

IX SESSION OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND  
GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

**Comments by Brazil**

Brazil submits below the comments to documents 9/4 and 9/5. As both the draft provisions and the comments related thereto may have significance in terms of the interpretation of the instruments discussed in the framework of the IGC, Brazil' s remarks address also issues raised in the text of the comments to the draft articles.

**Document WIPO/GRTKF/IC/9/4**

General comments:

- Protection of Traditional Cultural Expressions (TCE) and Expressions of Folklore (EF) must not be confined to the realm of intellectual property alone. Whatever international instrument to result from the activities of the IGC, nonetheless, should restrict itself to the competences of the Organization, without prejudice to using intellectual property rules to confer some kind of protection to the aforementioned expressions.
- The instrument(s) to be produced as a result of IGC' s discussions must address the question of TCE/EF produced by immigrants - thus considering the mobility of the populations.
- The duty to require compliance with prior informed consent (PIC) from local or indigenous communities shall not be conditioned upon registration. Prior Informed Consent must be sustained as a general principle, irrespective of the status granted on cultural expressions or traditional knowledge.
- Registration shall not be a condition for enforcement of rights (as seems to be proposed by draft articles 3 (a) and 7), neither as a condition for counting the term of protection (as proposed by draft article 6(i)). In this connection , the draft instrument on TCE/EF should adopt provision similar to the one contained in article 11.1 of the draft on traditional knowledge (TK) ("Eligibility for protection of traditional knowledge against acts of misappropriation should not require any formalities").
- References to the expression "particular value or significance" should be suppressed from the draft instrument (eg, articles 3 and 7). Traditional expressions should be eligible for protection by the mere fact that they are part of the cultural heritage of indigenous and local communities.

Specific Comments:

I - Objectives:

- (iv) Clarification would be appreciated as to the meaning of the expression "derivatives of cultural expressions", which is also found in other parts of the document (eg, articles 3 and 10)
- (vii) Add "natural and cultural" before "the environment"
- (ix) Include "according to the prior informed consent" after "promote"

II - General Guiding principles:

- Item "b": Considering that the main guiding principle concerning the protection of TCE/EF is the right to deny access to these expressions, it is not acceptable to adopt the principle of balance between the interests of the holders of the expressions and those of the users.

### III - Substantive provisions

#### Article 1 (comments to):

- Article 1 (a)(bb) sets out as one of the criteria for the protection of TCE/EF the idea that the expressions be "characteristic of a community' s cultural and social identity and cultural heritage". The use of the term "characteristic" suggests that TCE/EF must be both "authentic" and "genuine". Considering that the Brazilian experience recognizes the dynamic and iterative (in the sense that it represents a process) nature of the cultural expressions, this idea should be reflected in the draft, contrary to the idea conveyed by the current version of the document.
- Brazil would appreciate some clarification as to the meaning of "tacit consent" ("Criteria for protection, ii) in the text of the comments, as well as possible means to assess the actual occurrence of such "consent" in concrete cases.
- Brazil does agree with the comment presented under item (iii) according to which "expressions that may characterize more recently established communities or identities established would not be covered."

#### Article 3:

- (a): Enforcement of rights by the custodians of TCE/EF shall not be conditioned upon registration.
- Although reference is made to PIC under item (a), there is no such reference under the other items. Brazil understands that the requirement for PIC should be incorporated for all the other categories of expressions, regardless of previous registration.

#### Article 4:

- The draft article should address those cases in which an expression is under the custody of more than one community.
- The provision requiring compliance with PIC should turn redundant the expression "when required in these provisions" (item (a))

#### Article 5:

- Item (a)(iii): Delete the items "reporting news and current events" and "incidental uses" as these cases refer to too broad instances.

#### Article 6:

- Term of protection should only be related to the fulfillment of the criteria for protection. Once a TCE meets these criteria, protection should be accorded without need for any further requirement.

#### Article 7:

- Brazil does not agree with the need for registration as a condition for protection of the right over TCE/EF by its custodians.
- (iv): Brazil has concerns with the use of ADR in order to solve disputes relating to TCE/EF and proposes to suppress reference to this sort of dispute settlement from the draft instrument.

#### Article 9:

- This provision should also permit the application of the protection over rights previously acquired in a manner inconsistent with the other provisions of the draft instrument.

### **Document WIPO/GRTKF/IC/9/5**

#### General comments:

- Brazil is of the view that protection of TK is **not** contingent upon the consent by the interested communities and that it has a mandatory nature.
- The draft instrument on TK should clearly incorporate a provision requiring PIC and benefit-sharing as a condition for access to TK.
- The draft instrument must contain a provision whereby intellectual property applications should disclose the origin of the TKs, any associated genetic resources, as well as evidence of compliance of PIC and benefit-sharing from the country of origin.

#### Specific comments:

##### I - Policy objectives:

- (iv): Add to the last part of this item the following: "... and promote measures aimed at conservation and protection of natural and cultural environments."
- (vi): Brazil has concerns with the language found in this item as it could convey the idea, which is not acceptable for Brazil, that TK protection should seek to facilitate the transmission of the knowledge ("respect and facilitate...").
- (vii): This provision could benefit from language already set out by the CBD, article 10 (c), which elaborates the underlying idea from item (vii) in a clearer fashion.
- (ix): The title of this provision should be changed in order to be in line with the title in the index of the Annex ("Concord with relevant international agreements and processes")
- (xi): The word "existing" should be deleted.
- (xii):
  1. The verb "promote" should be replaced by "ensure";
  2. The expression "other applicable international regimes" should be replaced by "relevant national and international regimes";
  3. The final part of the provision (starting from "and including...") should be suppressed.
  4. After the suppression proposed in number 3 above, the following expression should be inserted: "in particular the Convention on Biological Diversity".

- (xiii):
  1. The language of the provision should make clear that the expression "if so desired" assumes compliance with PIC;
  2. The following expression should be deleted: "...for, authentic products of traditional knowledge and associated community industries."

## II - General Principles (comments to):

- Item (a) - suppress the last sentence of the text, starting from "Measures for...", taking into account that contrary to what is suggested, measures for protection of TK shall not be deemed voluntary nor have their applicability conditioned upon manifestation on the part of the holders of such rights.
- Item (c) - The last part of the comments on this item suggests that enforcement measures are optional. Brazil thus proposes to replace this last part of the comments for the following: "(c) Measures for protecting traditional knowledge should be effective in achieving the objectives of protection, and should be understandable, affordable, accessible and not unjustifiably burdensome for their intended beneficiaries, taking into account of the cultural, social and economic context of traditional knowledge holders. National and international measures should be available in order to provide appropriate enforcement procedures that permit action against misappropriation of traditional knowledge and violation of the principle of prior informed consent."
- Item (e)
- First paragraph: delete the paragraph as it stands and, instead, rephrase it making it clear that the principle of equity may lead at time to treatment more favourable for the TK holders, as this idea does not seem clear enough from the language used in the last sentence of this paragraph ("In reflecting these needs...").
- Second Paragraph: Replace the paragraph by the following: "As a means of ensuring that the intellectual property regime is equitable and responsive to broader societal interests, the rights of TK holders over their knowledge should be fully recognized and safeguarded. Respect for prior informed consent should be ensured, and holders of TK should be entitled to the fair and equitable sharing of benefits from the use of their traditional knowledge. Where traditional knowledge is associated with genetic resources, the distribution of benefits should be consistent with measures established in accordance with the Convention on Biological Diversity, providing for the sharing of benefits arising from the utilization of genetic resources."
- Item (f)
  1. Suppress the final part of the title starting from "...governing...";
  2. Replace "the applicable law" for "national and international regimes";
  3. Add a second paragraph, as previously proposed by Brazil, in the following terms: "Measures should be adopted with a view to ensuring that existing intellectual property systems operate in a manner that is consistent and does not run counter to the objectives of traditional knowledge protection."
- Item (g) - Delete the first paragraph of the comments.
- Item (h) - Brazil would appreciate clarification as to the part of the text starting from "if so desired...".
- Item (j) - Delete the part of the text starting from "including, for example,..."

### III - Substantive provisions:

#### Article 1:

- Paragraph 2:
  - add "or illicit" between "unfair" and "means" (second last sentence of the draft provision);
  - replace, all along the paragraph, the terms "acquisition" and "acquired" for other that does not convey the idea of "appropriation"
- Paragraph 3:
  - In the heading: Replace "prevent" for "suppress";
  - (iv): delete the expression "if the traditional knowledge has been accessed"
  - (iv): replace "compensation" for "benefit-sharing";
  - (iv): delete the last part, starting from "when such use" until "knowledge";
  - (iv): add "according to the national and international regimes" as the final part of the provision;
  - (v): delete the word "willful".
  - Add the following as small roman (vi): "The granting of patent rights for inventions involving traditional knowledge and associated genetic resources without the disclosure of the country of origin of the knowledge and resources, as well as evidence that prior informed consent and benefit-sharing conditions have been complied with in the country of origin."

#### Article 2:

- Add in any one of the paragraphs explicit reference to the possibility of a "sui generis" system, as it is mentioned among the General Guiding Principles.

#### Article 3:

- Paragraph 2 (last part): Replace "**and** knowledge associated with genetic resources" for "**or any other** knowledge associated with genetic resources", as knowledge related to, inter alia, medicine, agriculture and environment are also comprised within TK associated to genetic resources.

#### Article 4:

- (ii): Brazil would like to request clarification about the treatment to be accorded to any cases that might not fall under items (i) through (iii);
- (iii): replace "**integral to** the cultural identity" for "**related to** the cultural identity".

#### Article 5:

- It is suggested that, for the sake of clarity of the text, the provision be split into two.

#### Article 6:

- Paragraph 1: The provision should incorporate language indicating that the use of the TK requires, apart from compliance with PIC, respect for mutually agreed terms regarding benefit-sharing.
- Paragraph 1: Add "according to national legislation of countries of origin", or the like, at the beginning of the paragraph.

- Paragraph 2: Replace "**only** give" for "**mainly** give" as TK holders should be free to require benefits of whatever kind as a condition for the use of the knowledge.

#### Article 7:

- Paragraph 1: delete "...from its traditional holders...";
- Paragraph 3: add the word "unjustifiably" (or the like) before "burdensome";

#### Article 8:

- Paragraph 1(ii): Replace the expression "use in government hospitals" for "use by public health system", in order to accommodate national systems, such as the one in Brazil, in which private hospitals may be included in the public health system;
- Paragraph 2: suppress the paragraph, in view of the broad language used in it.

#### Article 9:

- Paragraph 2: Replace "specify the duration of protection" for "prevail", with the aim of ensuring that, under the case provided for under this paragraph, the national law is the one to be applied.

#### Article 10:

- Delete the word "acquisition" (second and third lines);
- Add, after "good faith", the following: "as well as fair and equitable benefit-sharing with traditional knowledge holders, according to national legislation of countries of origin."

#### Article 11:

- Paragraph 2: Replace "in the interests of" for "to enhance...", considering that registration is only one of the measures that can ensure transparency, certainty and conservation of TK.

#### Article 12:

- Include language stating clearly that the national legislation to be respected is the one from the country where knowledge holders are located.