



International Chamber of Commerce

The world business organization



Prepared by ICC Commission on
Intellectual Property

Comments on “The Protection of Traditional Knowledge: Objectives and Principles”

(Document no. WIPO/GRTKF/IC/16/5 Prov)

Submission to the WIPO Intergovernmental Committee on
Genetic Resources, Traditional Knowledge and Folklore

Highlights

- Definition of traditional knowledge
- Definition of misappropriation
- Permitted acts and exceptions

Comments on “The Protection of Traditional Knowledge: Objectives and Principles” (Document no. WIPO/GRTKF/IC/16/5 Prov)

ICC is pleased to have the opportunity to make this submission to the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (the IGC). ICC supports the renewed impetus for discussion on all three topics of relevance to the IGC – genetic resources, traditional knowledge and traditional cultural expressions. However, for the purposes of these comments, we will limit our focus to traditional knowledge.

ICC recognizes the concerns expressed by some WIPO members that the IGC has not yet generated sufficient results, including, e.g., an international instrument on traditional knowledge (TK). However, on a practical level, there has been real progress in reducing the risk of patents inappropriately issuing over traditional knowledge. For example, the inclusion by WIPO of traditional knowledge sources in the minimum PCT documentation and the development of traditional knowledge databases are particularly valuable. The Traditional Knowledge Digital Library (TKDL) compiled by India and made available to the European and US Patent Offices is another example of useful progress.

ICC welcomes the renewal of the IGC’s mandate. However, the goal of agreeing how “to ensure the effective protection of genetic resources, traditional knowledge and traditional cultural expressions” in the next two years is challenging, given that there is still only limited agreement about principles.

In ICC’s view, two of the stated principles of the negotiation require more emphasis: **efficiency** (under which we include effectiveness) and **balance**. In the corresponding document on TCEs, WIPO/GRTKF/IC/16/4 Prov,¹ balance, between users and holders of knowledge, is specifically included as a principle. WIPO/GRTKF/IC/16/5 Prov does not include this paragraph. We think balance is equally important in both contexts.

An international instrument that effectively protects traditional knowledge must be one that is justiciable - that is to say, one in which disputes can be resolved by an impartial judge applying and interpreting a clear set of principles. An instrument that does not offer such a system will not command respect or gain adherents.

At present, there is not enough clarity about the essence of TK, i.e., what would be protected and how misappropriation would be defined, to provide a justiciable system. Until such clarity is provided, there is little chance for an effective international instrument. To succeed in achieving the goals of the mandate, the IGC should not try to do too much. Trying to cater for every possible situation may result in a system that does not work at all. It might be easier to start with a limited scope, and expand it in the light of experience, when it has been seen what works and what does not.

The IGC should seek:

- to limit and clarify the definition of traditional knowledge;
- to limit the definition of misappropriation;
- to clarify the scope of permitted acts and exceptions;
- to avoid new requirements, such as 'disclosure of origin', that are burdensome but of little benefit.

¹ WIPO/GRTKF/IC/16/4 Prov, [Annexe, p7, Background, para (b)]
“(b) Principle of balance

The need for balance has often been emphasized by the diverse stakeholders taking part in discussions concerning the enhanced protection of TCEs/EoF. This principle suggests that protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and sustain TCEs/EoF, and of those who use and benefit from them; the need to reconcile diverse policy concerns; and, the need for specific protection measures to be proportionate to the objectives of protection, actual experiences and needs. ”

Definition of traditional knowledge

It is recognised that the concept of “traditional knowledge” is difficult to define precisely because of its holistic, context-dependent, dynamic and intergenerational characteristics. However, a definition with clear criteria is required if traditional knowledge is to be respected. The current definitions are vague in the extreme, and for that reason, would be very difficult to apply. Clear criteria are essential to assist WIPO Member States to distinguish between traditional knowledge that is to be protected in accordance with national law and general knowledge that is available to all.

Definition of misappropriation

Many countries have expressed concerns regarding “misappropriation.” However, the concept of misappropriation appears to vary widely. As a fundamental matter, the concept of misappropriation should be linked to notions of appropriate access and benefit-sharing through compliance with national ABS laws. In other words, if there is no violation of the national ABS law, there is no “misappropriation.” When considering how to define specific instances of “misappropriation” under national laws, the following circumstances may be taken into account:

- whether the relevant TK was communicated directly to the user by traditional holders;
- whether the relevant TK is not known, disclosed or used anywhere else;
- whether permission to use the relevant TK was obtained from at least some genuine holders;
- whether mutually agreed terms for benefit-sharing exist and are respected.

Other circumstances may be considered, but clear rules are needed to determine which conditions are essential. There are many outstanding questions that governments must consider. Should there be special conditions regarding research or non-commercial use or publication of TK? If the information claimed to be TK has become publicly known or is in use by other – perhaps unrelated - indigenous peoples, would ABS laws still apply? How can a system be designed to put users on notice that published information is not freely available for use (as the patent system does)? If the relevant TK is unpublished, should it be treated in the same way as other proprietary unpublished information – so that, for example, if it is developed independently, it cannot be subject to restrictions on use?

Permitted acts and exceptions

Balance between the interests of users and holders of TK is essential. There should be a remedy for clear cases of misappropriation – i.e., in cases where it is shown that an entity has violated the national ABS laws. However, likewise, there must be no liability for cases of legitimate use. These include, among others:

- use of information in the public domain;
- use of protected traditional knowledge with permission from an authority entitled to give it;
- use of information for purely private purposes;
- use of information that can be shown to have been developed independently.

Any legislation in the area must recognise that public knowledge has a special status. There are both ideological and practical difficulties in controlling its use. Exceptions to this have to be very carefully crafted. An international instrument that does not take this into account cannot succeed.

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 120 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.



International Chamber of Commerce

The world business organization

Policy and Business Practices

38 Cours Albert 1er, 75008 Paris, France

Tel +33 (0)1 49 53 28 28 Fax +33 (0)1 49 53 28 59

E-mail icc@iccwbo.org Website www.iccwbo.org