying a speech community like the IGC and its communicative processes. The utterance alone cannot be adequately analyzed otherwise without looking at its broader context and taking into account
ideological perspectives on the substantive issues under negotiation. All three aspects need to be combined in the analysis.

For the analysis of terminology, this has a number of implications. What Fabian describes for the study of emerging languages (Fabian 1977) equally holds true for taxonomic systems deriving from the communicative activities of a speech community primarily defined by those activities (and not, as the concept initially suggested, by descent, one shared language, or spatial limitation):

While classificatory relationships are undeniably involved in the determination of what a term ‘means’, investigations of emerging special languages whose formation can still be traced to concrete events, experiences and ‘ideologues’, compel us to ascribe equal importance to innovative, definitory articulations which become visible as the dogmatic closures of taxonomies. […] Taxonomies […] would have to be retrieved from texts, rather than from sentences and that may mean that not the dictionary of a language but its ‘literature’ is the appropriate source (making a dictionary one codification among others.) (Fabian 1977:194)

The shared activity of negotiating “traditional knowledge” among a varying number of actors, embedded in multiple institutional contexts, is in itself constitutive of a speech community that generates referential linguistic structures of shared terms and contested denotations. Looking at the elicitation of term–meaning relationships in documents or interview-responses in simple definitional modes (X means Y) would then be an equally insufficient source, much like Fabian’s sentence-dictionary-complex. Instead, the opening of taxonomies and their contextualization in text-narrative relationships is a prerequisite for eliciting meaning as the dialectical relationship between terms and objects (Fabian 1977:183). Thus, the relationship between terms and their meaning is necessarily normative (as are taxonomies), shaping reality from subject-positions in a predominantly objectifying and naturalizing fashion.

This can best be illustrated by the discussions during IGC 14 and following meetings about the working method during subsequent sessions. The African Group Proposal180 called for “text-based negotiations” while Group B instead proposed using the term

[38] outcome-oriented deliberations (cf. [29])

It was introduced by the representative of the United States of America at IGC 14 during discussions on future work.181 This term has no “referent” in international

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180 WIPO/GRTKF/IC/14/8 Rev.
181 Author’s notes, IGC 14.
negotiations or in IGC negotiations, leading the delegate of South Africa to re-
mark that he was “puzzled by some of these concepts”, that he “never heard of
outcome-oriented deliberations” and that he “can’t come back to my ministry with
‘outcome-oriented deliberations’ because of the seriousness of the issues”.

The term has only weak indexical meaning and is a way to bypass a highly in-
dexical referential frame and term – “text-based negotiations”. At IGC 14, the
term was used repeatedly by different actors (mainly the EU and the U.S.) and is
documented in the report of IGC 14,\textsuperscript{182} so it has a point of reference now in the
official documentation.

Establishing such references can be viewed as an important strategy in interna-
tional negotiations, as it contributes to the legitimation of terms and to the con-
struction of stability and saturation by, for example, arguing the term has been
used before and that this is a sufficient basis for shared understanding and use of
the term. The phrase “outcome-oriented deliberations” is in this case used in con-
junction with phrases such as “without prejudice to any outcome” and in contrast
to “text-based negotiations”, itself portrayed as too vague and ambiguous (cf.
[27]). In a statement on this terminological opposition,

\begin{quote}
[t]he Delegation of Brazil indicated that there existed a conflict be-
 tween the terms “text-based negotiations” and “outcome-oriented
deliberations”. The term “text-based negotiations” could be consid-
ered as new language, since it had never been used before by this
Committee. After nine years of deliberations, the Committee might
need new tools and new language, such as “text-based negotiations”,
in order to move forward. The term “outcome-oriented delibera-
tions”, on the other hand, although it may be well-crafted or a new
expression, could be perceived as non-committal language.\textsuperscript{183}
\end{quote}

While other delegations constantly tried to establish the conventionality of the
phrase “text-based negotiations”, the Brazilian delegate, belonging to a speeding
up delegation, takes the step of portraying it as “new language” for the committee,
while arguing that the “competing” term could be understood as “non-committal”
language. Thus, he shifts the discussion on the two terms away from RF\textsubscript{1} (technical
discussions including procedure, specific definitions and other pragmatic aspects
concerning the specific work the committee is to do) to RF\textsubscript{2} (the indexically weak
commitment to the IGC process). Dismissing the new term would, for that reason,
not only denote a lack of terminological and procedural clarity, but also imply a
rejection of commitment as the alternative term is “non-committal language”.

\textsuperscript{182}WIPO/GRTKF/IC/14/12.
\textsuperscript{183}WIPO/GRTKF/IC/14/12:53.
In this example, specific terms are used as strategically deployable shifters mediating between the two main referential frames of the IGC. Taking into account this quality of terms central to IGC negotiations, their indexical and semantico-referential meaning can only be elicited by looking at their narrative context, in this case the broad discussions of the two contrasting terms. The subject position of the speaker of an utterance influences this context and the resulting constellation in a major way. He plays a central aspect in portraying the relations between terms and the contextual objects they denote as already legitimated, thus lending these terms authority.

A number of important aspects can be distilled from this example: actors pursue strategies in international negotiations and use terms conducive to their interests. The use of these terms is contingent on the context of the utterance, both in synchronic and diachronic perspective. To be efficient, speakers have to take into account pragmatic and semantic meanings of terms, and have to consider relevant referential frames and audiences.

Terms can only be understood by taking this context into account and by paying attention to the dialectical relationship between the specific term and its specific indexical meaning in “denotational text-time” (Silverstein 2004:634). In this example, they are used with the aim to make the decision between them a technical rather than a normative decision. Proponents of a given wording each try to portray them not as meaning-laden or intentional but as “natural” and as the only possible wording. Thus they shape reality from subject positions in a predominantly objectifying and naturalizing fashion. This can be achieved both by referring to abstract values (when all participants want the IGC to succeed, outcome-oriented deliberations are a good thing), or to discrete pragmatic functions (text-based negotiations are a common term and the natural next step in negotiations). Yet, the arguments can also be reversed, as the Brazilian example shows. And this requires delegations in opposition to change their strategy as well.
The same dialectical relationship between terms and their meanings holds true for the analysis of pragmatic strategies. They can be viewed as the dialectical relationship between different desires and restrictions to these desires at a distinct moment that creates the possibility to realize a strategy, changing between stability and instability. Contextualization and the analysis of ideological perspectives – here, perspectives on cultural property – are a presupposition for the analysis of utterances in the context, as they allow for an understanding of the speech community within which an utterance is realized. Pragmatic strategies are linked to terms and utterances, but they are also linked to social and political interests or desires that determine the shape of linguistic utterances. Limiting the scope of analysis to terms, their meanings and the pragmatic strategies they are part of misses the broader socio-political context that influences them.

Hence, the concept of the speech community is both useful and problematic. As Silverstein notes, pragmatic strategies “depend in the last analysis upon the shared understanding of norms for indexical elements in speech acts” (Silverstein 1976:48), meaning the normative implications of utterances need to be understood by at least some participants in the speech community. If nobody understands the pragmatic meaning of an utterance apart from the speaker, its indexical value is zero.

If we subscribe to an understanding of the speech community as the process of communicative interaction that reproduces and shapes rules of linguistic conduct, a “shared understanding of norms” depends on specific factors that influence the specific communicative exchange. There are already established rules and norms of communicative practice. There are also rules of interaction and interpretation that are in flux, contested, or vague. At any time during communicative events within the IGC, participants come from different linguistic and speech communities and thus do not necessarily share an understanding of all the indexical meanings of utterances during a communicative event. In such extremely heterogeneous and dynamic speech communities like WIPO’s IGC, a “shared understanding of norms” is too limited a focus for analysis. What has to be taken into account as well are the strategic interests and ideological presuppositions of participants. The IGC as speech community would thus be constituted both by communicative interactions and the broader context.

A second aspect is the diversity of participants. The skill sets, level of competence, ideological presuppositions, motivations and “thought patterns” that characterize each actor is very heterogeneous, as is how each actor perceives language, linguistic registers and linguistic choice. For an analysis of pragmatic strate-

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184 Some of them are professional diplomats, others experts in copyright, trademark, or international law, scholars from a broad range of disciplines, and NGO representatives with various professional backgrounds.

185 See Mertz 2007 for an account of how one learns how to think like a lawyer in law school.
gies or pragmatic qualities of utterances, this needs to be taken into consideration, as this is not an ideal-typical situation of a speech community in which a high degree of shared understanding can be presupposed. Neither Bakhtin’s notion of “typical expressions” nor Fabian’s dialectical analysis of taxonomies pay attention to the fact that in any given communicative event with more than two participants, there is more than one dialectical negotiation of taxonomies or attribution of meaning to typical expressions.\footnote{Similarly, one might argue that even in communicative events with only two participants – including the reading of a book – there is more than one negotiation of meaning (Bakhtin 1983).}

Utterances in such communicative events of a speech community in a dynamic state have different simultaneous functions (Silverstein 1976:47). In any given communicative event, actors perform more than one function of an utterance simultaneously, consciously or unconsciously, intentionally or unintentionally. These functions are directed at a number of different audiences at the same time, meaning the indexical or referential meaning of an utterance is different from audience to audience. What can be distinguished are different dimensions of audiences involved in the IGC process as well as different functions relating to them. They can be used to signal positions and strategies, to build and maintain alliances between different delegations, and to establish hierarchies and pressure.

Taking the statement by Brazil as an example ([38]), what is signaled to the audience is not only the delegation’s position with regard to the discussions of “text-based negotiations” and “outcome-oriented deliberations”, but also the delegation’s perspective on the IGC process as a whole, the pragmatic strategy of wanting to speed up negotiations, and the construction of an opposition. All these different functions influence communicative patterns and strategies significantly.

Interactional practices of the IGC are thus contingent on the multifunctionality of utterances, and responses to utterances must compensate for their multiple relevant functions. This requires creativity and going beyond structured interactional patterns. During the heated discussions on future work at IGC 14, representatives of stalling delegations such as Germany do so using personalized forms of address. A harsh critique of opposing delegations was countered by a courteous statement that touched on substantive questions and made use of RF\textsubscript{2}, but also used the first name of the representative of the African Group to relax a tense situation and signal a shared interest. This created the possibility of making a response that was essentially not in the interest of the opposed party, but was hard to respond to critically due to the use of a social index signaling a friendly exchange. Such unconventional forms of address can of course also be used by speeding up delegations.

In conclusion, the creative use of interactional practices draws its force from instabilities of the speech community. As outlined in Chapter 3, the maintenance of stability is of interest both to speeding and stalling delegations. Stability can be
maintained mainly by progressively moving forward, as the discussion of referential frames has shown. This also holds true for the practice of micro-editing that will be described in the following.

**Micro-Editing**

Micro-editing is part of more general tactics in international organizations. In contrast to the pragmatic strategies described above, the process of micro-editing does not concern whole utterances as instantiations of communicative patterns and strategies. Rather, it is the modification of small utterance fragments to change the indexical meaning of utterances in context.

As an example, during IGC 12 in early 2008, the decision process on future work of the committee did not take place in the main session but was brokered in meetings of regional groups. Their spokespersons communicated with one another via the chairman and the WIPO secretariat. At the end of this process, a written proposal was drafted which then had to be decided upon in the main plenary. Given the high uncertainty as to the conventions of this bartering process as well as the high stakes, actors in this setting relied upon micro-editing of text to channel their interests into these documents. This process is both in evidence in such small, closed group sessions preparing the decision making documents for the general session, but can also be observed during drafting exercises in the main plenary.

In the Group B regional group consultations, preparing the future work list at IGC 12, a great deal of strategic discussion took place, albeit in a highly relaxed, even familiar conversational tone. There was speculation on the specific intent of the session’s chair in asking for a decision on this task, as well as on the possible moves to be expected from delegations eager to see quicker results.

The draft document on future work prepared by the IGC secretariat was carefully scrutinized. Upon encountering the formulation “in-depth work”, one participant argued for crossing this out for fear that another two-week committee session, the format of some IGC meetings prior to IGC 12, might be the result; his fears made the room erupt in laughter. In another group meeting it was proposed to label a proposal by Group B with a new document number (i.e. WIPO/GRTKF/IC/12/…) to signal progress. Similarly, a delegate proposed to replace the term “gap” in a document about the gap analyses on TK and TCEs with “interface issues”, as this was a more ambiguous term that could strengthen the negotiating position of Group B.187

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187 Author’s notes, IGC 12.
The informality of conduct and the idioms used in this setting, such as “kicking the can further down the road” or “breaking some china”, illustrates a high level of awareness of the emergent habitus of the committee and an offhand awareness of the power of effectively used colloquial expressions. It also allowed delegations to openly discuss strategies for main plenary discussions. In one regional group meeting, it was argued that a proposal by the African Group on future work should not be discussed substantively. Instead, it was proposed to argue that Group B needed “more time to evaluate” the proposal, as one should not “ask for information because we might get it.” Needless to say, the group observed here consisted of delegations that felt they had the upper hand in this setting. Micro-edits can have a significant influence on IGC meetings, be it by effectively establishing referential frames, deploying shifters or by framing decisions in a way conducive to one’s interests.

Three examples illustrate the use and effects of micro-edits, all of which stem from the initial draft document on future work prepared by the IGC secretariat and the reactions to this document by Group B delegations at IGC 12. In this small setting in Room B, delegates huddled together in small groups, discussing specific phrases and formulations and trying to take all possible implications of the paragraphs into account. The Group B meeting was chaired by a representative of the U.S. permanent mission in Geneva. Aside from the informal character of the meeting, there seemed to be a general shared understanding of the regional group’s goals and motivations. Some of the more active delegations (Canada, the U.S.) were assisted by younger staff members who provided copies of documents, prepared texts and modified proposals according to the discussions. The specific instances of micro-edits were thus prepared in these informal settings and later introduced into the main plenary.

The first example addressed the scope of documents and prior work to create the gap analyses for TK and TCEs. The initial draft prepared by the secretariat read as follows:

[40] The Intergovernmental Committee reviewed the progress made on its substantive agenda items at the current session, and agreed that: (i) concerning item 8 (traditional cultural expressions/expressions of folklore (TCEs/EoF)), the Secretariat will prepare, as the working document for the next session of the IGC, a document that will describe (…)

In contrast, after discussions Group B successfully requested to change the wording to:

[41] The Intergovernmental Committee reviewed the progress made on its substantive agenda items at the current session, and agreed that: (i)
concerning item 8 (traditional cultural expressions/expressions of folklore (TCEs/EoF)), the Secretariat will, taking into account the previous work of the IGC, prepare, as the working document for the next session of the IGC, a document that will describe (…) 

By inserting a clause such as “taking into account the previous work of the IGC” into the working document, the scope of documents that must be considered is significantly expanded. This leads to an increased ambiguity of the resulting document, which is in the interest of stalling delegations.

Similarly, the following change of wording has the effect of stalling negotiations by way of broadening the scope of information the committee has to deal with:

[42] At its thirteenth and subsequent sessions, all three substantive items of the Committee’s mandate (genetic resources, TK and TCEs/EoF) should be discussed in depth and that the time allotted to each item be balanced.

The final version of this paragraph read:

[43] At its thirteenth and subsequent sessions, including any intersessional sessions, all three substantive items of the Committee’s mandate should be discussed in depth and that the time allotted to each item should be balanced.

By adding the phrase “including any intersessional sessions”, stalling delegations can insure that inter-sessional work will need to be considered in equal measure with regard to the three substantive issues of the IGC. Even if some parties might see the possibility of achieving tangible consensus in one of the areas discussed, the insertion insists such progress cannot be made at the cost of another area, either during the bi-annual meetings or even during any formal intersessional work. This inclusion is especially noteworthy since the discussions on GR lag behind, and thus any progress in the other areas could be stalled by this issue.

A third example for micro-editing relates to the softness of verbs. With reference to the introduction of inter-sessional working groups as proposed by the African Group, the initial draft from the secretariat read:

[44] With a view to accelerating the work of the Committee in accordance with its mandate, at its thirteenth session the Committee will develop proposed modalities and terms of reference for the establishment of intersessional mechanisms or processes (…)
The wording of this paragraph that is also part of the decisions of IGC 12\textsuperscript{188} was altered after Group B discussions and consultations between the regional group coordinators to read:

[45] With a view to accelerating the work of the Committee in accordance with its mandate, at its thirteenth session the Committee \textit{will consider taking a decision on} proposed modalities and terms of reference for the establishment of intersessional mechanisms or processes (…)

The change from “will develop” to “will consider taking a decision on” nicely reflects the efforts of Group B to stall the negotiations. By using non-committal and ambiguous language, the process is to be prolonged and specific decisions, as well as the drafting of documents needed for progress, are delayed. The reluctance of Group B countries to take a binding decision on the given subject is reflected in this change of wording.

The opposing parties are well aware of the significance of these micro-edits. This creates a dynamic of conceding and retaining. You have to concede some of your opponents “linguistic moves” in order to retain some of yours. It is thus not about winning (as winning would imply that there is no consent), but about obtaining a strategically advantageous position for the next round of negotiations. Although the intentions are often clearly recognizable, pragmatic strategies and micro-edits allow for a continuation of the IGC process at a slow pace and with dim prospects for coming to an agreement. They are a way for stalling delegations to keep issues of TK and TCEs largely limited to WIPO while not making too many concessions.

The presupposition for such thinly veiled communicative strategies is their vagueness and ambiguity. In this respect, micro-edits are similar to shifters, in that both not only differentiate between positions, but also map commonalities and the common ground between actors who otherwise hold incommensurable positions. They mediate between different actors, contribute to the cohesion of the committee and allow for the expression of fundamentally different viewpoints. Thus, they are a way for actors to exchange views that can differ from each other extremely, while at the same time creating a discursive space that allows this exchange. The specificities of diplomatic negotiations allow for pragmatic strategies balancing between distinct interests and motivations. While the intent behind micro-edits like changing “will develop” to “will consider taking a decision” is well-understood by participants in the IGC, its specific instantiation prevents delegations from being held fully accountable for this implicit stalling of the IGC process. The veiled intention behind such indirect speech acts must be inferred from its context. This inference can be understood as a “buffer” making it possible for stalling delega-

\textsuperscript{188} WIPO/GRTKF/IC/12/9.
tions to realize their strategies in order to slow down negotiations. On the other hand, this buffer prevents speeding delegations to openly critique them for doing so, as the changes in wording are ambiguous and can be attributed to other external factors, such as the need for further consultations and discussions to achieve more clarity.

The practice of micro-editing is not limited to regional group meetings. In IGC sessions beginning at IGC 14 in June/July 2009, the discussion of specific paragraphs was shifted to the main plenary session. Projected onto a screen behind the dais, delegation after delegation commented on the African Group proposal for a new IGC mandate for the 2010/2011 biennium. Although this mode of drafting texts is common to international negotiations, the session’s chair as well as the WIPO secretariat initially struggled with implementing this approach. The chair was not wholly satisfied with this mode of work from the beginning and stated a number of times that “this is not a drafting exercise”, although delegations subsequently engaged in just that. He repeatedly complained that he could not see what was projected onto the screen behind him. Numerous offers by delegations to provide him with a laptop or a second screen so that he could monitor what happened behind his back were ignored.

The specific methods for documenting the statements and comments onscreen also had to be figured out. It was unclear, for instance, whether new text should be bracketed or underlined, or whether the member state requesting the change should be noted in a footnote or in the continuous text. These uncertainties have been addressed, so that starting with IGC 17, deletions are marked by brackets, additions by underlining, both preceded by the delegation’s name set in upper case:

[46] Peoples and Communities, INDIA, MBOSCUDA, MEXICO, TRINIDAD AND TOBAGO [for example] including Indigenous Peoples, Local Communities, Cultural Communities, and/or MBOSCUDA First Nations IRAN individual groups and families in whom INDIA [the custody], and safeguarding of the traditional cultural expressions/expressions of folklore are INDIA [entrusted or held] presumed to be vested in accordance with […]

As micro-edits, the amendments and requested deletions can be understood as instantiations of communicative patterns and strategies related to interests and power. For instance, the changes requested by India to this passage on the definition of beneficiaries in WIPO/GRTKF/IC/16/5 (“The Protection of Traditional Knowledge: Revised Objectives and Principles”) hint at domestic policy issues and

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189 WIPO/GRTKF/IC/14/8 Rev.
190 Author’s notes, IGC 17.
the relation between indigenous groups (or adivasi) and the state in India. Similarly, a proposed amendment by Iran can be read as the awareness of potential cultural resources tied not to communities but to individuals in the Iranian context. Micro-edits thus go beyond the level of strategy within IGC negotiations and relate to the political and economic interests of member states.

For example, at IGC 17, the delegation of Trinidad and Tobago requested to add

[47] works of mas

to the list of forms constituting the subject matter of protection for a possible legal instrument. The representative argued that this specific form of TCEs was not adequately reflected in the document, though other delegations referred to the phrase “tangible and intangible” as encompassing this form as well. The example indicates that member states want to see their interests accurately reflected in WIPO documents, but it also leads to highly specific formulations, undermining the intent of creating broad, encompassing legal tools. This makes it difficult to draft and decide on texts, as the legal implications of all aspects in these texts need to be considered by member states.

Speeding up delegations can thus also stall negotiations by being too specific in their micro-edits. The distinction between stalling and speeding delegations is only an abstraction of a more complex constellation of actors and motivations, for at times the strategies and arguments employed by delegations interested in substantial results of the negotiations are ineffective or even cause a deceleration of the process. This relates to the complex interplay between the interests of member states, I.LCs, NGOs, regional groups and the two basic strategies (speeding and stalling). If a given delegation or organization is part of speeding up delegations but views the position of other speeding delegations as problematic, the specific interest of the delegation can have more weight than the general interest in coming to an agreement. The proposed inclusion of “works of mas” is one example for this: while it serves the national interest of Trinidad and Tobago and other states, it takes some speed and momentum out of negotiations as it causes discussions about its reasonability.

Another example concerns the relation between I.LCs and the African Group: as the main proponent of a legally-binding agreement for the protection of TK and TCEs, the African Group often portrays itself as representing the bearers or holders of cultural property as well. However, many IGCs contest this notion as it is counterproductive to their interest of maintaining and controlling their TK and TCEs autonomously. They thus contradict some proposals by the African Group,

191 See Fenelon and Hall 2008, which includes a number of case studies.

192 Barbados and Jamaica supported the amendment as well.
although this leads to a weaker position of speeding up delegations. Micro-edits thus mediate between different levels and aspects of negotiations, and as instantiations of communicative strategies they balance various interests and motivations of participants as well. For that reason, there is a hierarchy of strategies that at times subordinates the general strategies of speeding and stalling.

To come back to the specific process of micro-editing as a way to either speed or stall negotiations, a number of examples at IGC 14 illustrate how delegations make use of utterance fragments in order to edit their interests into documents. The discussions centered around the African Group proposal\textsuperscript{193} show that the modification of text, even in small dimensions, has relevant implications for the course of negotiations. Similar to opening statements, it also permits an insight into the perspectives and strategies of actors in IGC negotiations. The second sentence of the original text of the African Group proposal – clearly aiming at fast progress and establishing a mode of work preparing a legally binding international instrument for the protection of GRTKF – read as follows:

\begin{quote}
[48] The Committee will undertake during the next budgetary biennium (2010/2011) text-based negotiations on genetic resources, traditional knowledge and traditional cultural expressions.
\end{quote}

During the discussions of this passage at IGC 14, a number of delegations made comments with regard to the specific wording. While the text was projected onto the screen behind the dais, representatives requested amendments, changes and deletions to this sentence. The Australian delegation proposed to rephrase the text as follows:

\begin{quote}
[49] The Committee will undertake during the next budgetary biennium (2010/2011) text-based negotiations without prejudice to the outcome, including a possible legally binding instrument on genetic resources, traditional knowledge and traditional cultural expressions.
\end{quote}

The addendum to the paragraph leaves the door open for stalling delegations to contradict arguments by speeding delegations that text-based negotiations are a clear indication for the drafting of a legally binding instrument. Other types of outcomes, especially a non-binding convention or a declaration, are included in the edited statement, thus reducing the stakes for stalling delegations not interested in substantial changes to the intellectual property system. Similarly, the EU requested the paragraph to be rephrased as follows:

\begin{quote}
\textsuperscript{193} WIPO/GRTKF/IC/14/8 Rev.
\end{quote}
The Committee will continue its work and undertake during the next budgetary biennium (2010/2011) text-based negotiations outcome-oriented deliberations on genetic resources, traditional knowledge and traditional cultural expressions, based on their impartial treatment and noting the different levels of development in the texts.

As outlined above, outcome-oriented deliberations lack the implication of working towards a text as the basis for a potential legal instrument. The delegation from New Zealand, in a similar vein, proposed to replace text-based negotiations with “the development of text.” On the other hand, the representative of Brazil argued that the passage should be complemented by a formulation differentiating between the three substantive issues of the IGC:

The Committee will undertake during the next budgetary biennium (2010/2011) text-based negotiations on genetic resources, traditional knowledge and traditional cultural expressions, taking into account the different levels of development reached by the three substantive topics and the different levels of development of the texts indicated in the third paragraph.

The rationale behind this proposal was that by factually separating TK and TCEs from GR, it was possible to speed up negotiations on the first two issues where substantial progress was more likely. Adding this formulation as a qualifier into the text, speeding delegations would thus be able to refer to it and argue for a quick agreement on TK and TCEs independent from the work on GR that was lagging behind.

In the process of constructing text by micro-edits, proposals are edited in order to reflect strategic perspectives on the consequences implied in the text. “Text-based negotiations” are rephrased as “outcome-oriented deliberations” or “the development of text” or fully discarded, as they are regarded as conceding too much to the parties in opposition. These “drafting exercises” are quite common in the UN system, and call for the competence, if not sophistication, to phrase one’s desired perspectives at the appropriate linguistic micro-level. The implications of terminology need to be considered closely, such as the – at least in the UN system – shared understanding that “text-based negotiations” refers to the drafting of a convention or a treaty. “The development of text”, or for that matter “outcome-oriented deliberations” have different implications – first and foremost not the drafting of a convention or treaty. While on the first sight these distinctions seem to be rather simplistic, the extensive amount of work that was put into these drafting exercises illustrate that even minor changes of linguistic fragments can have major implications on the further proceedings – a fact that is acknowledged by the actors involved and taken into account when drafting texts. Interviews and conversations with IGC participants indicate they are quite cognizant of and very reflective about these practices.
Like opening statements, micro-edits can be understood as boundary objects mediating between stability and instability in the process of IGC negotiations. They maintain a common ground and a shared understanding that allows actors to stay at the negotiating table and continue their deliberations despite radical differences in perspective. This is possible through the interplay of referential frames – in the sense of conceding and retaining – and the communicative frame. They permit the expression of interests and strategies in a manner that prevents overt reproaches or disputes. By editing small utterance fragments, actors can frame texts and passages of text according to their perceptions and interests. As instantiations of communicative strategies, micro-edits are compensatory mechanisms, as they permit conflicting utterances while maintaining the IGC as a speech community. Furthermore, they are highly variable strategically deployable shifters. The meaning of micro-edits is mostly at the pragmatic and not the semantico-referential level. Phrases like “without prejudice to the outcome, including a possible legally binding instrument” ([49]) gain their power not from semantic meaning, but because they point to more general strategies within the IGC while maintaining coherence among the participants.

To understand these edits, it is necessary to analyze not only the utterances and the IGC as its context. What has to be taken into account as well is the broader ethnographic context, issues of domestic policy and diplomacy, including ideological presuppositions about the substantial issues negotiated. The following chapter will shed light on this interplay using the example of different perspectives on traditional knowledge in IGC negotiations.