

AFRICAN GROUP

Comments on Gap Analysis

1. We welcome the two documents prepared by WIPO secretariat (Gap Analysis on the Protection of Traditional Knowledge and Traditional Cultural Expressions/Folklore). Both documents underline what, in our view, the IGC, through its work during the past several years, has clearly established— that there are gaps under the international property rights norms for the protection of traditional knowledge and cultural expressions/folklore. These documents to some extent consolidate previous documents brought to the attention of the Committee. The elements incorporated in them generally are consistent with the mandate given to the secretariat during the 12th session of the committee. Future sessions of the committee are expected to provide opportunity for detailed comments. General observations are made in the following paragraphs.
2. One of the components of the mandate to the secretariat is captured in the committee's instruction to the secretariat to prepare the two working documents by describing “what gaps exist at the international level, illustrating those gaps, to the extent possible, with specific examples.” As previous working documents of the committee and the numerous contributions of member state and partners show, there are numerous incidents or examples (both factual and normative) which anchor the prevalence of such gap. The working documents fall short of providing representative set of examples.
3. We consider the mandate given to the secretariat as a very important one. Evaluating the current normative framework for the protection of TK and TCEs, *in an authoritative manner at that, is no easy task. It would be useful to provide a full account of how the process of preparing the document has been done (departments involved, individuals participated, length of time spent of the report, level of supervision etc.)*
4. *The mandate also requires the secretariat to take into account, while preparing these working documents, the previous work of the committee. Though—as we have already noted— the outcome of the secretariat's work consolidates the outcomes of the committee's previous documents, there ought to be an attempt to clarify the extent to which the secretariat has taken into account the previous works of the committee. The advantage of such an exercise is straightforward. It saves the committee from investing voluble time in considering issues that have already been looked. This will definitely advance the committee's work by clarifying what has been already achieved. But in both documents, there isn't a systematic presentation of how previous works of the committee have advanced the discussion on various issues.*
5. *The gap analysis documents make use of academic publications and documents published by private foundations. What is the basis for selecting these documents?*
6. The working papers introduce definitions to ‘traditional knowledge’ and ‘cultural Expressions/ Folklore.’ These definitions are categorised as ‘working definitions’ for the purpose of the gap analysis. This presents a tricky question. If a certain definition is adopted prior to the investigation of the particular gap in relation to TK and TCEs, then the entire exercise is compromised unless there is a general

agreement on that particular definition. What is the basis of such definition? How do they impact on discussions within the committee generally and the perspectives and proposals of the secretariat in the working documents? *The secretariat should refrain from abrogating to itself the authority to define these concepts.* It will be sufficient to summarise how the concept is captured under international instruments and works of the IGC. It seems that the committee has adopted different approaches to the two working documents in this regard.

7. The concept of 'protection' assumes an important dimension of the working documents. In our view, the definition explored for protection within the committee is not necessarily limited to a narrow and legalistic one. Protection in its general sense relates to physical protection of these resources and also their further development. We consider that this general understanding of protection should be explored and is very much within the ambit of WIPO's mandate in general and that of the IGC in particular. One can take the various recommendations of WIPO's Development Agenda to see how the element of protection is generally captured. There may well be several unanswered questions connected to this approach, and some of these questions are indeed complex and encroach upon sensitive issues such as competencies and mandate. *It will be inappropriate for the working document to privilege one approach over another. The secretariat should not be interpreting the mandate of the IGC (as it does in para 22 of the Working Document on TCEs). How can we reconcile the working documents' narrower approach on protection and the view clearly expressed that "protection of TCEs must be supported by the provision of appropriate technical assistance, capacity strengthening and support for documentation where desired by communities."* (Para 79, TCEs Working Document.
8. *Both working documents make reference to international law and legal instruments (trade law, human rights, and public international law). To what extent can these references serve as authoritative assessment of the current state of play under international law?*
9. *The two documents cite, in numerous occasions, UN Declaration on the Right of Indigenous Peoples. To what extent can these sorts of instruments be considered as adequate in addressing certain protection gaps?*

Comments of the African Group regarding the Gap analysis document on TCEs

General comments:

- The Group hoped that the identified gaps would advance the incremental work of the IGC in the realization of its mandate and not to become a clog in the wheels of progress.
- Most of the gaps identified after the 12th session of the IGC had indeed been the subjects of extensive studies and comments since the beginning of the work of the IGC. The value of the exercise was seen in the intended focus on legal and normative gaps within the context of WIPO.
- The gap analysis should be read along with the list of 10 issues or questions earlier considered by the IGC.
- It should be understood that the analysis suggesting how some gaps may be filled by aspects of existing IP or general law necessarily mean that TCEs, as such, are adequately covered. They are not.

Definitions:

- While the definition of TCE is indeed a huge challenge, the choice of a descriptive definition instead of a strict definition is preferred at this stage in order to move forward.
- For the sake of our interest, « protection » is closer to what is being sought by the African Group rather than mere preservation or safeguarding.
- (Para. 15) If the term (details of what we understand by) “protection” is not agreed upon, it may be replaced by a sui generis system (even similar to IP).

Forms of TCEs (para. 12 and 14):

- Care should be taken in dealing with methods to avoid confusion between TCE and TK.

Gaps not directly addressed:

- The gaps that are not directly addressed and indeed relevant to the concerns of the African Group and failure to address them satisfactorily only raises doubts over the suitability of WIPO for dealing with the matters. It is however conceded that there will always be a few issues that cannot be addressed with the IP framework.

Appropriate regime to cover TCEs:

- Conventional IP system does not fit properly with TCEs, as these have special characteristics and are of a special nature.
- Existing international instruments cannot properly and adequately address the protection of TCEs.
- Questions such as period of protection, fixation, originality and ownership were recurrent elements referred to and analyzed during the

discussions. They demonstrate the specific nature and characteristics of TCE and its incompatibility with the conventional IP System.

- A sui generis system is the most appropriate tool that could be designed in order to meet the needs of TCE owners for protection.
- An international legally binding instrument is necessary to protect TCEs. This treaty should clearly meet concerns of indigenous communities, such as their sovereignty on their TCS, the prior informed consent.

Management of TCEs:

- the role of the State is important to manage TCE protection issues. It was also indicated that concerns of indigenous communities would be better met if these communities manage themselves their TCEs. Reference is made in this respect to the principles contained in the Convention for the protection of cultural heritage of UNESCO.
- Indigenous communities that detain rich resources of TCEs have the firm right to benefit from them with the objective to improve their living conditions.
- Limitations and exceptions for the use of TCEs should also be considered with clear conditions that take into consideration the objectives of users.
- In order to be protected, TCEs should be defined and identified by communities. The role of States in this respect is extremely important.

Indigenous and traditional names, words and symbols:

While Art. 6 quinquies of the Paris Convention may come to help in a situation where a work is such as may « deceive the public » the judicial attitude to the determination of what should « deceive » makes reliance on judicial discretion insufficient and fragile.