

# 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 12<sup>th</sup> 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?*