



International Chamber of Commerce

*The world business organization*

# **ICC responses to questions on traditional knowledge by WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

*Prepared by the Commission on Intellectual Property*

Below are ICC's responses to the questions concerning traditional knowledge formulated by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore at its Tenth Session on November 30-December 8, 2006.

## ***1. Definition of traditional knowledge that should be protected***

This question, and the related questions of the objectives sought to be achieved and of what the substance of any rights and exceptions should be, is one on which consensus will be needed before any progress can be made. Those who will be called to respect the rights sought will in any event require:

- a) reasonable certainty as to what is protected, and what is not;
- b) reasonable certainty as to the extent to which it is protected, and what use if any can still be freely made of it (eg, mere possession? private study? research use?);
- c) a clear nexus between the knowledge and the claimant of rights in it;
- d) a proper justification for the rights claimed, which must be proportionate;
- e) a fair and effective system for enforcing the rights and adjudicating disputes.

## ***2. Who should benefit from any such protection or who holds the rights to protectable traditional knowledge?***

The communities that are originators or custodians of the knowledge, and that have made it available to users. National governments will need to determine what communities should be recognized for this purpose, according to transparent and agreed principles.

## ***3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?***

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This is the key issue upon which consensus is needed, since it will determine what knowledge should be protectable and the substance of rights and exceptions. Both moral and economic rights may be capable of protection, provided the protection sought is proportionate.

**4. *What forms of behavior in relation to the protectable traditional knowledge should be considered unacceptable/illegal?***

This question must be considered alongside the questions of definitions and objectives. Fundamental is that the rights of the holders must be in balance with the rights of the public. Forbidden acts may vary according to the nature and status of the knowledge, the objective of protecting it (moral or economic or both) and (perhaps) the status of the owners and users.

**5. *Should there be any exceptions or limitations to rights attaching to protectable traditional knowledge?***

Yes. This will naturally depend on what those rights are decided to be. One vital objective will be to preserve the public domain. The general rule is that what is publicly known is available for all to use. Many members of ICC feel strongly that any new restrictions on use of public domain information are unacceptable.

**6. *For how long should protection be accorded?***

Again, this depends on the type of protection accorded, and the objective sought. Certain moral rights, for example attribution, may last indefinitely. Knowledge that is secret may likewise be protected from use by others as long as it remains confidential.

**7. *To what extent do existing IPRs already afford protection? What gaps need to be filled?***

While in many cases a variety of IPRs (patents on improvements, design rights, trademarks, plant breeders' rights, geographical indications, contracts for use of confidential information) may be used to shelter traditional knowledge from exploitation by the general public, nevertheless these rights are not readily used by indigenous people. It needs to be discussed further whether a proper case can be made for a new right to control useful knowledge specific to a given group, and if so under what circumstances.

**8. *What sanctions or penalties should apply to behavior or acts considered to [be] unacceptable/illegal?***



It is not possible to answer this question in the abstract. The answer will depend on many factors including the definition of protectable traditional knowledge, the objective of its protection and the nature of rights given to those who control the knowledge.

**9. *Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?***

Rights will have to be administered and enforced nationally. As yet there is no consensus on the need for or contents of an international agreement.

**10. *How should foreign rights holders/beneficiaries be treated?***

In the same way as nationals. There is no reason to discriminate.

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