

Comments on Gap Analysis on the Protection of Traditional Knowledge

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Page 13- (iii) undisclosed TK

Comment

The concept of trade secret protects trade information not yet publicly known or not yet accessible by the persons who are normally connected with the information. It is still unclear how this secrecy requirement could be interpreted in situation where the TK or secret know – how is disclosed within the local community, does it still considered as trade secret?

In addition, the information that is eligible for protection as trade secret must have commercial values of which derive from its secrecy. It can be argued that trade secret does not recognize traditional knowledge in its spiritual and cultural value.

We, therefore, feel that the gap in applying trade secret regime to protect certain characteristic of traditional knowledge is unclear. In order to adjust trade secret regime to accommodate TK protection could have a far reaching effect. Additional study is required to make sure that it does not have unexpected impact on the trade secret regime itself.

Page 23- item 47 (i)

Subject matter not covered under existing IP law

Comment

It is quite natural to find that the current intellectual property law of members countries does not adequately protect traditional knowledge as such. Since IP system focuses on the protection of creations and innovations

that have originality or novelty. Traditional knowledge, on the other hand, gains its value not because it is new, but because it is generated, preserved and transmitted in its traditional and intergenerational context. The core value of subject matter of TK differs from subject matter under IP system.

IP system, therefore, can only compliment *sui generis* TK protection regime by discouraging the misuse or misappropriation of TK, but IP system cannot serve as the main focus of the work of IGC.

Since the gap of lacking appropriate TK protection causes problems to many countries, and the nature of the problem such as misappropriation of genetic resources, traditional knowledge occurs abroad, outside jurisdiction of national law, it, therefore, requires international binding TK protection regime to address the gap.

To fill this gap, the secretariat should continue to develop international binding instrument in this regards as well as model law on TK and introduce to the committee.

Page 27

Prior informed consent

Comment

Under Article 15 (3) of CBD, the contracting party who access to genetic resources must have the certificate of origin.

The gap is that, in practice, several Government are not in the position to issue the required certificate or consent, such as to access to TK because it lacks effective database system and institution. Besides, in some countries it is the local communities who are the ones who own TK, not the Government.

To fill the gap, the committee should render much needed assistance to member countries in developing the effective database system, the management of database as well as the establishment of institution and suitable

national legislation. This assistance, in the short term, could help member countries in addressing the problems of misuse/misappropriation.

Annex Page 4 TK-related signs and symbols

Comment (b) gaps identified

The secretariat should be aware that GI protection cannot protect traditional knowledge as such. Therefore, it can be seen a mechanism that prevent marketing of illegitimate commercial uses of traditional knowledge.

Annex Page 8 Specific mechanisms of TK protection against certain prejudicial acts and acts of misappropriation

Comment (b) gaps identified

The secretariat should address that norm requiring explicit obligations to share benefit derived from commercial use of TK to TK holder.

Annex Page 9 Illegitimate patenting of TK

Comment (b) gaps identified

The secretariat should indicate in the gap analysis that both patenting of traditional knowledge as such without the consent (etc.) and patenting of invention that develop from TK without consent (etc.) are problems that need to be resolved.

Misuse and misappropriation of TK

Comment

The gap should clearly identify “misuse” along with “misappropriation” since the two may have different meaning and coverage.

