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List of Issues and Briefing Notes

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1. Subject matter and definitions of TK and TCEs

This issue may be considered as one of the starting points for protection. One may wish to begin with setting out a description of the potential subject matter itself, listing characteristics or devising an analytical description. Complementarily, substantive criteria may be drawn, which specify more precisely which elements would be protectable. It may also be considered to reflect upon the nature of a description of the TK and TCEs, whether it should be limitative or open.

Indeed, a distinction is made between the description of the subject matter in general and the more precise delimitation of those TK or TCEs that are eligible for protection under a specific legal measure. Not every part of TK or TCE could conceivably be the subject of protection within an IP framework.

Experts could also ponder on the choice of terms to designate the subject matter as well as related terms, such as “traditional,” “characteristic,” “heritage,” or “community.”

It would be extremely interesting in this panel to study the relationship between TCEs and TK.

2. Beneficiaries

A paramount issue is that of identifying the beneficiaries of protection under a *sui generis* regime, which are meant to be the concerned indigenous peoples and traditional or local communities. The role of customary law in identifying such beneficiaries is a matter of acute importance.

The panel could look at the specific criteria which link the TK or TCEs to a people or community.

It could also be invited to consider the role of individuals in the creation and holding of TK and TCEs and of the communal nature of the rights being afforded.

Specific attention should be dedicated to the vesting of rights and their subsequent management, including the power to grant authorizations to use the TK or TCEs and the enforcement of rights. The role of the State or independent authority might be looked into. It may be wise to debate the difference between owners of rights and beneficiaries.

It is also to be considered whether more than one community or people may qualify for protection or if protection would be granted to peoples and communities whose TK or TCEs are unique and specific to them. This also touches upon the allocation of rights or distribution of benefits among communities which share the same or similar TK or TCEs in different countries.

The group might also want to discuss the issues of non-indigenous peoples, and of the nation as beneficiaries.

Lastly, for the sake of legal certainty and predictability, care should be given to the treatment of third party users.

3. Rights, Duration, Formalities

This panel could study rights to prevent the misuses and misappropriations of TK and TCEs, which would be crafted to complement protection mechanisms currently available under existing conventional IP law.

Matters of concern include the nature of the right: should it be a right of prior informed consent or a typical IP exclusive right to authorize uses?

Another matter is the desire that the acquisition of rights should be easily available and practically feasible. This needs to be balanced against certainty and transparency.

Another issue is that of registration. Should it be mandatory in all cases? Or optional, thereby granting extra privileges? What should be the criteria and who would decide? What would be the role of registration (would it constitute rights or would it serve information purposes only?) How would disputes be resolved?

The case of secret TK and TCEs should be looked into, both in terms of rights and formalities, as well as of duration.

As regards the term of protection, experts could discuss the value of having a limited or unlimited term of protection. A term linked to use of the TK or TCEs is currently an option. Such an approach draws upon the very essence of the subject matter of protection: TK and TCEs are characteristic of and identify a community.

4. Illegal actions and sanctions

This group would discuss the specific acts of misuse or misappropriation which may be considered reprehensible or illegal. It would work in close coordination with the group on exceptions and limitations.

The group would also consider the appropriate civil and criminal sanctions and remedies that may be made available for breaches of the rights provided.

5. Exceptions and Limitations

It is trite law that any IP-type of protection of TK or TCEs should be subject to certain limitations, to safeguard the public interest.

At the same time, the protection of TK or TCEs should not prevent communities themselves from using, exchanging and transmitting among themselves their TK or TCEs in traditional and customary ways and in developing them by continuous recreation and imitation.

An interesting issue for debate is the treatment of derivative works or adaptations, as well as the notion of "borrowing."

It might also be of interest to see how a protection system would be compatible with encouraging further creativity and innovation.

6. International regime, relationship with IP and transitional measures

This group would deal with the question of how rights and interests of foreign holders of rights in TK or TCEs would be recognized in national laws. It would examine the conditions and circumstances in which foreign rights holders would have access to national protection systems, and the level of protection available to the benefit of foreign right holders.

Issues include the principles of national treatment—the principle most often deployed in IP conventions—reciprocity and assimilation, and the determination of points of attachment.

The groups might also be invited to consider how customary law would be regarded in an international context. It would also discuss the issue of legal status/ legal standing and of the value of a foreign registration.

As to the question of the relationship with IP and other regimes, the groups might wish to clarify to which extent a new *sui generis* regime would provide forms of protection not currently available under conventional and existing IP laws, as well as the complementarity with non-IP measures and programs, such as trade practices and marketing laws; contracts and licenses; cultural heritage registers, inventories and databases; customary and indigenous laws and protocols; cultural heritage preservation and promotion laws and programs; etc.

Lastly, this group would study the question of whether protection should operate retroactively or prospectively, and in particular how to deal with utilizations of TK or TCEs that are continuing when the provisions enter into force and which had lawfully commenced before then. It would need to find answers to the question of the vested interest of third party users.

7. Genetic Resources

The group might wish to look into the question of defensive protection of genetic resources through measures which prevent the grant of patents in respect of inventions related to genetic resources that do not fulfill the requirements of novelty and non-obviousness.

It may also examine the IP aspects of access to genetic resources and equitable benefit-sharing arrangements that govern use of genetic resources.

Lastly, the group may discuss the disclosure requirements in patent applications that relate to genetic resources and associated TK used in a claimed invention.

8. Capacity-building and economic development for indigenous peoples

The focus of the group would be to consider the link between protection of GR, TK and TCEs and economic development. Practical projects of WIPO and others would be showcased and examined, and lessons and “good practices” could be extracted.

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