

UNCTAD-ICTSD Project on IPRs and Sustainable Development



# Protecting Traditional Knowledge and Folklore

A review of progress in diplomacy and policy formulation

By **Graham Dutfield** Senior Research Associate, ICTSD  
and Academic Director of the UNCTAD - ICTSD Project on IPRs  
and Sustainable Development



International Centre for Trade  
and Sustainable Development



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The Project is being implemented by the International Centre for Trade and Sustainable Development (ICTSD) and the secretariat of the United Nations Conference on Trade and Development (UNCTAD) (Project Number INT/OT/1BH). The broad aim is to improve the understanding of intellectual property rights-related issues among developing countries and to assist them in building their capacity for ongoing as well as future negotiations on intellectual property rights (IPRs).

For details on the activities of the Project and all available material, see <http://www.ictsd.org/iprsonline>

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## ABOUT THE AUTHOR

Graham Dutfield, Senior Research Associate at ICTSD and Academic Director of the ICTSD-UNCTAD project on IPRs and Sustainable Development, is a recognised international expert in the field of IPRs and traditional knowledge. He is also a Senior Research Fellow in Intellectual Property Law at the Queen Mary College, University of London

## FOREWORD

The present paper dealing with Protecting Traditional Knowledge and Folklore: A review of progress in diplomacy and policy formulation is one contribution of the joint UNCTAD-ICTSD Project on Intellectual Property Rights (IPRs) and Sustainable Development to the ongoing debate on the impact and relevance of intellectual property to development. It analyses the proposals made by developing countries in several international fora (WTO, CBD and WIPO) with respect to the protection of traditional knowledge (TK). These proposals refer to "defensive" protection on the one hand, and to "positive" protection on the other hand. The former kind of protection responds to developing countries' concerns about their knowledge or cultural expressions being subject to monopolization and commercialisation through IPRs to the advantage of unauthorized persons, without sufficient opportunity for their indigenous communities to obtain an equitable share in the resulting benefits. In the context of defensive protection, one major proposal relates to the introduction of a disclosure of origin requirement into patent law to assure a fair participation by the holders of TK in any benefits arising from the commercialisation of their knowledge. The study points out ways to design such a requirement in TRIPS-compatible forms. It then assesses critically the practical use of the second major proposal, relating to the establishment of TK prior art databases.

As to "positive" protection, the study discusses possibilities for TK holders themselves to obtain an IPR to make effective use of their knowledge. The author explains the advantage of a liability regime of protection over a property-based system in those countries where TK is already in wide circulation and may therefore only be subject to subsequent compensation rather than to a right of exclusivity. In order to assure the secrecy of certain TK and to protect it from unfair commercial use, positive protection of TK could also be achieved through the establishment of database rights, modelled after the protection of undisclosed information under Article 39.3 of the TRIPS Agreement. Finally, a proposed way of reducing transaction costs and improving the international enforcement of rights over TK is the establishment of global biocollecting societies that would, in addition to serving as a repository of TK registers, provide a range of other services.

The study concludes by making a number of strategic considerations as to how developing countries could possibly proceed in their efforts to protect TK on the international level. In essence, the author puts emphasis on the importance of concerted action between groups of like-minded developing countries. However, the paper also highlights the limitations of any harmonization effort, noting the need to respect the tremendous jurisprudential diversity of traditional societies.

Intellectual property rights (IPRs) have never been more economically and politically important or controversial than they are today. Patents, copyrights, trademarks, industrial designs, integrated circuits and geographical indications are frequently mentioned in discussions and debates on such diverse topics as public health, food security, education, trade, industrial policy, traditional knowledge, biodiversity, biotechnology, the Internet, the entertainment and media industries. In a knowledge-based economy, there is no doubt that an understanding of IPRs is indispensable to informed policy making in all areas of human development.

Intellectual Property was until recently the domain of specialists and producers of intellectual property rights. The TRIPS Agreement concluded during the Uruguay Round negotiations has signalled a major shift in this regard. The incorporation of intellectual property rights into the

multilateral trading system and its relationship with a wide area of key public policy issues has elicited great concern over its pervasive role in people's lives and in society in general. Developing country members of the World Trade Organization (WTO) no longer have the policy options and flexibilities developed countries had in using IPRs to support their national development. But, TRIPS is not the end of the story. Significant new developments are taking place at the international, regional and bilateral level that build on and strengthen the minimum TRIPS standards through the progressive harmonisation of policies along standards of technologically advanced countries. The challenges ahead in designing and implementing IP-policy at the national and international levels are considerable.

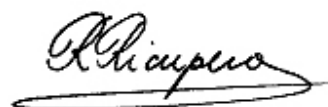
Empirical evidence on the role of IP protection in promoting innovation and growth in general remains limited and inconclusive. Conflicting views also persist on the impacts of IPRs in the development prospects. Some point out that, in a modern economy, the minimum standards laid down in TRIPS, will bring benefits to developing countries by creating the incentive structure necessary for knowledge generation and diffusion, technology transfer and private investment flows. Others stress that intellectual property, especially some of its elements, such as the patenting regime, will adversely affect the pursuit of sustainable development strategies by raising the prices of essential drugs to levels that are too high for the poor to afford; limiting the availability of educational materials for developing country school and university students; legitimising the piracy of traditional knowledge; and undermining the self-reliance of resource-poor farmers.

It is urgent, therefore, to ask the question: How can developing countries use IP tools to advance their development strategy? What are the key concerns surrounding the issues of IPR for developing countries? What are the specific difficulties they face in intellectual property negotiations? Is intellectual property directly relevant to sustainable development and to the achievement of agreed international development goals? Do they have the capacity, especially the least developed among them, to formulate their negotiating positions and become well-informed negotiating partners? These are essential questions that policy makers need to address in order to design IPR laws and policies that best meet the needs of their people and negotiate effectively in future agreements.

It is to address some of these questions that the joint UNCTAD-ICTSD Project on Intellectual Property and Sustainable Development was launched in July 2001. One central objective has been to facilitate the emergence of a critical mass of well-informed stakeholders in developing countries - including decision makers, negotiators but also the private sector and civil society - who will be able to define their own sustainable human development objectives in the field of IPRs and effectively advance them at the national and international levels.



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Rubens Ricupero  
UNCTAD Secretary General

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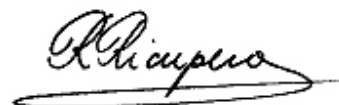
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