

JAPAN

Comments on the Draft Gap Analysis on the Protection of Traditional Knowledge

Japan submits the following comments on gap analysis. We will reserve further comments hereafter, if necessary.

[General Remarks]

Japan recognizes that the issue of traditional knowledge is important for many member states. However, Japan believes that the depth of understanding among member states on this issue is still insufficient for any kind of an agreement at the international level to be formed. Therefore, as a step to deepening our understanding of traditional knowledge, we appreciate the Secretariat for its compilation of this draft on gap analysis.

In the process of more specifically defining "traditional knowledge" in the draft on gap analysis, it is written that "... as a distinct gap analysis is required for 'traditional cultural expressions,' this suggests that the analysis should focus on traditional knowledge in the strict sense (TK *stricto sensu*), rather than the broader concept of traditional knowledge that has sometimes been used as a general term. (para.3)"

On the other hand, however, the draft does not refer to the specific details of broader-sense definitions of traditional knowledge. In the draft, many relevant expressions from many relevant documents are cited. The scope of traditional knowledge to be dealt with in the gap analysis, however, is not clearly set forth. Before proceeding with further discussions based on the gap analysis, very fundamental

issues should be made clear, such as definitions of various terms concerning traditional knowledge, and it is essential that the discussion be based on a shared understanding of issues, terms, and definitions.

The following are Japan's comments on some expressions/wording included in the draft gap analysis. Japan is ready to make further comments when necessary.

[Details]

(i) Item II.(b)(i): The concept of 'protection'

The expression of paragraph 7, "For the purposes of this draft gap analysis, 'protection' is taken to mean the kind of protection that is most often considered in intellectual property contexts..." narrows down the purposes of the gap analysis. We understand that the draft also refers to other options than IP laws; however, any expression that might create the prejudgment that traditional knowledge can be protected under an IP system should be avoided, considering the fact that many member states of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore have had different opinions and concerns regarding definitions, subject matter, and objectives for the term "protection" set forth in the List of Issues. Especially, the understanding that the word "protection" was restricted to IP protection was not shared by member states. Furthermore, it is necessary to examine not only under an IP system but also options other than legal protection and mechanism.

(ii) Item III.(a)(ii): defensive protection of TK within the patent system

"Disclosure requirement" is taken as an example of "defensive protection." On the other hand, there are those who express an objection against the introduction of such a disclosure requirement based on the grounds that such a disclosure requirement will not preclude erroneous granting of

patents. Rather, they doubt if such a disclosure requirement will serve as an effective measure for the protection of traditional knowledge related to genetic resources. At least, both pros and cons about this issue of disclosure requirement should, therefore, be included in the gap analysis.

The subjects of disclosure requirement proposals such as those in the TRIPS council focus on genetic resources and traditional knowledge related to them. That means that every piece of traditional knowledge is not always regarded as a subject of discussion for protection under the IP system. Some parts of this draft gap analysis, on the other hand, refer to 'TK related to genetic resources' while other parts refer to TK alone. Amendments should be made to these parts so that TK as a subject of protection is more precisely described and clearly defined.

(iii) Item IV. (c)(iii): forms of misuse and other illegitimate actions that cannot be prevented under existing law (page 25)

In regard to "Protection against unjust enrichment or misappropriation of TK," a discussion should be carried out taking up as many presumed cases as possible such as the following: a remedy or a medicine is produced directly relying on the TK of an indigenous community; a remedy or a medicine is produced relying on a piece of publicly-known knowledge; or a remedy or a medicine is produced utilizing a piece of knowledge in addition to TK.

[Others (correction)]

(i) Item III.(b)(iv): UN Desertification Convention

In the third line, "to that end, shall undertake to" should be corrected to "to that end, undertake to". Furthermore, in the tenth line, "Article 6(b)" should be corrected to "Article 6(b) of ANNEX II".

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