



Permanent Mission of Brazil in Geneva

71, Avenue Louis-Cusaï - Case Postale 165
1216 Cointrin Geneva - Switzerland

Note nº.

ADVANCE COPY

The Permanent Mission of Brazil presents its compliments to the World Intellectual Property Organization and has the honor to send herewith Brazil's preliminary comments on the gap analyses on the protection of traditional knowledge and on the protection of traditional cultural expressions (TCE)/expressions of folklore. These comments are being sent without prejudice to the submission of additional comments at a later stage.

2. The Permanent Mission of Brazil avails itself of this opportunity to renew to the World Intellectual Property Organization the assurances of its highest consideration.

Geneva, June 30, 2008



Genetic Resources, Traditional Knowledge and Biotechnology Section
PCT and Patents Arbitration and Mediation Center, and Global I.P. Issues
WORLD INTELLECTUAL PROPERTY ORGANIZATION

Geneva

(Fax 022 338 8090/022 338 8120)

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.

Wipo Intergovernmental Committee on
Intellectual Property and Genetic Resources,
Traditional Knowledge and Folklore

**Gap analysis on the protection of Traditional Cultural Expressions (TCE)/
Expressions of Folklore(EF)**

Comments by Brazil

Brazil submits below the comments to the document prepared by the Secretariat above mentioned. The comments are presented without prejudice to the submission of further comments at a later stage.

General Comments

- Prior Informed Consent, benefit-sharing from the community of origin of TCEs must be the general principles, irrespective of status granted on TCE/EF. It should be ensured that communities enjoy rights over their TCEs/EFs and that the requirement of prior informed consent is a condition for their use by third parties.
- Traditional expressions should be eligible for protection by the mere fact that they are part of culture heritage of indigenous and local communities.

Specific comments:

Paragraph 27 (c)

With respect to "protection of style", it should be taken into account that the use of other cultures as source is part of the creative process. In other words, when disclosed the origin, "styles" can be processed and acquire new connotations that should not be considered as a misappropriation.

Paragraph 29

With respect to defensive protection of TCEs, Brazil suggests the protection against (i) misappropriation of designs of handcrafts.

Paragraph 33, (a)

(a)TCEs should be classified as original work of a specific community as long as it is the first one made and not a copy. TCEs are the product of a group culture, existing since its beginning, and/or being the earliest form of something.

Paragraph 33, (b)

Although it is not always possible to identify one individual author, TCEs/EoFs of ethnic groups and traditional populations have an identifiable collective authorship, given that they belong to a specified group or population – a reason why it is not possible to defend that the expressions belong in the public domain. Therefore, entitlement to rights should be collective and in accordance with the interests and traditions of the groups in question. The notion of “author” is an element that attests the complexity of the issue, i.e., often there is not an identifiable author or authors within the traditional communities.

Paragraph 33. (h)

A provision on exceptions and limitations is welcome as long as it is based on the need to allow uses of public interest.

Paragraph 35

In order to protect TCEs against misappropriation, IP mechanisms of protection should be developed at the same time as non-IP mechanisms should not be discarded.

Paragraph 39 – Table – Desired protection

In relation to “desired protection”, it must include positive protection system of TCEs, without prejudice to the decision Members may take to protect TCEs/EoFs via “sui generis” systems as well the other options listed in the document.

Paragraph 89

TCEs are not in public domain as they belong to a specific group which should be compensated by their use by non-members of the group in question as a benefit-sharing mechanism. An international instrument should, inter alia, clearly ensure communities the entitlement of collective rights, moral and economic, related to their TCEs/EoFs.

Paragraph 90

TCEs could not be treated as orphan works. Despite the difficulty to identify one individual author, TCEs of ethnic groups and traditional populations have an identifiable collective authorship. Therefore, entitlement to rights should be collective and in accordance with the interests and traditions of the groups in question.

Paragraph 101

It is important to remind that registers, inventories, databases and lists of TCEs are non-exhaustive. Others TCEs could be added as long as they are disclosed.

Annex

Protection desired for Literary and artistic productions.

- Gaps: No explicit communal rights protection. - The economic, social and cultural rights are the communal rights perceived. See 42 (a) and (c) of the present document prepared by the Secretariat
- Options: Orphan works – The authors of work are determinate collectivity, as the author is not only one person, but a group. See comments to items 33 (b) and 90.

Protection desired for Secret TCEs:

- Gaps: Definitions of "disclosed" and "confidential". In a parallel, the definition of undisclosed information, Article 39, TRIPS, could be considered.

Wipo Intergovernmental Committee on
Intellectual Property and Genetic Resources,
Traditional Knowledge and Folklore

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