

SWITZERLAND

Comments on Gap Analysis on the Protection of TCEs/Folklore

We thank and commend the Secretariat for the elaboration of the two draft gap analyses regarding traditional knowledge (TK) and traditional cultural expressions (TCEs). In the view of Switzerland, the two documents address in a careful and comprehensive way the issues specified in the relevant decisions of the 12th session of the IGC.

The gap analyses are well structured and provide a very useful overview of the issues that the IGC needs to address in its discussion on the protection of TK and TCEs. We consider Chapter II on definitions to be of great value, as it clearly indicates the need for clarifying terminology and concepts, something Switzerland has been continuously pointing out during the discussions of the IGC.

Chapters III to VI are most helpful, as they provide an overview of what obligations, provisions and possibilities for protection are already in place, where and what gaps exist, and in what manner these gaps could be addressed. We also consider the distinction between IP and other areas of public international law in Chapter III to be a promising approach, as it allows the IGC to focus its work on those areas within its mandate.

In our view, the contents, structure and chapter titles of both gap analyses should be drafted in a parallel manner, to the extent possible. The same applies to the working definitions of relevant terms, such as in particular the definition of "gap" and "protection." This parallelism will simplify the comparison of both gap analyses and the ensuing discussions in the IGC.

Specific comments on and proposals for amendments to the draft gap analysis on TCEs:

- Both documents state at the outset that there exists no internationally agreed definition of TK and TCEs. As Switzerland stated at previous IGC-meetings, it considers the clarification of the two concepts to be a crucial prerequisite for the further successful work of the IGC. Such definitions need not be final ones; rather, working definitions would be sufficient. In the view of Switzerland, the definitions used in the IGC documents mentioned in the gap analyses and the definitions put forward in the gap analyses provide a good basis for the further work of the IGC on definitions.
- As pointed out by Switzerland previously, TCEs may exist outside of indigenous and local communities. This is, for example, the case for TCEs found in Switzerland. Thus, in the view of Switzerland, the definition of the concept of TCEs (see paras. 5 to 9 of the draft gap analysis) should be broad enough to also cover these forms of TCEs. Accordingly, even though TCEs of indigenous and local communities is likely to be in foreground, other TCEs should not be excluded.
- We welcome the explicit mentioning of the conceptual divide in para. 34 and thus find it important that the alternative solutions through non-IP mechanisms are listed in para. 35.
- In paras. 55(g) and 101, we suggest to add a reference to existing (ethical) guidelines applicable to the mentioned activities and institutions with regard to TK and TCEs, such as the International Council of Museums' (ICOM) Code of Ethics for Museums.
- In para 71, we suggest to point out in the text that there is at this time a lack of experience with the implementation of the mentioned international instruments due to their recent adoption.
- We suggest to add the column "desired protection" of the table on page 13 in the annex, that is, between the columns "existing protection" and "gaps."