

Gap analysis on the protection of traditional knowledge

Comments by Brazil

The comments below are without prejudice to the submission of additional comments at a later stage

Identified gaps

There are some gaps that we would expect to be explored or more elaborated in the document, as follows:

- a) *Trigger for the application of norms protecting TK*: the draft document leads to the erroneous idea that TK protection would only be triggered in those cases of misappropriation of the traditional knowledge: itself or when the traditional knowledge has *directly* led to the development of a given product (see page 26 for an example). Consideration should also be given to those cases where the TK has contributed to the subject matter of a given IPR even when the latter has not directly derived from the TK.
- b) *Term of protection of TK*: It is expected that the gap analysis takes into consideration the fact that the term of protection accorded to IPRs might not be adequate to ensure the due preservation of TK.
- c) *Assessment of the application of ABS legislation in third countries*: considering that many countries have as of yet passed ABS legislation, the gap analysis should consider possible obstacles to the extraterritorial application of such legislation by courts in third countries in the event of the advent of an international norm on the protection of TK.
- d) *Possible sanctions*: many acts amounting to possible misappropriation of TK is dealt with in the gap analysis. However, it would also be relevant to take into account the impact deriving from the lack of adequate sanctions to redress the damages caused by the acts of misappropriation.

Options that exist or might be developed to address the gaps

- a) *Conditions for negotiating binding provisions*: the Annex to the document often refers to the possibility to resort to the elaboration of binding norms "if timely for precise international norm" (see page 7 of the Annex for an example). The elaboration of a binding norm is not conditioned to the existence of precision of its contours, as the vague definition of the term "invention" (TRIPS, Article 27) demonstrates. In fact, international norms must allow some space for national legislation in order to be not only acceptable as an international norm, but also to accommodate possible differences across countries.
- b) *Shortcomings of soft law*: although there is room for the use of soft law in the international regulation of TK, the gap analysis should take into account the shortcomings of the existing soft law in effectively addressing problems of misappropriation (such as the case of the Bonn Guidelines), which is a gap in itself.

Specific Comments

33. The UNESCO "Convention on Protection and Promotion of Diversity in Cultural Expressions" should be mentioned in the table once it states in its preamble: "Recognizing that the diversity of cultural expressions, including traditional cultural expressions, is an important factor that allows individuals and peoples to express and to share with others their ideas and values".

43. It should be included the clause "supporting the safeguarding and preservation of traditional knowledge" once it would comprise the transmission among and within traditional communities.

47. (page 24) The Brazilian experience shows that more than one community can be the rights owner of a TK.