

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.