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PANEL REPORTS

Prepared by the International Bureau

Report of the International Symposium on Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: Towards Sustainable Development for Indigenous Communities

Introduction

The International Symposium took place from October 31 to November 4, 2010, in Saint Petersburg, Russian Federation. The meeting was organized by the Ministry for Regional Development of the Russian Federation, in cooperation with the World Intellectual Property Organization (WIPO).

Approximately 80 persons participated in the Symposium. They were experts identified and invited by the Russian Federation, and they participated in their personal capacities. Participants were from about 20 different countries from all parts of the world. Participants included officials and members of the academy, non-governmental organizations and indigenous and local communities.

The present document compiles the individual reports of the rapporteurs of the panels.

Summary of main Issues Identified

Panel One: Subject Matter and Definitions of TK and TCEs

Chair: Mr. Justin Hughes

Rapporteur: Mr. Marcus Goffe

The Chair opened the Panel by commenting that efforts at definitions had been long and complex. He summarized the issues as such: (1) Are TCEs a subset of TK or separate – this was a complex issue because it was an attempt to use western juridical concepts to define non-western indigenous concepts. The discussions mirrored that taking place in copyright. The Chair expressed the view that, as Silke von Lewinski had said, the only purpose of a definition was to determine which TK should be subject to legal constraints. The Chair gave a brief background to the international discussions on folklore in UNESCO and WIPO. He said that there were two steps: (1) defining it; and (2) making a list of examples. He referred to the Nigerian Copyright Act which defines a TCE as a group-oriented and tradition-based creation of a group of individuals as an adequate representation of their social or cultural identity, standards or other means. The Chair summarized the main characteristics of the definition as – (1) belonging to a community; (2) passed from generation to generation; (3) transmitted orally or by imitation; (4) reflecting the expectations of a community. The principal document at the IGC defining TCEs and TK were documents WIPO/GRTKF/IC/17/4 and 17/5 which included comments made at the 16th session of the IGC and comments thereafter. The Chair proceeded to read from the WIPO Intersessional Working Group (IWG) text (document WIPO/GRTKF/IC/17/9) which was a substantially shortened version. Defining TCEs was usually a two-part process (1) description of TCEs and (2) delimitation of the TCEs or TK to be protected. A lot of TCEs and TK were so internationally diffused that it was impractical to protect them. The Chair opened the floor.

It was suggested to use the Draft produced by the IWG (Doc. 17/9) for discussion. An expert identified key criteria of a definition – (1) passed on from generation to generation, and (2) a unique product that belongs to the community as part of the cultural heritage. It was also proposed that examples be listed in footnotes. Not all culture could be protected. It was pointed out that national laws could list examples of TCEs and that the international instrument provide for that possibility. Most countries try to squeeze into the international law what should be in the national law. It was suggested that a “decision” document could carry some of the content which would not feature in the instrument itself. An international register could be created that would describe subject matter to be protected.

It was asserted that even though States viewed the UN Declaration on the Rights of Indigenous Peoples as an aspirational document, indigenous people saw it as codified international law. The bundling of rights of indigenous peoples and of local communities could be problematic and it was suggested that applicable legal regimes be separate. Definitions had to be based on the UN Declaration, especially on Article 31, rather than on biodiversity laws, as the TK laws could not operate without acknowledging the rights of indigenous peoples. The onus was on States to engage indigenous peoples to work out details of international laws.

It was recalled that TK is not limited to a particular field of technology.

It was proposed to continue the discussion on Doc. 17/9. However, the Chair explained that the Symposium was not continuing the work of the IWGs. Doc. 17/9 was made available at the request of participants.

Three questions were raised by one participant – (1) how does one secure legal certainty?; (2) how does one deal with registries in light of evolving TK, TCEs; and (3) how does one distinguish *sui generis* protection from copyright by individual members of the community?

It was proposed to have a short definition of TK. At the international level, the definition should have a universal approach, based on one common basis – "traditional."

The Russian Federation has a law on the protection of cultural heritage. It was suggested to use the term "traditional technologies" to cover many areas.

It was suggested to use the term "characteristic" instead of "unique."

It was queried whether new expressions of traditional motif would be protected as TCEs or by copyright. The Chair responded that, in his opinion, a TCE had to be passed from generation to generation in order to be eligible for special protection as a TCE. One expert said that a modern work could qualify for copyright protection and would not need TCE protection.

There was wide agreement that a lean, less wordy text, such as Doc 17/9, was more desirable at the international level, with the details and examples of protectable subject matter being left to be included in national laws. However, a representative of a local community in the Russian Federation expressed the opinion that different formulations should not be discarded.

The point was made that there should be no ambiguity, as, in spite of experience with folklore in Russia for decades, it was still not clear what was implied by "folklore." A participant approved of a 30-year-old definition of folklore as "artistic culture."

A participant wondered who would judge whether an expression of traditional technologies as a commercial product was protectable. He also supported a broad definition of beneficiaries to include peoples and other communities. He commented that there were many different types of folklore, including fire brigade folklore, office workers folklore, and even folklore of criminals. It was also queried how long an expression had to exist to qualify as a tradition.

Panel 2: Beneficiaries

Chair: Mr. Abdikalil Tokoev

Co-Rapporteurs: Mr. Les Malezer and Ms. Alexandra Tsibanova

The session centered on the discussion that communities, and not individuals, have the right to hold TK and TCEs, and that communities are to be the beneficiaries when their rights to TK and TCEs are accessed. Even though some communities might have only a small population, there was agreement it should not be individuals who are the beneficiaries.

If individuals leave their communities or have particular responsibilities for TK or TCEs within the community, the collective rights of the community should be respected and individual benefits, where they occur, should take account of any required endorsement of the community.

In certain cases, individuals within a community are regarded as custodians for important and secret information, but this does not allow them to act independently from the will of the community. On the other hand, they may have certain rights as beneficiaries where TK or TCEs are accessed, but this would still be in accordance with customary law.

An example was provided where an individual was the author of many cultural performances involving TCEs. In this instance, it was regarded that the community continued to hold rights to the TCEs and that the performances ultimately remained vested in the community after the life of the author.

Discussion was held on how the decisions would be made to access TK and TCEs and to share benefits. It was agreed the customary law of those communities should always be used to decide who the beneficiaries are.

The State can play a role in assisting the communities, and national and regional institutions can be a resource for communities. However the government should not decide how the benefits are to be provided or used, as this responsibility rests with communities.

The rights of indigenous peoples, taking into account in particular the right of self-determination, need to be respected. The role of TK and TCEs for indigenous peoples, and for local communities, must be understood in the context of the relationship with their territories, ceremonies, natural resources and sacred places. It was therefore important that national law recognize the existence and identity of indigenous peoples and respect their rights to TK and TCEs in the wider context due to the fact that TK and TCEs have an intricate connection to their lands and resources.

Attention should not be distracted from local communities who are not indigenous peoples, as they also are the owners of their TK and TCEs, and are most likely to have customary laws and practices that will be used to determine rights within their communities. The State may be aware that there are many communities, such as the examples given in regard to Kenya and Nigeria, which have their own traditional systems and knowledge.

Where a community holding rights to TK or TCEs is deemed to be the national population, it was agreed that the State may play a central role in the protection of that TK or TCE, but the rights still belonged to the community and there should be due recognition, including in structures, that the State was functioning as a custodian for the community.

Concern was expressed about how States, if receiving benefits arising from access to TK or TCEs, would distribute those benefits to the community. Some support was expressed for the idea that the State should establish a legislative framework for distribution of national benefits wherever benefits might occur. The funds generated from utilization of TK and TCEs should be used for preserving and developing cultural heritage of the indigenous peoples.

It may therefore be possible in certain instances that the owners of TK or TCEs and the beneficiaries are identified and treated as separate entities. However, should this situation

arise, the determination of benefits would still occur within context of traditions and norms of the community.

Situations may exist where distinct communities hold common TK and TCEs, or otherwise may share related information. Also the boundaries of a community may extend across national borders and be subject to differing jurisdictions, and perhaps with inconsistent protections. These situations require further attention, but the same principles apply in using customary law and practices to determine how access to TK and TCEs might occur and benefits should be distributed.

A brief examination of a case relating to “throat singing,” as a TCE, raised some concerns. Throat singing is attributed, in an international register related to the UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage, to communities in China but its relevance to communities in the Russian Federation is not recorded. The community claims unique variations exist in throat singing but the variation that belongs to Russian communities is not protected. The community feels the need for technical support to claim protection for their TCE. Although the State can take steps to register the TCE, the national register is not associated with the UNESCO Convention and might not be adequate to address the specific concerns of the community.

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At the session devoted to the question of “beneficiaries”, the basic discussion led to a debate on the fact that it is precisely communities, rather than individuals, that have the right to be holders of traditional knowledge (TK) and traditional cultural expressions (TCEs), and that such communities must act as beneficiaries when their TK and TCEs are used. Even despite the fact that a number of communities and peoples may be small in number, individuals should not become beneficiaries.

In cases where specific individuals leave their communities or have a special responsibility for TK and TCEs within their communities, it is necessary to respect the collective rights of the communities as a whole. Where these people gain personal benefit, if such exists, it is necessary to take into account any requirements of the community when using TK and TCEs.

In some cases, individuals within communities act as the custodians of important and secret information, although this does not allow them to act independently of the will of their communities. On the other hand, they may possess particular rights as beneficiaries in case of the use of TK and TCEs; nevertheless, such situations lie within the jurisdiction of customary law, taking into account the rights of a community in TK and TCEs.

One example was cited, in which a particular person was the author of many performances including elements of traditional cultural expressions. In that particular case, it was decided that the community should continue to enforce its rights in TCEs; and, finally, rights in those performances were retained by the community after the author’s death.

Discussions continued further relating to how decisions should be taken regarding the granting of access to TK and TCEs, and how to share the benefits. An agreement was reached whereby communities must be guided by customary law, on the basis of which beneficiaries would also be determined.

The State may play a specific role in providing support for communities, and national and regional institutes may become the source of additional assistance for such communities.

Nevertheless, the State shall not decide how benefits will be granted or used, since responsibility for such activities lies with the communities.

Respect should be shown in relation to the rights of indigenous peoples, in particular the right to self-determination. The rights of indigenous peoples and local communities in TK and TCEs should be considered in the context of the relationship of such knowledge and expressions with the territories settled by the peoples and communities, together with ceremonies, natural resources and sacred places. Thus, recognition in national legislation of the existence and identity of indigenous peoples is extremely important, as is respect for their rights in TK and TCEs in the broader context and in the relationship of the rights in TK and TCEs with the territory on which indigenous peoples live and their use of natural resources.

It should also be pointed out that local communities which do not represent indigenous ethnic groups may also act as the owners of their own TK and TCEs, and resort to customary law and practices in order to determine the rights in TK and TCEs within given communities. States may be familiar with a situation where a large number of such a community live on their territory, as was shown in the example of Kenya and Nigeria which have their own traditional systems and knowledge.

When the broader public of a specific nation is recognized as a community in possession of rights in TK and TCEs, it is assumed that the State may play the main role in protecting such TK and TCEs, although rights must remain the property of the community, and there should be recognition that the State acts as the custodian of such rights for the community.

Concern was expressed as to how national governments, when obtaining benefit from access to TK and TCEs, would share that benefit with a community. A number of participants in the discussion supported the idea that the State must establish legislative frameworks for the sharing of benefits from the use of TK and TCEs, where this exists. However, there was a unanimous opinion that funds from the use of TK and TCEs must be channeled to preserve and develop the cultural heritage of indigenous peoples.

In the process of the discussion, it was noted that in some cases the owners of TK or TCEs and beneficiaries are different subjects and they must be considered as separate entities. Notwithstanding, the use of TK and TCEs, together with the definition of the benefit, should be undertaken in the context of the traditions and norms of a community.

Such situations may exist where clearly defined communities hold common TK and TCEs or, in some other way, are in joint possession of information relating thereto. Also, the geographical boundaries of a particular community may occupy the territory of several States, and thereby a given community will lie within several jurisdictions, the systems of protection of which may not coincide. Situations of this kind will require additional consideration but, in that regard, guidance should be taken from the same principles which are enshrined in customary law and practices, in order to define how access should be granted to TK and TCEs, and how benefits may be shared where they exist.

A brief consideration of the situation with regard to “deep-throat singing” as a traditional cultural expression gave rise to specific questions. In the international register kept by UNESCO as part of the Convention for the Safeguarding of the Intangible Cultural Heritage, “deep-throat singing” is attributed to communities in China, but its link with a particular ethnic group in Russia has no designation therein. Thus, a cultural conflict arises between ethnic groups regarding the right in a particular form of TCEs.

The Russian community states that “deep-throat singing” has unique variations, although the variations of a given TCE, which relate to indigenous peoples, are not preserved. The community considers that it should be provided with technical support in order that it may claim its right to protection of its TCEs. Despite the fact that the State may take specific steps to register TCEs, national registers are not affiliated with the UNESCO Convention and do not fully satisfy the needs of a particular community.

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Panel 3: Rights, Duration, Formalities

Chair: Mr. Preston Hardison

Rapporteur: Mr. Heng Gee Lim

The chair underlined the specificities of secret TCEs and TK which could not be protected by IP the way non secret ones could. The law of trade secrets protected corporate knowledge, but in indigenous and local communities, there were many avenues of disclosure to those who did not know or were not trained in the tradition. A legal regime would need to address the details of the disclosure of secret TK. As concerned remedies, he proposed differentiating acts made in good faith and after attempts to discover the rights holders (due diligence) from those made in bad faith. What is the level of effort required to locate and identify the right holders? In the IGC, in respect of TK, the remedy was equitable benefit sharing. In addition, rights of attribution, integrity and reputation were very important and went beyond IP law.

Regarding term of protection, IP was mostly secular and involved economic relationships. The State granted a monopoly right, after which the protected materials went into the public domain. The rationale was that this provided an incentive for innovation and progress. However, indigenous customary laws did not correlate with this paradigm. Under customary law, there was no right to use without an obligation. As long as a community used the TK or TCE, protection was potentially permanent. He asked whether economic rights should also be permanent. He asked whether there should be a different term for secret TCEs/TK and individually held TK/TCEs.

There should be no formalities for TCEs/TK. But databases or registers could be useful to determine if TK existed or not. But there were taboos and prohibitions against storing and there was the danger of documented TK/TCEs being made available to others. Registers might be useful for TCEs already in the public, but for TK, they might pose problems.

The chair opened the discussion.

The discussion started with a question – what exactly is the *sui generis* law trying to protect? Is the law protecting TK, TCEs and GR against acts of misappropriation, against unauthorized commercial use or to prevent use of sacred material?

The Chair replied that all the above purposes are important. To achieve these purposes, three regimes are possible:

- Protection against any use
- Protection against any economic use
- Protection against any inappropriate use

Further discussions were mainly centered on the duration of protection for TK and TCEs.

The question of whether retrospective protection should be granted was brought up. Some participants felt that retrospective protection would interfere with existing “use” rights. It may not be fair to prevent a person who has been exploiting the TK/TCE from continuing to do so, since there was no law to prevent her from doing it at that time.

A suggestion was made that where such exploitation gave rise to IP rights which were owned by a third party, upon the expiry of the duration of the rights the TK/TCEs would revert to the relevant indigenous community, instead of going into the public domain.

Some participants were of the view that such an approach might be workable in the case when the IP involved was a patent, which has a relatively short period of protection of 20 years from the filing date. However, this might not be feasible in the case of copyright which had a duration of life plus 50 to 70 years. In such a case, it would be an unreasonably long period to wait for the TCE to be returned to the indigenous community. Hence, it was suggested that such prior third party user be given a year or two to carry on using the TK/TCE. Further use after that period should be with the consent of the TCE holders.

However, there was disagreement with the above suggestion. It is appropriate that in the case of pure or slavish copying, no independent copyright should subsist. Where, however, the work is inspired by a TCE, or is considered a derivative work, then that work had satisfied the requirement for originality and was a work of authorship. Such a work qualified for copyright protection and should be entitled to the full copyright term. In such a case, it would be unfair to limit the copyright duration to merely one or two years.

As opposed to the above example, however, other participants gave examples of situations where the requirement of originality was so easily satisfied that it was unfair to confer on the owner of such copyright works the full copyright duration. The taking of a photograph of a traditional design, for example, might involve very little skill. However, in many jurisdictions, the photograph would be protected by copyright. Similarly, the fixation or making of a sound recording or a film of a traditional performance, might involve only the skill of pressing on the button of a tape recorder, nevertheless the recording was protected as a copyright work.

A view was expressed that in relation to TK, the duration of protection should be indefinite. However, a question was raised as to whether the TK should still be protected where a patent granted based on the use of such TK had expired. On expiry, the content of the patent specification was in the public domain and freely available for use by anyone without restriction. To continue to protect the relevant TK might not be possible in such a situation. It was, however, noted that if such TK, based on generations of experience, were to be lost in the above situation, that would impose too high a cost on the indigenous community. On the other hand, TK elements which were not disclosed in the patent specification might still be protected. Where TK was published defensively, then the duration of such protection would be indefinite.

A participant pointed to the difficulty of defining TCEs/TK. The current Russian Federation law applied to objects of cultural or traditional value. It was suggested that having in place a register was a good idea, as it provided notice to the public as to the existence of certain rights.

A fear was also expressed that if the duration of rights were to be limited, then the beneficiaries might be tempted to get economic benefits as soon as possible. This would jeopardize stable and sustainable development and safeguards for future generation.

Mention was also made regarding the possibility of protecting some form of TCE under trade mark law. For example, a trade mark could be cancelled if it brought the TCE into disrespect or disparagement. Another ground for cancellation would be where there was a false suggestion of a connection to or sponsorship by an indigenous community.

There was also a discussion on whether there should be a process for providing evidence of prior informed consent and benefit-sharing in relation to an application for a patent based on the use of TK. However, the discussion was inconclusive.

Panel 4: Illegal Actions and Sanctions

Chair: Mr. José Maza

Rapporteur: Ms. Marisella Ouma

The purpose of this panel session was to discuss the specific acts of misuse or misappropriation of TK and TCEs that might be considered reprehensible or illegal as well as consider the appropriate civil or criminal sanctions and remedies that may be made available for the illegal acts. The Chair gave a brief on the topic and opened the floor for discussion. There were two main issues that came out of the discussion;

- What are the appropriate measures for use, abuse, or misuse of TK and TCEs both at the local and international level?

- What measures should be taken today when the rights of the holders of TK and TCEs are infringed by corporate entities?

The Chair acknowledged the link between the rights granted, exceptions and limitations as well as the sanctions and remedies available for illegal use of TK and TCES. It is also important to distinguish between the intentional and non-intentional violation of the TCEs and TK.

The illegal actions were listed as hereunder:

- Use of works that would be prejudicial to the interests of the community as a whole, for instance the use of sacred forms of TCE or TK;
- Use of works in a manner that would be offensive to the holder of the TCE;
- Breach of a mutually agreed term between the user and the holder of the TCE or TK;
- Use and access to TCE or TK without prior informed consent of the holder of the same
- Failure to provide for equitable benefit sharing for the commercial use of the TK and TCEs.

One participant raised the issue of whether or not it would be possible that before any action is taken, first, to determine the extent of derivation from existing TCEs and, second, assess the degree of intent. These would help determine the kind of sanction that would be suitable.

On the issue of prior informed consent, there was a proposal that a register will help in the creation of a database which users could make reference to facilitate the acquisition of prior informed consent. Even where the detail was not available, it would be important to identify the general characteristics of the TK or TCEs and create an obligation to try and identify the owners of the TK or TCE.

The burden of proof should be on the potential users to prove that they believed that they had the right to use the material or that they did everything to obtain the consent or that they were not aware of the existence of the TK or TCE. However, issues of burden of proof should be left within the realm of domestic law.

Some representatives of the indigenous communities noted that the main concern was the large scale of unauthorized use as well as the highly offensive uses of TK and TCEs, especially those that related to sacred practices.

The other issue that was discussed was the retrospectivity of the provisions in the treaty, especially as they related to works which the users either thought were in public domain or genuinely believed to have obtained authority for the use. It was clear from the discussion that there was a need to make a provision for a transitional period to regularize or stop such uses but this should be left in the realm of national legislation.

The international instrument should, thus, provide for the inclusion of measures to ensure that the protection against the illegal or unauthorized use of TCEs and TK and provided the necessary sanctions and remedies, including civil, criminal and administrative actions.

During this discussion, it was suggested that WIPO address the protection of TK and TCEs in conjunction with UNESCO as had been done in the past. Many participants expressed the need for greater precision on the role of IP in this area, as opposed to or in addition to safeguarding/preservation measures.

Panel 5: International Dimension, Relationship with IP and Transitional Measures

Chair: Mr. Ian Goss

Co-Rapporteurs: Mr. Alexey Avotonomov and Ms. Natalia Buzova

The Chair asked how would rights and interests of foreign holders of rights in TK or TCEs be recognized in national laws. He also said that the following questions were important:

- What are the conditions and circumstances in which foreign right would have access to national protection systems?
- What is the level of protection available to foreign right holders?
- What is the legal status and value of rights registered in a foreign jurisdiction?
- How should customary law, which is particular to communities and regions, be treated in an international context?
- Do we modify the existing system or should we establish *sui generis* regimes. In other words can we address existing gaps and limitations in this system or do we need new rights?
- Should an international instrument operate retrospectively and impact on already granted rights, an issue that goes to the heart of the current system certainty?

The key points discussed included the international principles which would be central to the establishment of any instruments, such as national treatment, reciprocity and mutual recognition.

There was a need to focus on three areas when developing an international treaty: policy objectives, international principles, and enabling mechanisms, international and domestic.

It was deemed important that developing options at the national level provide flexibility. Also important was the use of existing IP systems and related domestic legislations, e.g., patents, trade marks, geographical indications, copyright, etc., as well as unfair competition, contract, environment, and access and benefit-sharing laws, etc. Some of these may need to be adapted, but it was important to look at these first before developing *sui generis* options.

There was a need to define who indigenous peoples or communities are. While definition would be different for each domestic jurisdiction, it was difficult to achieve national treatment. A specific phrase, dealing with foreign right holders in an international instrument, could be more appropriate than the legal concept of national treatment. Other essential principles were discussed, such as respect, comity of nations, concept of most favorable treatment. Moreover, the principle of freedom of expression needed to be balanced against the possibility of spiritual harm.

There were discussions about the fact that TCEs could provide a good opportunity to achieve an outcome in the IGC as a first step.

The issue of individuals immigrating to a new country and their ability to continue to express their culture was discussed.

There were three necessary elements to a treaty: not undermine international laws, be complementary with international laws, and protect subject matter which is shared across national boundaries e.g., overarching the need to be broadminded and protect the minorities.

Customary law is important and needs to be considered in developing the treaty. Another key intent should be respect for indigenous peoples, which in turn will establish trust between nations and these peoples.

Panel 6: Exceptions and Limitations

Chair: Mr. Sa’ad Twaissi

Rapporteur: Mr. John Asein

The panel noted the immense work that had been carried out within the IGC and particularly the incremental work of the IWG on the formulation of Article 8 of document WIPO/GRTKF/IC/17/5 and Article 5 of document WIPO/GRTKF/IC/17/9 dealing with exceptions and limitations

The Panel acknowledged the importance of the two articles as a way of achieving the desired balance between the allocation of more rights under the proposed regimes and the legitimate interest of society to the continued use of TK and TCEs. The Panel, however, cautioned that the application of well-known exceptions under classical IP systems may not always be appropriate in the case of TK and TCEs. As an example, it was noted that the doctrine of fair dealing or fair use may not fit into the context of TK and TCEs for effective protection.

The Panel urged further work to be done in improving the texts and in particular for more attention to focus on the following areas:

(i) The legitimate use of existing TCEs and TK by the holders at least in the traditional contexts. Members of communities that have moved out of their traditional settings should also benefit from this exception;

(ii) The sustainable use of the TCEs and TK in ways that take cognizance of their organic and dynamic nature;

(iii) the use of TCEs and TK as inspiration for the creation of new IP rights taking care to distinguish between borrowing, adaptations and non-permissible use.

The Panel identified the close linkage between the formulation of exceptions and limitations on the one hand and the definition of beneficiaries on the other. Specific questions were raised on the identification of persons and activities that would qualify as coming within the traditional or customary contexts, including the status of persons belonging to communities that may have acquired and maintain particular TK and TCEs that are derived from source culture with which they have historical ties.

The Panel maintained the need to make special provisions for sacred/secret TCEs, bearing in mind that while the economic rights of holders may be subject to more exceptions, their moral rights and the need to avoid offensive treatment must remain sacrosanct. It was further noted that the use of TCEs is not always based on commercial considerations. In order to achieve greater certainty it was proposed that communities may be encouraged to document permitted uses of TK and TCEs under their prevailing customary laws and practices. To this end, the Panel emphasized the pre-eminent status of customary laws and practices, as well as traditional institutions in the determination of permissible uses.

The needs to accommodate the peculiar needs of countries that may wish to administer their TK and TCEs in a manner that gives special concessions to their nationals was accepted.

The Panel took special note of the consequences of uses in evolving media and recommended further work in the formulation of exceptions and limitations to address these and other emerging concerns of indigenous and local communities.

Panel 7: Genetic Resources

Chair: Ms. Larisa Simonova

Rapporteur: Mr. Benny Müller

The following topics were introduced by the Chair, Mrs. Larisa Simonova from the Russian Federation, and discussed by the participants:

Genetic resources are defined in Art. 2 of the Convention on Biological Diversity (CBD, see http://www.cbd.int) as “genetic material of actual or potential value.” Genetic material is “any material of plant, animal, microbial or other origin containing functional units of heredity.“ Important in this context is also Art. 15 of the CBD. Under the Convention, a new protocol was adopted a few days ago (see http://www.cbd.int/cop10/insession, document UNEP/CBD/COP/10/L.43/Rev.1). This protocol is a legally binding instrument for countries that decide to ratify it. The protocol relates to access to genetic resources and associated TK as well as to the sharing of benefits arising out of the utilization of such resources or knowledge (access and benefit-sharing, ABS).

The issue of genetic resources is a topic for the IGC because products elaborated on the basis of genetic resources can be patented. This is for example important for traditional medicine, also in Russia. In other words, as expressed by a participant, the question is how the IP system can contribute to ABS. What is the value of genetic resources for innovation and creativity? Giving an economic value to genetic resources may contribute to sustainable development and incentivize conservation of the resources. In relation to this, several participants called on indigenous peoples to defend and preserve their folklore, knowledge and biological resources.

The IGC is mandated to develop legal instruments on TK, TCEs and GR. The three topics should be addressed on an equal footing. Discussions are already quite advanced with regard to TK and TCEs. However, with regard to GR, draft articles for protection do not exist yet. However, there is a document (WIPO/GRTKF/IC/17/6) which lists possible options in three clusters (see http://www.wipo.int/tk/en/igc).

The first options are on defensive protection of genetic resources, aimed at preventing misappropriation. The participants discussed that patents have to fulfill the requirements of novelty and non-obviousness, but that sometimes patent examiners do not have access to the necessary information to decide if these requirements are met. Therefore information sources such as databases might be a useful tool. As an example, the Indian database “TKDL” was mentioned. It was acknowledged that databases are sometimes criticized because too much information may be disclosed. However, it often covers information that already is publicly available. There seemed to be a prevailing sense among the participants that indigenous peoples should have the right to decide on what can be included in a database.

The second cluster of options is on disclosure requirements. Disclosure requirements mean that when someone applies for a patent for an invention that is based on a genetic resource or TK, he may have to provide information in his application on the origin or source of this genetic resource or TK. In addition, options are discussed that he also has to provide evidence that he accessed the genetic resource or TK with the prior informed consent of the owner and that he has a benefit-sharing agreement with the owner of the genetic resource or TK. Russia does not have a disclosure requirement yet, it wants to wait and see how efficient disclosure requirements are. An argument that was brought forward during the panel was that the patent system is a strict, formal regulation where changes require caution. The questions were asked: What should the contents of the documents be? How would the patent examiners check that information? There are disclosure requirements in Latin America. Another example is Switzerland where patent applicants have to provide information on the source of genetic resources and TK. Evidence of prior informed consent or benefit-sharing is not required in Switzerland. There are pre-grant and post-grant sanctions for not complying with the requirement, but not revocation. It was also mentioned that there is a coalition of more than 100 countries in the World Trade Organization (WTO) proposing to include a mandatory disclosure requirements into the TRIPS-Agreement.

The third cluster in document 17/6 relates to options on IP issues in mutually agreed terms for fair and equitable benefit-sharing. Several participants flagged the issue of the transboundary nature of genetic resources (see Art. 8 of the CBD-ABS Protocol on transboundary cooperation). This adds a level of complexity and may also be a possible source of conflict. For example, there are plants existing in Thailand as well as in Malaysia. A participant expressed the view that because genetic resources are so widely spread, the ABS-Protocol is actually more on biological samples.

In addition to document 17/6, a participant presented a working document submitted to WIPO by Australia, Canada, New Zealand, Norway and the United States of America (WIPO/GRTKF/IC/17/7). It contains draft objectives and principles. The document reflects common ground in WTO, CBD and WIPO. The intention is to move discussions on genetic resources forward, to a similar level as the issues of TK and TCEs. WIPO received comments on the document by several countries including Russia. A further momentum should also come from the successful adoption of the ABS-Protocol under the CBD.

It was then expressed that the rights of indigenous peoples to genetic resources are somehow acknowledged in the ABS Protocol, but not clearly specified. And that it has to be ensured that benefits go back to indigenous communities. A dual approach of consent was proposed, i.e. from a State authority and also from the indigenous community.

The panel also addressed the question of what law applies to unmodified organisms that, depending on the national context, may be held by indigenous peoples. A participant stated that indigenous contribution to preservation of unmodified genetic resources should also be acknowledged. In addition, participants touched on the topic of embodied TK in modified organisms, for example their contribution to breeding. A participant from Africa also emphasized the link between TK and genetic resources. This was interesting not only for pharmaceuticals, but also in cosmetics and other sectors. She mentioned an example of a microbial organism from Kenya and highlighted that much depends on existing access laws. Also the concept of national sovereignty was discussed and the need for consolidation of regional, national and international law. When the issue of patentability of naturally occurring compounds such as gene sequences was brought up, the view was expressed that there should not be IP rights on unmodified genetic resources because the IP system is for human creativity and innovations, not for discoveries. Therefore, there is a difference between ownership regarding a genetic resource and ownership of intellectual property IP rights attached to an invention based on the resource, and a corresponding difference of tasks between CBD and WIPO.

Another question was the status of collections in private companies, museums etc. That is, when genetic resources and TK are no longer in the original territory. It was considered that more analysis would be needed on how genetic resources get into innovation and how TK gets into innovation. Additionally, the moral dimension was raised, including with regard to access to medicines.

In Russia, there are many programs developed on the basis of a Strategy and Action Plan. On the situation in Russia with regard to indigenous ownership over genetic resources, a Russian indigenous representative put forward the example of deers that communities are taking care of. So the indigenous community has its own deer species. They can share the genes to ensure the conservation of the animal with State support. In her opinion, the State should acknowledge indigenous conservation efforts and the corresponding fund should not be destroyed. Then, there was a question asked if Rospatent was creating a database on traditional medicine. The explanation was that Rospatent does not create a database, but that it grants patents also with regard to traditional medicine and that this is section 61 K of the patent classification.

Panel 8: Capacity-building and Development for Indigenous Peoples

Chair: Mr. Weerawit Weeraworawit

Co-Rapporteurs: Mr. Alexey Zenko and Mr. Alexey Avtonomov

The Chair introduced the panel discussion by pointing out that any capacity-building and development needed to be sustainable and holistic. In order to do that, governments should do their utmost not only to empower the peoples in any efforts to set up *sui generis* protection of TCEs, TK, and GR but also to ensure that the existing capacity of the peoples, especially in terms of their environment, was not eroded. He added that educating the public was the prerequisite for capacity building and sustainable development and that funding should also be provided in a sustainable way. He expressed hope that WIPO, with its active role and assistance to date, could make a positive contribution to the sustainable development of the *sui generis* system.

The rapporteurs emphasized the importance the Russian Federation had been attaching to the protection of the rights of indigenous peoples, often marginalized in the past. The Russian Federation determined to enable indigenous peoples to be self-supporting, a key factor of any sustainable development. They also underscored a need for the private sector to help protect the rights of the indigenous peoples whose environment was often damaged by business ventures. In this regard, the Russian Federation has imposed tough measures on the private sector regarding compensation for the affected people. They expressed the will and determination of the Russian Federation to exert more efforts to help indigenous peoples benefit from the new rights as well as its readiness to be responsive to their overall needs and aspirations as was evident by the ongoing efforts.

Representatives of the indigenous peoples of the Russian Federation expressed their sincere appreciation for the commitment stated and assistance given so far as well as the excellent arrangements by the Ministry for Regional Development of the Russian Federation for their participation at the Symposium.

Some participants urged that any assistance given for capacity building and sustainable development should be made equitably and with responsiveness to different needs and urgencies.

Some expressed the view that public awareness of the issues involved was indispensable in ensuring the success of the protection of TCEs, TK, and GR and that this should be ensured by educating the public, especially the young, in a systematic manner. It was expressed that even now the peoples at the grass-root level were not well acquainted with modern IP rights and not in the position to use such rights as a tool for their sustainable economic development.

Some commented that to make the efforts on the protection of TCEs, TK, and GR worthwhile and relevant, the protection should be done in a holistic manner encompassing not only the legal protection of rights but also the preservation of the very existence of the TCEs, TK, and GR themselves through the protection of their environment.

A view was expressed that TK should be clearly defined as the relationship between mankind and his universe through knowledge being passed on from generation to generation.

Some expressed the view that there was a need for various organizations such as WIPO, UNESCO, FAO, UNEP to work together closely to ensure that any *sui generis* protection system arrived at should enable indigenous peoples and local communities to enjoy sustainable development with all their rights fully respected.

Some, while taking note of the major progress in the CBD context regarding the benefit sharing of biodiversity resources, especially the recently adopted Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, were hopeful that such progress would be complementary to and help in the efforts to protect the inextricably intertwined TCEs, TK, and GR.

The participants acknowledged with great appreciation the presentation by the representative of WIPO on ongoing activities to meaningfully strengthen the capacity of indigenous peoples and local communities, (1) in the IGC, especially through the Voluntary Fund, as well as through (2) publications and (3) capacity-building projects such as those carried out under the Creative Heritage Project. It was felt that WIPO could play a leading role in working with other international organizations to ensure both the international legal protection of the new emerging issues discussed at the Symposium and the preservation of the subject matters of such protection in an integrated and holistic manner.

The Chair thanked all the participants for their lively and positive inputs during this panel discussion and expressed his fervent hope that any *sui generis* protection to be created should be genuinely beneficial to indigenous peoples and local communities, that they in turn had to be sustainably enabled to make use of any new rights, and that such rights should be alive and should not merely be meaningless words on an international legal instrument.