

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.