



International Chamber of Commerce

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Comments on WIPO gap analysis on traditional knowledge

ICC congratulates the WIPO secretariat on the draft gap analysis which is a thorough and fair-minded analysis of the problems facing the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Unfortunately it reveals a very wide range of uncertainties and disagreements. This makes the task of the IGC very difficult. In order to make progress, agreement must be found at a basic level, on concepts and on goals.

The draft assumes some basic concepts, in particular:

1. 'Traditional knowledge' has at least three characteristics; it is
 - a) transmitted from generation to generation;
 - b) distinctively associated with the traditional or indigenous community in which it is transmitted;
 - c) integral to the cultural identity of that community, which is recognised as its guardian (draft, p6).

2. 'Protection' implies a measure of control over the traditional knowledge in question (draft p7/8), with perhaps the right to exclude. This control is to be exercised by the community or someone acting on its behalf.

Accepting this, then the **first gap to be identified is the absence of any generally recognised legal means for 'protecting' knowledge *as such***. Knowledge of a specific type may be protected in a particular way for a particular time - but not generally. For example, secret technical knowledge may be protected against disclosure in breach of confidence - but not against disclosure or use by someone who develops the same knowledge independently. The commercial use of technical knowledge may be protected, even though published - but only for a limited time, by the grant of a patent, typically involving an official examination to check that the knowledge protected is new and clearly defined. Copying of knowledge may be protected by copyright laws - but these protect form only, and not the facts or ideas which are the essence of the knowledge. Once knowledge has been made public, it is generally difficult to control its use: an example is the "Spycatcher" case (1988) in which the British Government unsuccessfully tried to stop disclosure of sensitive information by one of its ex-employees.

If 'traditional knowledge' is to be protected positively, it must be defined clearly, so that third parties know what they may not do. The general characteristics noted above need to be clarified

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further. Then, particularly where knowledge in the public domain is to be protected, each right given should be carefully defined and checked, just as is done with patents, to ensure that in each case the rights of the holders and those of the public are in balance. **A gap we identify here is that no system for doing this exists or has been proposed.**

A practical system for protecting traditional knowledge should be designed, as far as possible, to mesh smoothly with existing intellectual property law. The introduction of a new right need not conflict with the continuation of existing rights - if it does so unnecessarily, it will make the introduction of the new right that much harder.

'Negative protection' - in the sense of preventing others claiming rights in existing traditional knowledge - is not controversial in principle. Patent law, which is often seen as the main offender in this respect, fully agrees that only what is new should be patented. The patenting of publicly available information (which happens from time to time) is wrong, and should be prevented. Some suggestions for negative protection may cause difficulties, however.

ICC does not accept, for example, that unpublished traditional knowledge should be a bar to a subsequent patent. An inventor who did not have access to that knowledge, but re-invents it for himself, should be entitled to patent it (though not necessarily to stop others who are already using it privately). Also, inventors should be allowed to improve public traditional knowledge, using it to make further advances - and such advantages should be patentable provided they are inventive rather than trivial.

Another controversial proposal for 'negative protection' is that patent applicants be required to disclose the 'origin or source' of biological materials - or traditional knowledge - used in making the invention. For rare or unique materials this makes sense - and is already regularly done for such materials, it being a requirement under existing patent law that the patent applicant must disclose how to obtain the materials that his invention makes use of. The majority of biological inventions, however, make use of materials that are widely available, and it makes no sense to make it obligatory to disclose the specific source of each. This would be pointless and burdensome. As to disclosing the origin of traditional knowledge, this could be discussed further. US patent applicants are already required to disclose all relevant prior art of which they are aware, and it is possible that such a requirement could be adapted and taken up by other countries. A pre-requisite would be a clear and agreed definition of traditional knowledge, however.

What is lacking - here we identify a third gap - is evidence that proposed remedies (such as 'disclosure of origin') would be effective without compensating disadvantages (or at all).

Perhaps some such evidence will become available in a few years' time from countries that have introduced a 'disclosure of origin' requirement.

We congratulate the WIPO Secretariat on its paper, and we look forward to further discussion of the important points it raises.

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