

## JAPAN

### Comments on the Draft Gap Analysis on the Protection of Traditional Cultural Expressions/ Expressions of Folklore (TCEs/EoFs)

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

#### [General Remarks]

We appreciate the Secretariat's efforts devoted to this gap analysis responding to proposals/questions presented from each member state at the previous meeting.

We regard this gap analysis produced by the Secretariat as useful in the sense that it gives each member state a rough description of some of the gaps related to the intellectual property protection of TCEs/EoFs. However, in spite of tentative definition of TCEs/EoFs in carrying out gap analysis, its scope is quite unclear. The lack of a common understanding or image concerning such fundamental issues, including the very definition of "TCEs/EoFs," can be regarded as a great constraint in conducting this gap analysis.

For example, paragraphs 96 to 98 refer to "adaptation rights", but a common understanding of the concept of adaptations of TCEs/EoFs cannot be achieved without a clearer definition of TCEs/EoFs. Consequently, it is impossible to consider whether or not adaptation rights are necessary in order to resolve gaps.

Given this situation, it is difficult to fully analyze the gaps, the necessity of addressing the identified gaps and methods of filling in the gaps. If a more concrete as well as

precise analysis is to be conducted, we believe a consideration of fundamental issues like definitions of words including TCEs/EoFs, and constructing a common understanding in advance will be absolutely indispensable.

Moreover, as far as this gap analysis goes, the analysis is being carried out focused on kinds of TCEs/EoFs that can be easily turned into intellectual property in order to make a point and to conduct analysis as much as possible. Furthermore, as paragraph 22 states "While instruments and programs for the preservation and promotion of TCEs as such are valuable and complement the protection of TCEs, the preservation and promotion of TCEs as such are not the focus of the IGC's work and, therefore, not of this analysis.", the important facets of preservation and promotion of TCEs/EoFs have been removed from consideration, and only intellectual property protection aspect is being considered. We understand the IGC's remit and mandate, but we believe that essential gaps of TCEs/EoFs can not be identified through considering only intellectual property protection.

In addition, paragraph 34 states that there are more profound conceptual divergences between the aspirations and perspectives of indigenous peoples and the conventional intellectual property system. However, there is no analysis on whether the gap analysis which focuses only on the intellectual property facet can resolve the conceptual divergences from the aspirations and perspectives of indigenous peoples. We believe analyzing the conceptual divergences from the aspirations and perspectives of indigenous peoples is absolutely necessary, because the protection of TCEs/EoFs cannot be achieved through the framework of intellectual property protection alone and should be realized through diverse approaches in line with the characteristics of the locality and community.

As long as there is no common understanding or image

concerning fundamental issues, it will be extremely difficult to carry out further gap analysis considering diverse factors, including the preservation and promotion of TCEs/EoFs, based on a small number of examples. Therefore, Japan believes, first of all, that we should discuss fundamental issues based on the List of Issues for constructing a common understanding at future IGC meetings, while referring to this gap analysis.

[Details]

(i) Paragraph 10

**Replace**

TCEs could conceivably include a wide range of tangible, tangible and mixed forms of creative expression.

**with**

TCEs could conceivably include a wide range of tangible, intangible and mixed forms of creative expression.

**<Reason>** Correction

(ii) Paragraph 15

**Replace**

The word "protection" in the above decision of the IGC is understood to mean protection in an IP sense (sometimes referred to as "legal protection"),

**with**

For the purposes of this limited tentative analysis, it is proposed that the word "protection" in the above decision of the IGC mean protection in an IP sense (sometimes referred to as "legal protection"),

**<Reason>** This ought to be revised because the understanding that "protection" is limited to protection in an IP sense in the IGC's decision is not shared.

(iii) Paragraph 41 b)

Under Articles 15.4 and 7.6 of the Berne Convention, while each country can stipulate a term of protection of any great length domestically, such a term of protection cannot be

applied internationally. Paragraph 41 b) states it is due to the "comparison of terms" under Article 7.8. We would like to ask the secretariat that the reason for this is maybe due to Article 7.3 which stipulates that "the countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years." rather than Article 7.8.

(iv) Paragraph 75

**Delete**

A key policy challenge is coordinating any new protection for TCEs with existing IP systems.

**<Reason>** This description cannot be supported, as it presupposes protection of TCEs/EoFs is confined to intellectual property protection.

(v) Paragraph 78

**Delete**

Committee participants may also wish to assess the addressing of gaps in relation to the specific technical and legal questions that have been previously identified as necessary to consider if wishing to establish new forms of protection for TCEs. These are:

- (a) What form of protection is intended and what rights should be granted?
- (b) Who would own the rights and who would benefit from them?
- (c) What are the exceptions and limitations, if any, that should attach to these rights?
- (d) How would the rights be acquired? Should there be formalities?
- (e) For how long should the rights last and how are they lost? Should they operate retroactively?
- (f) How to administer and enforce the rights? What forms of legal proceedings and dispute resolution mechanisms should there be? And.

(g) How should foreign rights be treated?

**<Reason>** This description is based on the hypothesis that there is a confirmed need to construct new legal protection of TCEs/EoFs which has not been agreed yet. Therefore, we think this reference is unnecessary in view of the objectives of this gap analysis.

(vi) Paragraph 96

**Delete**

If there is no such adaptation right, the community cannot control this use of its cultural materials and traditions.

**<Reason>** There has not been no proof yet that "an adaptation right" is necessary or appropriate for protection of overall TCEs/EoFs.

[Others (correction)]

(i) page 2, line 20

**Replace**

III. THE ANALYSIS

**with**

IV. THE ANALYSIS

(ii) page 14, line 1

**Replace**

III. THE ANALYSIS

**with**

IV. THE ANALYSIS

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