

Question Q232

National Group: Turkish Group

Title: **The relevance of traditional knowledge to intellectual property law**

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Date: 15.05.2012

Questions

I. Analysis of current law and case law

The Groups are invited to answer the following questions under their national laws:

1) Is TK defined in your national law?

No.

2) If yes to question 1, what is the source of the definition?

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3) If yes to question 1, how is TK defined?

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4) If TK is not defined in your national law, is there any 'working definition' described in any draft law or regulation, policy document or other discussion material?

Yes, there is a definition of TK in a draft law. As a result of attendance of Turkey to the international treaties and developing trends in the world regarding the protection of TK, it is defined and protected in the Turkish Patent draft Law. According to the mentioned draft law and its preamble (especially considering the attendance of Turkey to the United Nations Convention on

Biological Diversity), TK is defined as “a knowledge that comes out from an intellectual activity not related to a technical field and transferred from generation to generation”.

5) Does your national law provide for any protection (whether positive or defensive) for TK?

No explicit protection is provided for traditional knowledge (TK) in Turkish Law.

However, Turkish Group is of the opinion that the existing IP laws may be said to bring forth the below given results and might be regarded as indirectly related to TK:

- In accordance with the Turkish Decree Law No. 556, Pertaining to the Protection of Trademarks (hereinafter referred as “DL 556”), the elements / phrases to be evaluated within the framework of traditional knowledge shall not be restricted as one’s property by being registered. Accordingly, this protection may be regarded as both supportive and defensive for the main protection.
- Geographical indications, in accordance with the Turkish Decree Law No. 555, Pertaining to the Protection of Geographical Indications, are determined by the influence of natural and human factors. Also, along with the geographical indication, traditional knowledge may be deemed to find an indirect and positive protection area in geographical indications determined by the influence of human factors.
- Traditional knowledge and the information obtained by using this knowledge is public domain and is being used constantly for many years. This information, within the scope of Turkish Decree Law No. 551 Pertaining to the Protection of Patent Rights within the framework of innovation criterion, shall not be restricted as one’s property and shall be ensured to be owned by public. In this way, defensive protection may be said to be provided.

6) If yes to question 5, is the protection found in:

a) existing IP laws or regulations;

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b) adaptation of IP laws or regulations through sui generis measures for TK protection;

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Or

c) wholly sui generis laws or regulations relating to TK protection?

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7) If yes, to any part of question 6, please provide details of the law(s) or regulation(s), including where such detail exists:

a) criteria for eligibility for protection;

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b) beneficiaries of protection;

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- c) scope of protection;
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- d) sanctions, remedies and exercise of rights;
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- e) administration of rights;
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- f) exceptions to and limitations on rights;
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- g) term of protection;
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- h) formalities to which protection is subject;
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- i) transitional measures;
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- j) consistency with other laws;
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- k) national treatment and foreign interests; and
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- l) trans-boundary cooperation.
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Note: the items in this non-exhaustive list are taken from the IGC draft articles relating to the protection of TK dated 20 May 2011: WIPO/GRTKF/IC/19/5. Groups may benefit from referring to this document in answering question 7, but should also add any additional criteria, which exists in their national law.

8) Are the protections described in response to questions 6 and 7:

- a) referable to TK alone; or
- b) related to or linked to the concepts of protection of:
 - (i) genetic resources; or
 - (ii) TCEs?

Since there is no direct regulation in our law, none of the protection methods above represents the TK alone, they handle with the TK dependently. Except for the descriptions present in the Draft Patent Law and originating from the international conventions, no definition and protection method defining the TK directly is included in Turkish law.

9) If yes to question 8(b), please provide details of any linkages.

There is no explicit linkage between genetic resources, TCEs and TK. However, the draft Patent Law Article 96 draws a linkage between TK and genetic resources by the below provision:

Specifying the origin of the genetic resource or traditional knowledge in patent application

Article 96: In case the invention is based of a genetic resource or a traditional knowledge, the explanation with regard to this resource or the origin of the information shall be declared in accordance with the regulation. Otherwise, it will be accepted as a declaration that the source or origin is not known.

10) Please identify any shortcomings in any protection of TK in your country by reference to the matters in questions 6 to 9 above.

Being a country having rich sources in traditional knowledge and folklore as well as geographical indications, values that can have traditional knowledge and folklore feature have not yet been determined by the authorities in Turkey to provide an efficient traditional knowledge protection and there is no certain definition for traditional knowledge in the national law regulation.

In addition to this, in traditional knowledge, being different from other intellectual property concepts, the owner of the property is not always known and the protection period cannot be limited to a certain time. This situation poses an obstacle for the protection of traditional knowledge within the limits of current intellectual property laws. And in Turkey, protection of traditional knowledge is not addressed separately in intellectual property law; It is included in present intellectual property types. There is no completely sui generis law in effect about this subject. Although cultural values included in the concept of traditional knowledge are similar to the geographical indications most, values such as stories, local themes, and treatment methods are excluded from the concept of geographical indications.

Consequently, even if the concept of traditional knowledge is tried to be protected with various intellectual property types in Turkish Law, it is not possible to protect TK completely by the means of present laws.

11) Please identify any significant case law in connection with protection of TK in your country.

There is no example of case law regarding the protection of traditional knowledge in Turkey.

II. Proposals for harmonisation

The Groups are invited to put forward proposals for the adoption of harmonised rules in relation to the role of TK in relation to IP law.

12) Is a harmonised definition of TK desirable?

It will be more reasonable not to make any definition about TK but constitute the frame of the TK by determining the certain concepts (in parallel with WIPO proposal). Because the definition is limiting and definitions within a frame can be insufficient after a while as a result of swift change and development of daily life.

13) If yes to question 12, please propose a definition of TK, or the concepts that should be included in any proposed harmonised definition of TK.

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- 14) Is it desirable to have only one form of protection for TK, either positive or defensive, or both forms? Please state reasons.

Both positive and defensive protection is important because, in some protection systems, it is important not to allow TK to be under one's property but when the protection is necessary it is also important to determine the beneficiary group of people.

- 15) Should TK be protected by:
- a) existing IP laws or regulations;
 - b) adaptation of IP laws or regulations through sui generis measures for TK protection; or
 - c) wholly sui generis laws or regulations relating to TK protection? In your answer, please identify which and state reasons.

The concept of traditional knowledge can only be protected limitedly with the present intellectual property types because of its different characteristic. For this reason, a sui generis regulation will be more reasonable and practical than adding sui generis provisions into the present texts. Likewise, TK can arise within any social/commercial area and considering the swift change/development process today, a sui generis regulation having a special law feature with flexible structure can effect all areas after itself.

- 16) If yes to any part of question 15, is a harmonised approach to protection desirable? In your answer, please state reasons.

Sui generis law will be more suitable than a harmonised regulation. Otherwise, gaps such as contradicting provisions, requirement for implementing with priority, interpretive differences can be seen.

- 17) If yes to question 16, how should that approach be implemented

- a) at an international level; and
- b) at a national or regional level?

Within a structure wherein the country boundaries lose its cultural and commercial importance and international cooperation and conformity is de facto acceptable in IP subjects, it is required to determine the minimum conditions via international regulations and provide minimum conformity in territorial level.

- 18) Having regard to WIPO/GRTKF/IC/19/5, please provide any proposals you have as to a harmonised approach concerning:

Since there is no practice of exercising TK rights in Turkey, this issue has not reach to a maturity in Turkey yet. Therefore, Turkish Group refrain from proposing opinion in the below facts since the results of the same are unpredictable for the Turkish Group for the time being.

- a) criteria for eligibility for protection;

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- b) beneficiaries of protection;

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- c) scope of protection;

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- d) sanctions, remedies and exercise of rights;
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- e) administration of rights;
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- f) exceptions to and limitations on rights;
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- h) term of protection;
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- h) formalities to which protection is subject;
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- i) transitional measures;
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- j) consistency with other laws;
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- k) national treatment and foreign interests; and
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- l) trans-boundary cooperation.
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- m) any specific measures for facilitating protection of TK, eg, systems for recording TK, specific mechanisms for benefit-sharing, or collective or reciprocal systems of administration on behalf of indigenous people or local communities.
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National Groups are invited to comment on any additional issue concerning the relevance of TK to IP law.

NOTE:

It will be helpful and appreciated if the following points could be taken into consideration when editing the Group Report:

- kindly follow the order of the questions and use the questions and numbers for each answer
- if possible type your answers in a different colour
- please send in a word document

- in case images need to be included high resolution (not less than 300 dpi) is required for good quality printing

SUMMARY

The Turkish Group's report is about the relevance of traditional knowledge to intellectual property law. Although Turkey is a country having rich sources in terms of local traditions, folklore, geographical indications etc., the definition of traditional knowledge is not given in the current Turkish legislation. On the other hand, it is to be noted that traditional knowledge is defined in the draft Turkish Patent Law as "*a knowledge that comes out from an intellectual activity not related to a technical field and transferred from generation to generation*" in line with the international treaties that Turkey signed and ratified as well as the developing trends in the world. However, since Turkish legislation remains limited to the respective definition and there is no practice of exercising rights arising from TK in Turkey, the scope of protection of TK rights and similar facts are unpredictable in this sense. Accordingly, since the practice of TK did not mature into any uniformity in Turkey it was necessary for us to refrain from putting forward strict proposals for the adoption of harmonised rules in relation to the role of TK in IP law.

ZUSAMMENFASSUNG

Unser Bericht befaßt sich mit der Relevanz des traditionellen Wissens für geistiges Eigentumsrecht. Obwohl die Türkei im Hinblick auf lokale Traditionen, Folklore, geografische Angaben usw. ein Land mit reichen Quellen ist, wurde eine Definition des traditionellen Wissens jedoch in der geltenden Türkischen Gesetzgebung nicht angegeben. Andererseits ist es zu berücksichtigen, dass das traditionelle Wissen im Entwurf von Türkischem Patentrecht wie folgt; „ein Wissen, das aus einer nicht zu einem technischen Feld angehörenden geistigen Handlung hervorgeht und von Generation zu Generation übertragen wird“ und zwar im Einklang mit den internationalen Verträge, die die Türkei unterzeichnet und ratifiziert hat sowie gemäß Entwicklungen von Trends der Welt definiert worden ist. Da die Türkische Gesetzgebung mit jeweiliger Definition beschränkt bleibt und Ausübung von Rechten, die aus TW (Traditionelles Wissen) stammen, in der Türkei keine Anwendung finden, der Schutzbereich von TW-Rechten sowie von ähnlichen Gegebenheiten ist in diesem Sinne unvorhersehbar. Demgemäß, da die Anwendung von TW in der Türkei in irgendeiner Einheitlichkeit nicht gereift wurde, war es für uns erforderlich, uns davon zurückzuhalten, um strenge Vorschläge zur Aneignung von harmonisierten Regeln bezüglich der Rolle von TW im geistigen Eigentumsrecht (IP) vorzubringen.

RESUME

Notre compte-rendu est à propos du rapport entre le savoir traditionnel et la propriété intellectuelle. Bien que la Turquie est un pays riche en matière de traditions locaux, de folklore, d'indications géographiques, etc., la définition du savoir traditionnel n'est pas défini dans la législation. D'un autre cote, conformément aux traités signés et ratifiés par la Turquie et aux tendances actuelles mondiales, le savoir traditionnel est défini dans l'avant projet de la loi Turquie sur les brevets comme « la connaissance d'une activité intellectuelle qui n'est pas lié à un domaine technique et qui est transférée de génération en génération ». Cependant, comme la législation turque reste limitée à la définition respective et comme la pratique des droitssurgissant du savoir traditionnel en Turquie est inexistante, l'étendue de la protection des droits du savoir traditionnel et des faits similaires restent imprévisible. En conséquence, étant donné que la pratique du savoir traditionnel n'a pas muri en uniformité en Turquie, il était nécessaire pour nous de s'abstenir de mettre en avant des propositions strictes pour l'adoption des règles harmonisés en ce qui concerne le rôle du savoir traditionnel sur le code de la propriété intellectuelle.

ANNEXURE A

Resolution

Question Q166

Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

AIPPI

Observing the struggle of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to come to final conclusions on the topics;

Noting that

- the Convention on Biological Diversity accepts the sovereignty of states over their genetic resources and traditional knowledge connected with it, and puts forward the concept of prior informed consent and access and benefit sharing when utilising such resources;
- many member countries of the Convention on Biological Diversity have not yet set up mechanisms how to access genetic resources under their control and how to get prior informed consent;

Mindful that

- the patent system is intended to encourage inventors to disclose their inventions to the public in return for a monopoly period in which patent owners may prevent others from practising the invention, and that an invention is a solution to a technical problem;
- patents should only be granted for inventions which are new, not obvious and capable of industrial application, and should contain disclosure of the invention sufficient to enable the skilled person in the art to work the invention;
- the patent system cannot prevent unlawful use of genetic material or traditional knowledge in research, development, marketing of products, or trade;

Supporting that users of genetic material and traditional knowledge connected with it comply with the requirements of the Convention on Biological Diversity and national laws in this respect.

Resolves:

- 1) Traditional knowledge in the public domain should be treated as other information in the public domain for the assessment of patentability of inventions.
- 2) The patent system is not suitable to control whether the requirements of the Convention on Biological Diversity are met, in particular since research results and products in commerce and trade need not be covered by patents.
- 3) If national laws require a declaration of the source of genetic material and traditional knowledge in patent applications, such laws should:
 - only require that the patent applicant to the best of his knowledge identifies the source from which the inventor obtained the genetic material or the information based on traditional knowledge;

- entitle the applicant to rectify any failure to indicate the source or add any later information obtained on the origin of the genetic material.
- 4) Ways and means other than patent applications should be developed to deal with prior informed consent and access and benefit sharing concerning genetic resources and traditional knowledge connected with it.