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Third Session
Geneva, June 13 to 21, 2002

TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY RIGHTS

Document submitted by the European Community and its Member States

1. On June 14, 2002, the Permanent Delegation of the European Commission to the International Organizations in Geneva submitted a document on behalf of the European Community and its Member States to the third session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.
2. The document is entitled "Submission by the European Community and its Member States on Traditional Knowledge and Intellectual Property Rights." The document is reproduced in the form received and published in the Annex.
3. *The Intergovernmental Committee is invited to take note of this document and the Annex to it.*

[Annex follows]

ANNEX

Submission by the European Community
and its Member States
on
Traditional Knowledge and Intellectual Property Rights

3rd session of the WIPO Intergovernmental Committee on IP and Genetic Resources,
Traditional Knowledge and Folklore
(13-21 June 2002)

INTRODUCTION

The protection of traditional knowledge (TK) has become a topic very high on the international IP agenda. It is felt, in particular by indigenous and local communities, that TK deserves stronger protection than is available under existing IP regimes. Complaints have been made about, *inter alia*, the inappropriate patenting of TK, the absence of the sharing of benefits from TK-based inventions and the insufficient consideration of TK in prior art searches by patent offices.

This issue is being intensively discussed in the framework of the newly created WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore. It has been included in the Doha Development Agenda, which resulted from the Doha Ministerial Conference of the WTO in November 2001, and led to a number of recommendations in the context of the sixth meeting of the Conference of the Parties (COP VI) to the Convention on Biological Diversity (CBD) in April 2002. The International Treaty on Plant Genetic Resources for food and Agriculture, approved by the FAO Conference in 2001, calls for protection of traditional knowledge relevant to plant genetic resources for food and agriculture.

It is of paramount importance to ensure policy coherence in all fora dealing with issues relevant to the interplay between IP and biodiversity related matters in order to secure a consistent approach across international bodies, and in particular the WTO, the CBD and WIPO. In this context, it should be recalled that the Doha Development Agenda of the WTO, and in particular its paragraph 19, instructs the TRIPs Council to examine the relationship between the Convention on Biological Diversity and the TRIPs Agreement and the protection of TK.

The role of IPRs in this context is crucial. Accordingly, the EC and its Member States confirm that WIPO, as the specialised UN agency responsible for the promotion of IP world-wide, is the most appropriate forum to tackle the relationship between intellectual property and TK. On several occasions, and especially at the first meeting of the WIPO Intergovernmental Committee, the EC and its Member States expressed their readiness to participate fully and constructively in the debate in order to reach a deeper understanding of the problems involved and develop effective approaches to achieve balanced solutions.

This note aims to define the position of the EC and its Member States on this issue. In this respect, the EC and its Member States would like to inform WIPO of their views on the following points.

1. USE OF THE EXISTING IP PROTECTION SYSTEM TO PROTECT TRADITIONAL KNOWLEDGE

It appears difficult to protect all types of TK under existing IP regimes. However, it may be possible, to a certain extent, to protect certain types of TK or, at least, the way in which it is presented, or products incorporating TK, through existing IP regimes. Therefore, the EC and its Member States believe that TK holders should be encouraged to make full use of the existing IP system whenever possible. For example, even though there are currently no IP standards specifically directed at TK protection within the EU¹, a number of existing IP standards may potentially be used to this end. This use can take various forms.

In the field of trademarks, it is possible, under certain conditions, to protect in the EU signs used in respect of products of traditional communities/groups by collective, guarantee or certification trademarks, either at national² or Community³ level. Geographical indications can also play a positive and complementary role in protecting traditional products and products incorporating elements of TK. Products originating from indigenous and local communities could for instance be identified as geographical indications, if their production is based on TK held by this indigenous or local community and fulfils the criteria for geographical indication protection. The EU legislation provides a Community protection for designations of origin and for geographical indications for agricultural products and foodstuffs⁴. Only a group or, subject to certain conditions, a natural person is entitled to apply for registration. The registered names are protected against any unlawful use or usurpation.

Community plant variety rights⁵ (PVR) are granted for varieties of all botanical genera and species, including, *inter alia*, hybrids between genera or species. Not only a person who has bred, but also a person, who has discovered and developed a variety, can be entitled to a PVR. Therefore a Community plant variety right for varieties resulting from TK can basically be granted, provided that the variety is: (a) distinct; (b) uniform; (c) stable; and (d) new. Comparable conditions provide the national PVR systems in the EU Member States.

Regarding copyright, TK as such does not enjoy protection under copyright or neighbouring rights, since ideas, knowledge or concepts are not protected, and also in view of other constraints, such as the identity of the author, term of protection, etc. However, expressions of

¹ With the exception of Portuguese Law No 118/2002 on traditional knowledge associated with genetic resources. This law is not yet in force.

² Article 15(2) of Council Directive 89/104/EEC of 21/12/1988 to approximate the laws of the Member States relating to trade marks, OJ No L 40 of 11.2.1989, p. 1.

³ Article 64(2) of Council Regulation (EC) No 40/94 of 20/12/1993 on the Community trade mark, OJ No L 11 of 14.1.1994, p.1.

⁴ Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ No L 208 of 24.7.1992, p. 1.

⁵ Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ No L 227 of 1.9.1994, p.1.

TK may, under certain conditions, be protected⁶. If TK is compiled into a database, the *sui generis* protection provided for in the EU legislation on the legal protection of databases⁷ covers the database itself, but not the actual information compiled therein.

Therefore the EC and its Member States confirm their support for work aiming to compile, compare and assess information on the availability and scope of IP protection for TK, and identify those elements of the agreed subject matter which require additional protection.

2. ENHANCING THE EFFECTIVENESS OF THE IP SYSTEM

Despite the opportunity which exists to use existing standards for trademarks, plant variety rights and copyright, TK can rarely be patented because of failure to meet the basic requirements for patentability, in general the novelty requirement.

However, as well as protecting TK by appropriate use of current intellectual property rights, a number of measures could be taken in the context of existing intellectual property law in order to better prevent, for example, inappropriate patenting of TK and to improve transparency and the sharing of information about patent applications for inventions based on or including elements of TK so as to facilitate benefit sharing. If a person applies for a patent on the basis of knowledge or information which has been obtained improperly, existing patent law allows the right holder of the knowledge or information either to have the patent cancelled or to have it transferred to his name. Some cases have been quoted of parties having obtained patent protection for technology that merely copied existing TK. When this is the case, the patent can be challenged for not meeting the patentability criteria. However, it is always preferable to deal with problems before they arise and the EC and its Member States acknowledge that preventive approaches therefore need to be explored.

The situation is different when TK is used as a basis for further substantive innovations. In such case, these innovations, where they meet the relevant patentability requirements, are perfectly patentable. The existence of such patents should not, however, override accompanying national or international requirements to obtain authorisation from the owner of TK from which the invention is derived and to reward them for the use of it or share the benefits of its use.

In order to take account of concerns of indigenous and local communities and facilitate benefit-sharing and the effectiveness of the IP system, the EC and its Member States considered that the following measures could be considered.

2.1. Development of registers/databases on TK

First, patent offices should fully include TK in prior art searches, to the extent that this information is available to them. In order to make this effective, TK should be more systematically documented in registers or databases. This should happen with the full

⁶ Directive 92/100/EEC on the Rental and Lending Right, OJ No L 346 of 27.11.1992, p. 61; Directive 93/98/EEC on the Term of protection, OJ No L 290 of 24.11.1993, p. 9; and Directive 2001/29/EC covering copyright and related rights in the Information Society, OJ No L 167 of 22.6.2001, p. 10.

⁷ Directive 96/9/EC on the legal protection of databases, OJ No L 77 of 27.3.1996, p. 20.

involvement and prior informed consent of the indigenous and local communities which are the TK holders. The relevant information should be made readily available to patent offices which should effectively consult these registers and databases.

In this respect, the EC and its Member States reiterate their support for work being undertaken by WIPO aimed at revising criteria and developing new criteria which would allow the effective integration of TK documentation into searchable prior art.

2.2. Disclosure of the origin of TK in patent applications

The preamble to the EU legislation on the legal protection of biotechnological inventions⁸ lays down that, if an invention is based on biological material of plant or animal origin, or if it uses such material, the patent application should, where appropriate, include information on the geographical origin of such material, if known; this is without prejudice to the processing of patent applications or the validity of rights arising from granted patents. This provision must be regarded as being an encouragement to mention the geographical origin of biological material in the patent application, along the lines indicated by Articles 16(5) and 11 of the CBD. However, the provision of such information is not an obligation under EU law. Nor does the failure to provide such information have, as such, any legal consequence for the processing of patent applications, nor for the validity of rights arising from granted patents.

The EC and its Member States are willing to discuss the modalities of any system that would allow Members to keep track, at global level, of patent applications with regards to TK for which access has been granted. In order to ensure the efficiency of the patent system, priority should be given to systems that would not be too complicated to manage and would not place a heavy burden on patent offices and on patent applicants. The information to be provided by patent applicants should be limited to the information on the origin of TK used in an invention which the applicant knows or has reasons to know.

3. DEVELOPMENT OF AN INTERNATIONALLY AGREED MODEL FOR THE LEGAL PROTECTION OF TK

The EC and its Member States support further work towards the development of an international *sui generis* model for the legal TK protection. A broader scope of protection including elements of particular interest to developing countries, and in particular TK, would improve confidence in the international IP system and benefit to broader scope of economic and societal actors.

Such an international regulatory framework to protect TK should clearly identify and strictly define the protected subject-matter, determine the beneficiaries of such protection, and the extent of rights they enjoy, regulating access to it and possibly define modalities as regards the sharing of benefits for the use of technologies derived from TK, while leaving sufficient flexibility to States to adapt this regime to local situations. Indeed, TK can be very diverse in its expressions according to the countries concerned. TK protection would have to be implemented and enforced by government and/or by civil action before a national court. The existence of such requirements should not change the patentability as such of an inventive

⁸ Recital 27 of Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions, OJ No 213 of 30.7.1998, p. 13.

novel application derived from TK, but they would affect the sharing of benefits from use of it.

The EC and its Member States therefore invite those Members which have practical experience with protecting TK at domestic or regional level to share this experience with this Intergovernmental Committee, so as to be able to better determine the possible building blocks for an international *sui generis* model.

CONCLUSIONS

- The EC and its Member States reiterate their support for the on-going work of the WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore. WIPO is the most appropriate forum to tackle the issue of legal protection of TK through intellectual property rights.
- In this respect, work on the definition of the term “traditional knowledge”, the possible use of existing IP protection for TK, the identification of elements requiring additional protection and the status of TK as prior art, is of particular relevance.
- The EC and its Member States confirm their commitment to find appropriate, effective and balanced solutions for protection of TK agreeable to all parties.
- The EC and its Member States agree that, where possible, the existing IP protection system should be fully used to protect TK.
- The EC and its Member States confirm the importance of the IP protection system as an incentive for innovation, growth and employment and their readiness to consider measures to prevent inappropriate patenting of TK and to facilitate benefit-sharing as regards the use of TK, such as the development of prior art databases with the involvement and prior informed consent of TK holders and where possible the disclosure of the origin of TK in patent applications.
- The EC and its Member States support further work towards the development of an internationally agreed *sui generis* model for the legal protection of TK. This work should be pursued, where possible, on the basis of the experience gained by countries protecting TK at local or regional level.

[End of Annex and of document]