

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

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SUBMISSION BY THE RUSSIAN FEDERATION: REPORT ON THE INTERNATIONAL SYMPOSIUM ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC RESOURCES: TOWARDS SUSTAINABLE DEVELOPMENT FOR INDIGENOUS COMMUNITIES

Document prepared by the Secretariat

INTRODUCTION

1. The Ministry of Regional Development of the Russian Federation (Minregion), in cooperation with the World Intellectual Property Organization (WIPO), organized an International Symposium on Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: Towards Sustainable Development for Indigenous Communities, which took place from October 31 to November 4, 2010, in Saint Petersburg, Russian Federation.
2. On December 6, 2010, the Delegation of the Russian Federation submitted a document entitled "Report on the International Symposium on Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: Towards Sustainable Development for Indigenous Communities" and requested that it be made available as an information document for the seventeenth session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.
3. *The Committee is invited to take note of this document and the Annex to it.*

[Annex follows]

ANNEX

REPORT ON THE RESULTS OF THE WORK OF THE INTERNATIONAL SYMPOSIUM ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC RESOURCES: TOWARDS SUSTAINABLE DEVELOPMENT FOR INDIGENOUS COMMUNITIES

The present report was prepared by Minregion under its own authority, with the assistance of the Symposium Rapporteur, Dr. Aleksey Stanislavovich Avtonomov.

The report summarizes the discussions that took place in the Symposium, and is not intended necessarily to represent the views of all the participants. The program for the event, working documents, informal reports of the Symposium's panel rapporteurs and list of participants are available online at www.wipo.int/tk.

Introduction

The International Symposium on Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: Towards Sustainable Development for Indigenous Communities, organized by the Ministry of Regional Development of the Russian Federation in cooperation with the World Intellectual Property Organization (WIPO), took place in Saint Petersburg (Russian Federation) from October 31 to November 4, 2010.

More than 80 people took part in the work of the Symposium, including representatives of State authorities, international organizations, scientific institutions, non-governmental organizations, indigenous peoples and local communities, from 20 countries. Participants from States participated in their personal capacity.

The aim of the Symposium was to have a scientific and practical discussion, in a non-formal context, of the key policy and technical issues relating to the protection of traditional knowledge (TK) and traditional cultural expressions (TCEs) as intellectual property (IP) subject matter, as well as access to genetic resources (GR) and the sharing of benefits from their use.

The issues discussed by participants in the Symposium were considered in a broad context and also touched on the concerns and hopes of indigenous peoples in relation to land resources, the environment and their biocultural heritage, which constitute a component of sustainable economic development for indigenous peoples and local communities.

The Symposium program consisted of eight sessions, at which the following issues were discussed: (1) the subject matter of protection, the concepts of TK and TCEs, (2) beneficiaries, (3) rights in TK and TCEs, duration of protection, procedural formalities, (4) unlawful acts and sanctions, (5) international aspects, relationship with IP, transitional measures, (6) exceptions and limitations, (7) GR, and (8) capacity-building for the sustainable development of indigenous peoples.

The Symposium also considered issues currently discussed by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, (IGC), as well as corresponding international instruments relating to indigenous peoples, biodiversity and cultural heritage, including the United Nations Declaration on the Rights of Indigenous Peoples (2007), the Convention on Biological Diversity (1992) and the recently adopted Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010), as well as the UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage (2003), the Convention on the Protection and

Promotion of the Diversity of Cultural Expressions (2005) and the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972).

The work of the Symposium was organized on the basis of subject-related sessions.

SESSION 1. SUBJECT MATTER OF PROTECTION, CONCEPTS OF TK AND TCEs

Participants in the Symposium considered that it was useful to proceed on the basis of the definitions of TK and TCEs prepared by the WIPO IGC and by the Intersessional Working Group in documents WIPO/GRTKF/IC/17/4, WIPO/GRTKF/IC/17/5 and WIPO/GRTKF/IC/17/9.

The key criteria for the concepts of TK and TCEs could include those such as “transmission from generation to generation”, “a unique product” that belongs to the community as part of its cultural heritage, “oral transmission or through imitation” and “the reflection of a community’s expectations.” It was also proposed to list examples of TK and TCEs in the footnotes to the above documents. An appropriate international register may be created for the purposes of identifying the subject matter of protection.

It was proposed to have a brief definition of TK reflecting a universal approach acceptable to all. Participants in the Symposium noted the possibility in many cases of using the term “traditional technologies.” The participants referred to the proposal of representatives of indigenous and minority peoples in the Russian Federation to define TK as “the sum of knowledge on the natural laws of the surrounding environment, expressed in the culture of indigenous peoples, which may be passed on from generation to generation as the basic principles and rules of human behavior in the environment, and providing the possibility of sustainable development for the whole of humanity.”

Symposium participants devoted attention to the possibility of using the term “characteristic” instead of “unique.” The issue was also raised of modern forms of work made using traditional methods, which should be protected by copyright or patent law, and not by an international instrument on the protection of TK and TCEs.

Participants in the Symposium supported the idea of creating a concise and general international instrument which would be made specific in each particular case at the national level.

SESSION 2. BENEFICIARIES

Symposium participants noted that the beneficiaries of the rights within the framework of a draft international instrument for the protection of TK and TCEs may be only communities and not their individual members. If a member of a community leaves that community, or otherwise uses TK and TCEs separately from the interests of the community, the community’s rights should be taken into account. The products and works in the sphere of TK and TCEs of individual members of the community must also belong to the community, including after the individual’s death.

Symposium participants expressed the view that the customary law of indigenous peoples should be applied when defining beneficiaries in relation to the use of TK and TCEs. The Government should assist communities, although it should not decide the matter of how benefits are granted and used, since that responsibility lies with communities. It was also said that in those countries where members of communities holding TK and TCEs dominate in a population, the State may play a key role in the protection of TK and TCEs although the rights therein should belong to communities, and the State may act as the custodian of the system of protection.

The rights in TK and TCEs should be considered in the context of the basic rights of indigenous peoples, which must be enshrined in the national legislation of States parties, since TK and TCEs are linked to the territories, ceremonies, resources and sacred places of the peoples in question.

In this regard, participants in the Symposium referred to the fact that TK and TCEs from different communities should not be mixed, but attention focused on the TK and TCEs of indigenous peoples and local communities. The need was expressed to create a mechanism for the transfer of income from the use of TK and TCEs by the State to communities in the form of funds which should use accumulated resources for the preservation and development of the cultural heritage of indigenous peoples.

In cases where owners of TK and TCEs and beneficiaries are different legal subjects, income should be shared in accordance with the rules and traditions of the community. Attention should also be paid to the fact that TK and TCEs may simultaneously belong to different communities, just as an indigenous people may live in different States, as a result of which that people is under the protection of different national legislative systems.

SESSION 3. RIGHTS IN TK AND TCEs, THEIR TERMS OF VALIDITY, PROCEDURAL FORMALITIES

A problem was noted in relation to confidential TCEs and TK, which must be protected differently than non-secret TCEs and TK. There are many opportunities to disclose secret knowledge by a person who is not familiar with a tradition. The legal system for the protection of such knowledge calls for a precise mechanism for the transmission of secret knowledge. It was proposed to distinguish acts relating to the disclosure of TK by rights owners, from those carried out by unscrupulous persons, as well as from those perpetrated without malicious intent. In addition thereto, it was said that matters relating to ownership of TK and TCEs, inviolability and reputation were highly important, but went beyond the limits of IP.

As regards the conditions for protection, as a rule, IP is related to economic relations. The State grants, for a specific period of time, a monopoly right to an author or inventor, after which the results of activities, which are protectable by such means, enter the public domain. This process is justified by the stimulation of innovations and progress. However, the customary law of indigenous peoples does not correspond to this paradigm. In accordance with the customary law of such peoples, the right to use TK and TCEs does not arise without a specific obligation. While a community used TK and TCEs, the protection thereof was potentially permanent. In this regard, participants in the Symposium raised the question – should economic rights also be permanent? Also, why should there be different conditions for community-held TK and TCEs and for individually-held TK and TCEs?

Symposium participants expressed the view that there should be no compulsory formal documentation of TCEs and TK. In addition, databases or lists may be useful for defining the existence and attribution of TK and TCEs. However, there were taboos and prohibitions on custodianship, just as there was a fear that secret TK and TCEs would become accessible “to the uninitiated.” Registers may be useful for the fixing of rights ownership, but, in the case of secret TK, they may give rise to problems.

The issue was raised of the “infringing” uses of TK and TCEs which had begun prior to the entry into force of an enforcement mechanism. Certain specialists were of the opinion that such an approach could work in the case where the subject of the IP used was protected by a patent, which has a relatively short period of protection – 20 years from the time of application. However, this may not be feasible in the case of copyright, whose protection lasts from the time of creation of a work to the lifespan of an author, plus 50-70 years after his death. The opinion was

expressed that the use of copyright would give rise to an unjustifiably long postponement of the return of TCEs to an indigenous people or local community. Reference was, therefore, made to the need to limit the term of validity of copyright to one year from the time of adoption of the international normative instrument under discussion. Subsequent use of TCEs and TK would be possible only with the consent of communities. However, a one-year limitation should be used only in cases of banal copying of TCEs, and in other cases, where there is work by an author based on or using a certain "style" of TK and TCEs, the rules of copyright should be adhered to.

In the case of a restriction on the period of protection of TK and TCEs, beneficiaries may attempt to gain the maximum benefit from rights ownership for a short period and squander the heritage.

It was also proposed to extend to the protection of TCEs the measures provided for by trademark laws. It was proposed to add to the draft instrument the possibility of suspending consent for the use of a trademark, where it violates the rights in TK and TCEs.

SESSION 4. UNLAWFUL ACTS AND SANCTIONS

Considering the possible sanctions for the infringement of use of TK and TCEs, participants in the Symposium paid attention to the need to divide such sanctions between those applied in relation to intentionally unlawful acts and those which are not premeditated. The need to produce appropriate measures was also highlighted, in the case of infringement of the rights in TK and TCEs by commercial entities.

The following list of unlawful acts was proposed:

- the use of works of TK and TCEs, which causes damage to the interests of indigenous peoples and local communities as a whole, for example the use of sacred forms of TK and TCEs;
- the use of works of TK and TCEs, which may be offensive to the TK and TCE owners;
- the infringement of conditions agreed with the owners of rights in TK and TCEs;
- use of TK and TCEs and access to TK and TCEs without the prior informed consent of the owners of the rights therein; and
- non-provision of fair distribution of income from the commercial use of TK and TCEs.

On the subject of prior informed consent from owners for the use of TK and TCEs, the desire was expressed to create a register of TK and TCEs in order to make known the party to be approached for the appropriate authorizations for the use of TK and TCEs.

The burden of proof for obtaining prior consent for the use of TK and TCEs should lie with the users, and the procedure for proving and the establishment of proof should be regulated by national legislation.

From the discussions at the Symposium, the need emerged to establish a period of transition (in terms of national legislation), during which the unsanctioned unintentional use of TK and TCEs could be regulated by agreement with the right owners or by the termination of the use.

An international instrument for the protection of TK and TCEs should provide for the obligations of States to introduce, at the national level, the appropriate mechanisms for the protection of TK and TCEs, as well as punishment for infringements in that particular area.

SESSION 5. INTERNATIONAL ASPECTS, RELATIONSHIP WITH IP AND TRANSITIONAL MEASURES

The participants in the Symposium agreed that there were two possible ways of achieving international regulation of IP rights in TK and TCEs: “soft” international law and international treaties, the implementation of which is compulsory for those who ratify them. Each of the given methods has its merits and shortcomings. Thus, instruments of “soft” international law provide recommendations for all States in the global community, although their implementation is not compulsory. International treaties, the implementation of which is compulsory, operate only in relation to those States which have acceded to such treaties. In that connection, whatever the nature of the international instrument, it should reflect specific principles, including the reciprocal nature of the obligations of States parties, recognition of the status of indigenous peoples and so on.

In addition, it was noted that the legal effect of any international instrument gives rise to constant monitoring of their implementation, which could be carried out by a supervisory international authority which periodically examines the application of the rules. Such an authority could be envisaged in an international instrument for the protection of the IP of indigenous peoples.

Symposium participants paid attention to the fact that different States have legislation which, in different ways, defines the status of indigenous peoples and the membership of a specific person of one or other such group. It was proposed that regulation of the status of indigenous peoples and definition of the membership of a specific person to a particular group should be left at the national level, although where a person moves from one State to another, his status as a person in relation to (or otherwise) an indigenous people is preserved as it is defined by the legislation of the State from which that person originates.

Participants in the Symposium agreed that the effect of the international IP instrument should be extended both to indigenous peoples and to local communities.

Taking into account the complexity of creating a comprehensive instrument which would immediately regulate TK, TCEs and GR, it was proposed to begin by devising and submitting for adoption a draft international instrument on the protection of TCEs.

SESSION 6. EXCEPTIONS AND LIMITATIONS

Participants in the Symposium noted that the well-known exceptions adopted in the existing system of protection for IP were not always applicable in cases of TK and TCEs (see the documents produced by the WIPO IGC, in particular Article 8, WIPO/GRTKF/IC/17/5 (TK) and Article 5, WIPO/GRTKF/IC/17/9 (TCEs)).

In this connection, further work was required in the following areas:

- (i) the legitimate use of TK and TCEs by their owners, as a minimum in the traditional context; members of communities who have left those communities should also benefit from such an exception;
- (ii) sustainable use of TK and TCEs by a means corresponding to their organic and dynamic nature;
- (iii) the use of TCEs and TK as inspiration for the creation of new IP subject matter and their separation from the results of borrowing, adaptation and unauthorized use.

A close link was identified between the subject of exceptions and limitations and the problem relating to the definition of beneficiaries. Problems were noted relating to the division of activities within the customary or traditional context, and also to the status of the members of communities that own particular TCEs and TK. The need was expressed to create special provisions for sacred TCEs and TK.

The need to provide for the specific requirements of countries that wish to administer their TK and TCEs in accordance with their own particular characteristics was acknowledged by participants in the Symposium. Particular note was taken of the importance of uses of TK and TCEs in the mass media and on the Internet.

SESSION 7: GENETIC RESOURCES

Symposium participants noted that the concept of GR was defined in Article 2 of the Convention on Biological Diversity.

TK, associated with GR, can include agricultural and medicinal knowledge, as well as knowledge of the environment.

The issue of GR was a subject of special consideration at sessions of the WIPO IGC, since the inventions produced on the basis of GR could be patented.

A number of possible alternatives for continuation of the work of the WIPO IGC were considered:

- (a) the “defensive” protection of GR – carrying out work to compile a list of existing periodicals, databases (with the participation of indigenous peoples) and other information resources, which document disclosed GR, and also examining the possibility of devising recommendations or guidelines in relation to the procedures for the search and examination of patent applications in order to generate a more effective inventory of disclosed GR;
- (b) introducing requirements for the disclosure in patent applications of the source for obtaining or country of origin of GR used in a claimed invention. In that particular area of work, there was a need to clarify a number of issues, for example relating to the range and term of validity of obligations which could be attached to GR and TK in the country of origin and foreign jurisdictions, and also the extent to which these obligations “penetrate” subsequent inventive activity and the corresponding patent applications. Clarity in this area was essential in order for patent or judicial authorities, and also the applicant for the grant of a patent or its owner, to be aware when the obligation to disclose came into force or when the mutual relationship between the original GR or TK was so remote and insubstantial that such an obligation could not be brought into effect;
- (c) IP issues in terms of mutually agreed terms for the fair and equitable sharing of benefits resulting from the use of GR. In that particular area, draft guidelines should be devised, as WIPO has done, relating to agreed practice on the basis of additional information available and included in the WIPO online database, and work should be done to collect information characterizing licensing practices in the field of GR.

The question of legislation which applied to non-modified organisms was a topical one. It was proposed to take account of the contribution of indigenous peoples to the preservation of non-modified GR. Also, the contribution of indigenous peoples was considered, taking into account their TK in relation to modified organisms, for example their contribution to the production of specific breeds of animals and plant varieties.

In order to achieve successful implementation of the given aspects of TK relating to GR, specially devised legislation, as well as harmonization of national and international law, were necessary.

At the Symposium it was noted that non-genetically modified derivatives from the process of nature should not be covered by patent protection. The distinction between ownership of GR and ownership of IP rights in an invention based on such a source was noted.

Participants in the Symposium attached importance to the fact that existing collections of national botanical gardens, reserves and sanctuaries, where GR are situated not on their original territory (ex situ), was a separate issue.

The need was also expressed to analyze how GR and TK are transformed into innovations. A particular ethical aspect was present in cases involving access to medicines, based on TK and GR, which were owned by indigenous peoples.

SESSION 8: CAPACITY-BUILDING FOR SUSTAINABLE DEVELOPMENT OF INDIGENOUS PEOPLES

Participants in the Symposium familiarized themselves with information relating to the activities of the State authorities of the Russian Federation in relation to provision of sustainable development for indigenous and minority peoples, including the adoption and implementation of appropriate normative acts at the federal and regional levels, State financial support for social, economic and ethno-cultural development, provision of access to natural resources for the operation of the traditional economy and other measures, and noted the importance of Russian experience in this particular sphere.

Symposium participants emphasized that the sustainable development of indigenous peoples, their communities and the countries in which they live should be the fundamental aim in devising a mechanism for the international legal regulation of the protection of TCEs, TK and GR. Participants shared a common approach to sustainable development as one of the priorities for the international community, and each State and people at the current time. It was highlighted that the economic prosperity and well-being of peoples, including indigenous peoples, in the modern world were based above all on appropriate use of knowledge and technologies. Knowledge was now acquiring ever greater significance and value. In such situations, the protection of TK, TCEs and GR at both the international and national levels could and should become a stable foundation for the sustainable development of indigenous peoples.

The participants also appreciated information from WIPO on its ongoing activities to strengthen, upon request, the capacity of indigenous peoples and local communities, (1) in the normative work of the IGC, especially through the Voluntary Fund, as well as through (2) publications (like the one prepared in cooperation with LIENIP) and awareness-raising and (3) legislative advice and capacity-building projects such as those carried out under the Creative Heritage Project. It was considered that WIPO could play a leading role in working with other international organizations to ensure both the international legal protection of TK and TCEs as well as their preservation in an integrated and holistic manner.

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